A SPOTLIGHT ON THE IMMUNITY OF HEADS OF STATE AND PROSECUTION OF INTERNATIONAL CRIMES BEFORE INTERNATIONAL COURTS

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ABSTRACT

This article contextualizes the issues of immunity and prosecution of international crimes at the International court and how the immunity of Heads of State has been treated at the International court level. The question of immunity of Heads of State officials from prosecution for international crimes has been treated differently by international courts while international criminal law is clear in itself that no Heads of State official is immune from prosecution for international crimes, the jurisprudence of international criminal tribunals reveals that there is a disagreement as to the extent of immunity accorded to Heads of State officials. Furthermore the discussion of the topic also addresses that, there is no uniform treatment or application of the immunity of Heads of States before international courts. The article argues further that the problem arises regarding issuance of subpoenas against Heads of state to testify or produce evidence before international courts. The jurisprudence of international courts indicates that such courts have adopted different positions on the extent and scope of immunity accorded to Heads of States where as Heads of state officials do not receive the same treatment before international courts hence this article examines the inconsistencies and loopholes on the aspect of subpoenas to Heads of state officials.

Keywords**:** Immunity, International Crimes, African Heads of State, African Court on Human and Peoples Right, Subpoenas, International Court.

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INTRODUCTION

General Overview: Position of Heads of States Immunity from Prosecution before International Courts

Since the Nuremberg and Tokyo Military tribunals, international courts including hybrid criminal courts or tribunals – have taken a strong position that in respect of international crimes, immunity of Heads of States is neither a defence nor a mitigating factor in the prosecution and punishment of individuals respectively. This reflects contemporary developments on the question of immunity of Heads of State officials in the international law sphere. The Nuremberg tribunal rejected the defence of immunity for many former German state officials,[i] and so did the Tokyo tribunal[ii]. Despite their work on the prosecution and punishment of Heads of State officials responsible for international crimes during World War II, the Tokyo and Nuremberg tribunals have been criticised as a manifestation of the victor's justice. It was only the powerful that judged the vanquished. The trials before such tribunals were only selective.[iii] After the Nuremberg and Tokyo tribunals, new patterns of crimes were committed in different parts of the world. For example, Yugoslavia and Rwanda witnessed genocide, crimes against humanity and war crimes. These events culminated yet in the development of international criminal law. International Criminal Tribunals for the former Yugoslavia and Rwanda became necessary to address impunity. Until the establishment of international criminal tribunals in 1990s and the judgment of the International Criminal Justice in the Arrest Warrant case in 2002,[iv] the position regarding immunity of Heads of States officials remained the same. Heads of State who are charged with international crimes do not benefit from immunity from prosecution before international courts. To date, the position still remains the same. The adoption of the Rome Statute of the International Criminal Court in 1998 indicates that this position will continue to remain the same. The Case Concerning Certain Criminal Proceedings in France (*The Republic of Congo* v *France) is another case where the ICJ had an opportunity to deal with the question of the* immunity of Heads of States officials from criminal proceedings. The ICJ observed that the right that Congo had asserted was the right 'to respect by France for the immunities conferred by international law on, in particular, the Congolese Heads of State.'[v] The ICJ has had yet another opportunity to deal with immunity in the Case Concerning Questions relating to *the Obligation to Prosecute or Extradite (Belgium v Senegal*). This case touches on the immunity of a former head of state of Chad, Hissène Habré regarding his extradition from Senegal to Belgium. Senegal argued before the ICJ that the courts in

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Senegal had ruled that immunity attaching to Habré as former president acted as a barrier for the court to allow his extradition to Belgium where he could face criminal prosecution for torture and other forms of crimes against humanity.[vi]

Although the ICJ did not address the issue of immunity directly in its deliberations on the indication of provisional measures, it is expected that the court had to consider the question of immunity in its final judgment, or that Senegal had to address this issue in its written pleadings which was scheduled to take place on 11 July 2011. Should the ICJ not have made pronouncement on the immunity attaching to Habré, one would have tempted to adopt the position already stated by the ICJ in the *Arrest Warrant case*, especially paragraphs 58 and 61 where the court accepted that a former state official may be tried for crimes against humanity before a domestic court of a foreign state, but that, no rule of customary international law removes the immunity of a serving Heads of State or any state official.

Apart from the ICJ, other international courts for example the International Criminal Court through its Pre-Trial Chamber have held that immunity of Heads of states does not bar criminal prosecution before international courts. The Pre-Trial Chamber of the ICC had an occasion to pronounce decision on the immunity of Heads of State, particularly that of the then serving President of Sudan Omar Hassan Al-Bashir in 2009. The Pre-Trial Chamber considered the current position of former President Omar Hassan Al Bashir as head of state which is not party to the Rome Statute. The Chamber held, such position that

> '*has no effect on the court's jurisdiction...' The Chamber reasoned that, in accordance with the preamble to the Rome Statute, one of the core goals of the Rome Statute is 'to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which "must not go unpunished."'*[vii]

To achieve this goal, the Pre-Trial Chamber of the ICC considered the provisions of article 27 of the Rome Statute.[viii] The Chamber exercised jurisdiction over crimes committed in the territory of a state not party to the Rome Statute. The decision would have been otherwise had the Chamber applied article 34 of the Vienna Convention on the Law of Treaties,

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1969 – which should have been that since Sudan is not a state party to the Rome Statute, no obligation is imposed on Sudan and its officials. International Criminal Tribunals have denied the defence of immunity or official capacity of Heads of States in relation to international crimes. The ICTY has given its clear position on the question of the immunity of Heads of State officials. From the jurisprudence of the ICTY, it is firmly established that the immunity of Heads of state is neither recognised as a defence nor a mitigating factor for the punishment of perpetrators who commit international crimes.

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

DEFINITION OF KEY TERMS

Immunity

The term "Immunity" is defined as the ability of a State official to escape prosecution for crimes for which he/she would otherwise be held accountable.[xi] *Black's Law Dictionary* defines the word Immunity as " Any exemption from a duty, liability, or service of process especially, such an exemption is normally granted to the public official.[xii]

African Court on Human and Peoples Rights{ACHPR}

The African Court on Human and Peoples Rights (the court) is a continental court establishes by the African Countries to ensure the protection of human and people's rights in Africa. It complements and reinforces the functions of the African Commission on Human and Peoples Rights. The court is established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples

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Rights.[xiii]

Prosecution

This term is regarded as an act of carrying on a legal action against a person accused of a crime in court. In this scenario the cases which fall under the jurisdiction of the International Criminal Court are prosecuted by Amran Khan who is the prosecutor of the ICC. In Africa Heads of States who have committed international crimes have been prosecuted before international courts. Not all States have enacted laws that punish international crimes in Africa, hence prosecuting Heads of State who have committed International crimes within the domestic perspective has been hard.[xiv]

International Crimes

International Crimes are regarded as the most serious crimes which have raised concerns to the community. The core crimes which falls under international crimes are genocide, war-crimes, crimes against humanity and aggression. (they are sometimes referred to as atrocity crimes) International crimes have been prosecuted by a range of international and national Courts including the ICC, which was established by the Rome Statute in 1998 and based in the Hague, it has the jurisdiction as per Article 5 of the Rome Statute to prosecute them.[xv]

International Court

International court is an international organization that hears cases in which one party may be a state or international organization and which is composed of independent judges who follow predetermined rules of procedures to issues binding decisions or to give advisory opinions on different international disputes.[xvi]

SUBPOENAS AGAINST HEADS OF STATES OFFICIALS BEFORE INTERNATIONAL COURTS

Operational Mechanism of the Principle of Subpoena.

There are various ways to ensure appearance of suspects of international crimes or attendance of witnesses before international courts. The Rome Statute lists warrant of

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arrest and summons to appear before the Pre-Trial Chamber of the ICC as ways to secure attendance of persons before the ICC.[xvii] The Trial Chamber of the ICC may require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of states.[xviii] From the provision of article 64(6) of the Rome Statute, the Trial Chamber of the ICC may seek state cooperation in obtaining evidence and testimony of individuals. This means that, where necessary, Heads of State officials, may also be required to cooperate with the ICC or accused persons during the conduct of trial or pre-trial interviews by the Prosecutor or the defence counsel for accused persons. Voluntary surrender, appearance or attendance of an individual before an international court is another way of securing attendance of persons before international courts.

In the ICTY, some accused persons surrendered voluntarily. For example, General Tihomir Blaškis surrendered voluntarily to the ICTY.[xix] If a person voluntarily appears or attends before an international court, he is deemed to have waived his or her immunity conferred upon that person by national and international law. In other words, a person cannot voluntarily appear or attend an international court and then claim immunity from appearing or attending such court.

Regarding the voluntary appearance and issuance of *subpoena*, Judge Benjamin Mutanga Itoe has given a very useful statement. In principle, witnesses appear to testify on the prompting or at the request of the party seeking to rely on their evidence. The other extreme is where as Judge Benjamin Mutanga Itoe observed, 'a witness, as in this case, and in criminal proceedings, has been prompted and invited by the party seeking to rely on his evidence, and he either refuses to appear or testify on his behalf. The course of action that is open to that party is, to apply to the Chamber under Rule 54 of the Rules of Procedure and Evidence, for the issuance of a *sub-poena* to compel him to appear and to testify.'[xx] Hence, if a person fails to attend voluntarily before the court to serve as a witness either for the Prosecutor or the accused (defence), or fails to produce documents to be used as evidence in court, the court may order issuance of *subpoena* to compel such person to appear and testify or to produce evidence before the court. Any failure to attend or produce evidence will be deemed contempt of court and may render such person to imprisonment or fine. Thus, 'a subpoena is a due process compelling alternative

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which the court has recourse to as a last resort, after necessary and traditional ways of securing a witness have been utilised but in vain.'[xxi]

A subpoena is a compelling and coercive remedy sought by a person which seeks to rely on it. Normally, courts are reluctant to issue this form of remedy, or they issue it very cautiously on extreme cases, perhaps because of its inherent punitive nature if a witness fails to comply with it. *Subpoenas*, apart from being governed by the Rules of Procedure and Evidence of international courts as such, they find basis in international human rights law as well, and in the Statutes establishing such international courts.

It is in respect of the *subpoenas* that there is a great controversy in the treatment of Heads of State, and their immunities regarding prosecution of international crimes. Essentially, a study of the jurisprudence of international courts regarding attendance or appearance of Heads of State officials before such courts leads to an investigation on whether the Heads of State officials are free from being summoned to appear and testify or produce evidence in such courts. To answer this question, one needs to understand whether a Heads of State is a serving or former one; and whether they are entitled to immunity from *subpoenas* issued by international courts. This will then require an examination of whether immunity of Heads of State officials is only in respect of prosecution for international crimes before international courts, or it also extends to subpoenas issued by such courts.

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

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

Given the nature of 'official position' that a Heads of State official occupies in the government, being the head of state and sometimes, a head of the government and Commander –in–Chief of the armed forces, it is imperative that there are circumstances in which the Heads of State official finds himself or herself in a position to issue orders to his or her subordinates. These circumstances would be relevant. For instance, this would apply at the time of a protracted armed conflict between the government forces and armed groups or rebel forces in a state. In such situation, a head of state may give orders to the Minister for Defence, or Minister for Safety and Security who, given their positions, could also eventually issue orders to the Military Commanders or Inspector–General of Police to order their subordinates to protect the state against any attack, and to kill members of the rebel forces or any other party to the armed conflict. Further, it is obvious that Heads of State officials may give orders to the military commanders of armed forces to wage war of aggression against another state if there are reasons to believe that a state of war exists between such states. If such crimes are committed, and the accused persons would want to invoke the defence of superior orders, and in so doing, they implicate the Ministers and President, by contending that they had received direct orders from the Heads of State officials, and that they want such Heads of State officials to be summoned to appear before a trial court and testify as witnesses whether they had issued orders or not, then it will be important for the trial court to issue *subpoena*s against such Heads of State officials. It is in these circumstances where a military commander, who is subordinate to the president for example, may want the court to summon the sitting president to appear before the court with a view to testify as a witness for the accused (in this case a military commander or one of the Ministers in the government), or being interviewed by the defence in order to help the defence make its case.

It should be known that Chief Samuel Hinga Norman, a Minister for the Interior during the time of war in Sierra Leone, was prosecuted for war crimes and crimes against

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humanity committed during an armed conflict in Sierra Leone, but he had contended that he was acting under orders of the former President of Sierra Leone at that time, Dr. Tejan-Kabbah, and so, he wanted the Trial Chamber of the SCSL to issue a subpoena ad testificandum against the then sitting President Tejan-Kabbah, despite his immunity from criminal proceedings as provided under section 48(4) of the Constitution of Sierra Leone, 1991.[xxv] The above examples reflect on how delicate the question of immunity may be regarded by courts, basically, whether courts may be free to issue *subpoenas* against a serving Heads of State official or not. Having stated the conditions for the issuance of subpoenas, it follows that this Article must examine the practice regarding the questions of s*ubpoenas* against sitting Heads of State before international criminal tribunals as discussed below.

THE ICTY AND THE QUESTION OF SUBPOENAS AGAINST HEADS OF STATES

The Prosecutor V Milosevic Case and the Principle of Subpoena

The Trial Chamber of the International Criminal Tribunal Yugoslavia prosecuted Slobodan Miloševic and discussed whether a *subpoena ad testificandum* could be issued against Tony Blair and Gerhard Schröder. On 18 August 2005, the Assigned Counsel for Milošević had filed an ex-parte application to the Trial Chamber for the testimony and pre-testimony interview of Tony Blair, the former Prime Minister of the United Kingdom, and Gerhard Schröder, former Chancellor of the Federal Republic of Germany.[xxvi] A week later, the Assigned Counsel for Milošević filed another application requesting the Trial Chamber of ICTY to issue a binding order against the Government of the Federal Republic of Germany, to require the Government of Germany to arrange for the Assigned Counsel for Milošević to interview, as with the UK, the Germany state officials, as witnesses to give evidence at the defence stage in the trial of Miloševis. The witnesses were Gerhard Schröder (former Chancellor), Helmut Kohl (former Chancellor), Joschka Fischer (former Minister of Foreign Affairs), Hans-Dietrich Genscher (former Minister of Foreign Affairs), and Klaus Kinkel (former Minister of Foreign Affairs). Later, on 17th October 2005, the Assigned Counsel for Miloševis restricted the witnesses to only two: Tony Blair and Gerhard Schroder,

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thereby[xxvii] leaving the rest of the German state officials initially named in the list of prospective witnesses as filed to the Trial Chamber.

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

The Chamber determined that the procedure to be followed when a state official is required to be interviewed is the *subpoena ad testificandum* 'addressed to the individual official and not a binding order addressed to the official's state.' After setting and examining the conditions for the issuance of subpoena,[xxx] the Trial Chamber concluded that such requirements were not met, and because the application had failed on merits, no issue of immunity of state officials would arise.[xxxi] To that extent, the Trial Chamber simply avoided addressing the question of immunity, but rather chose to reject the motions. Hence, Tony Blair and Gerhard Schröder were not subpoenaed to appear for an interview by the Assigned Counsel for Miloševic. The Trial Chamber of the IC TY made an important and landmark contribution in the field on subpoena duces tecum in the case of Prosecutor v Blaškis in 1997[xxxii]

The Trial Chamber also determined that the Tribunal may issue orders to individual state officials requiring them to take actions within their official capacity.[xxxiii] While declaring 'its readiness for full cooperation under the terms applicable to all states', the Government of Croatia challenged the legal power and authority of the ICTY to issue a subpoena duces tecum to a sovereign state, and contested the naming of a high government official in a request for assistance pursuant to article 29 of the Statute of the ICTY, claiming that, in its view, such requests are only properly directed to a state.[xxxiv] The Trial Chamber

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considered its power to issue binding orders to states. Before doing so, it had to determine the nature and purpose of the International Tribunal (ICTY). The Chamber determined that 'the Tribunal is an independent international court created under the terms of Chapter VII of the Charter of the United Nations to bring justice, to contribute to the restoration and maintenance of peace in the former Yugoslavia and to deter further violations of international humanitarian law.' It observed that it was established by the Security Council of the UN.[xxxv] In considering whether the ICTY has inherent powers to *issue subpoena duces-tecum* to a state, the Prosecution submitted that the ICTY 'has implied and inherent powers necessary or essential for the effective performance of its functions.' The Prosecution also submitted that 'the international tribunal should be deemed to have these powers which, although not expressly conferred, arise by necessary implication as being essential to the performance of its duties', and that, 'the power to require the production of evidence is part of the inherent powers of a judicial organ, as such powers are necessary and essential for the effective administration of justice.' Further, it was submitted by the Prosecution that in establishing the tribunal, the SC clearly intended that 'the International Tribunal would effectively discharge the responsibility assigned to it, the principle of effectiveness must govern whenever there aroses a question of its competence in a particular area.'[xxxvi] On its part, Croatia argued that the Prosecution sought 'a form of compulsory process that is unprecedented in international law' saying the Statute of the ICTY did not provide that. Croatia stated that 'there would be no violation of international law if the word "subpoena" were simply inserted into the Statute.'[xxxvii] Relying on the judicial precedents of the ICJ,[xxxviii] the Trial Chamber concluded that 'the power of the International tribunal to issue a *subpoena duces tecum* to a state may similarly be implied if it is necessary in order to fulfil its fundamental purposes and to achieve its effective functioning.'[xxxix] The Trial Chamber stated further that:

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

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

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

The Trial Chamber observed that the word *'subpoenas'* was inserted into Rule 54 in January 1995, when the Rules were revised at the Fifth plenary session in order to clarify and ensure completeness of the rules, and consequently, noted that, 'given that the word 'subpoenas' appears beside orders, summonses, warrants and transfer orders, it would seem that Rule 54 was intended to confer a general power.'[xlii]

The Trial Chamber stated that the issuance of a *subpoena duces tecum* is a valid exercise of the authority and power to issue binding orders. It concluded that, 'the issuance of a *subpoena duces tecum* to a state for the production of government documents is nothing more than an order compelling the production of those documents. The International ribunal has the inherent power and express to issue such orders. Resort to

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the mechanism of subpoena is provided for in Rule 54.'[xliii] The Chamber viewed Rule 54 as effectuating the duty of states and individuals to comply with orders of the International Tribunal. Further, the trial Chamber considered whether it had power to issue binding orders directed at government officials. In this regard, it observed, '[t]here is no doubt that a Judge or trial Chamber may address individuals directly in a number of circumstances. For example, under Rule 98, a Chamber may summon a witness to appear before it. 'By virtue of articles 6 and 7 of the Statute of the ICTY, the Tribunal properly 'has jurisdiction over individuals and it is their criminal responsibility that it is called upon to adjudicate, rather than responsibility of states.'[xliv] The Chamber observed, that 'it is a necessary exercise of the international Tribunal's powers for it to compel an individual to produce information required for an investigation or trial.'[xlv] Importantly, the trial Chamber held that government officials are not free from the issuance of a *subpoena duces tecum.* The Chamber boldly stated its position that:

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

On the duty to comply with its orders, the trial Chamber observed that, it has power to issue binding orders, including subpoenas, to states and individuals. The Chamber noted that article 29 of the Statute of the ICTY compels states to abide by the orders of the Trial Chamber.[xlvii] In this regard, the Chamber observed that 'sovereign immunity' is not applicable here[xlviii] and cannot preclude the International Tribunal from issuing binding orders to states, and equally, cannot protect states from complying with binding orders of the Tribunal. The position stated by the Trial Chamber is that, 'the Statute and Rules allow orders

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to be directly addressed to such officials.' This is possible under articles 18(2) and article 19(2) of the Statute of the ICTY, as well as Rules 39 and 54 of the Rules of Procedure and Evidence of the ICTY authorizing Judges to issue orders whenever necessary.

In conclusion, the position stated by the Chamber is that high state officials and heads of states are not immune from *subpoena duces tecum* and must comply with the binding orders of the Trial Chamber or that of a Judge. A state is equally obliged as individuals. The key consideration for the issuance of a *subpoena duces tecum* as emphasised by the Trial Chamber is to allow fair trial for the accused persons.

SUBPOENAS AGAINST HEADS OF STATE OFFICIALS UNDER ICTR

Prosecutor V Karamera Case and the Principle of Subpoena

Regarding issuance of subpoenas to serving Heads of State officials, the position of the ICTR, like that of the ICTY, is not uniform. The Trial Chambers of the ICTR have issued decisions that on one side reveal that subpoenas cannot be issued against serving heads of state officials, and on the other, that, subpoenas can be issued against serving Heads of State officials. On 19th February 2008, Trial Chamber III of the ICTR rendered a decision denying a motion to *subpoena* President Paul Kagame of Rwanda.[xlix] The Defence for Nzirorera had 'moved the trial Chamber to issue a *subpoena* directed at the President of Rwanda, Paul Kagame, directing him to submit to an interview.'[l] In requesting for *a subpoena*, the defence for Nzirorera argued that President Kagame's testimony was certainly relevant and necessary to establish the role of the Rwandan Patriotic Front (RPF) leading to the assassinations of President Habyarimana, Emmanuel Gapyisi and Felicien Gatabazi.

The defence argued that the 'evidence that the RPF was responsible for these acts and that they were part of Joseph Nzirorera's joint criminal enterprise to destroy the Tutsi' and that 'it knows of no person other than President Kagame who could provide direct and conclusive evidence on these issues.'[li]The defence for Nzirorera demonstrated that it had made reasonable attempts and efforts to contact and obtain the voluntary cooperation of

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President Paul Kagame, but that, the President refused to cooperate and reply to the letters sent on 2 September 2003 requesting him to testify about the RPF activities in Rwanda leading up to the genocide and including the assassination of President Habyarimana.

The refusal to such request was made available by a letter from the Rwandan Ministry of Justice dated 25 January 2008.[lii] The trial Chamber agreed with the defence for Nzirorera that it had made reasonable attempts to obtain evidence and cooperation from President Kagame. However, the Trial Chamber set conditions for issuance of the *subpoena*. It stated that it was necessary that 'in considering whether the prospective testimony will materially assist the applicant, it is not enough that the information requested may be "helpful or consistent" for one of the parties: it must be of substantial or considerable assistance to the accused in relation to a clearly identified issue that is relevant to the trial.'[liii]

The Trial Chamber further stated that it had to consider the specificity with which the prospective testimony was identified and whether the information could be obtained by other means. In this regard, the applicant had to demonstrate a reasonable basis for the belief that the prospective witness (President Kagame) was likely to give the information sought. After all the above conditions, the trial Chamber stated that the indictment did not allege that the accused persons were responsible for the assassinations of Emmanuel Gapyisi, Felicien Gatabazi or President Habyarimana. Surprisingly, the trial Chamber declared that the question of who was responsible for those assassinations was not clearly an issue in this case.[liv] Based on the above position, the trial Chamber denied the motion entirely. It is submitted that the Trial Chamber did not give much weight on the fact that it had found and agreed with the defence that President Paul Kagame had refused to cooperate with the defence, and therefore that, a *subpoena* was the only means to get evidence from President Kagame and, that voluntary cooperation by President Kagame had failed. Besides, the trial Chamber did not bother assigning any reason to its decision, apart from denying the liability of the RPF in the assassination of former President Habyarimana. Further, the trial Chamber did not discuss whether the defence for Nzirorera had failed to demonstrate that there was a reasonable belief that President Kagame's testimony was likely to give the relevant information sought for by the defence. The Chamber only stated the pre-conditions without examining whether the defence had failed to prove that the information sought from President Kagame would also materially

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assist the defence. It is therefore reasonable to argue that the decision of the trial Chamber was unreasonable because the defence for Nzirorera had made attempts to obtain information and cooperation from President Kagame but to no avail, and that, the requested information would have been of considerable assistance to the defence's case. The decision of the trial Chamber was such that it aggrieved the defence for Nzirorera thereby leading to an application for certification to appeal decision on the motion for subpoena to President Paul Kagame.[lv] In the application, Joseph Nzirorera contended that the Trial Chamber 'erred in concluding that the assassinations of President Habyarimana, Emmanuel Gapyisi and Felicien Gatabazi are irrelevant to the case', and that the trial Chamber 'applied the wrong standard for *subpoena*s for interviews applying a higher standard for obtaining evidence than for the admissibility of evidence when interpreting the requirement that the prospective testimony "can materially assist his case."'[lvi]

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

> *The events that took place in my country were so serious and so difficult to understand that as a former Prime Minister, I had the duty to explain them and politically assume responsibility. That is what I recognize. I did not perpetrate a crimes. I did not send anybody to kill anybody. But I was an authority…I am not one of those who deny the genocide of the Tutsis…. I saw that people were hunted down and killed for what they were, specifically, because they were Tutsis..Unfortunately, Mr President, during the same period and under the same circumstances, I saw that people from the Hutu ethnic group were massacred because they were Hutus….They were hunted down and killed. If the first was genocide, then the second was too. So I*

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> *believe there was a double genocide in Rwanda: genocide of the Hutus, and genocide of the Tutsis. Now, the question that arises is who perpetrated these genocides, and I have answers for that. Regarding the genocide of the Hutus, this is easy to demonstrate. It [is] much easier because one does not need a lot of information to know that the genocide of the Hutus was committed by the current President of Rwanda, his regime, his army, his militia. I have evidence which has been forwarded to you, Mr President.*

The above paragraph demonstrates that there were two sides of the genocide: genocide of the *Hutus* and genocide of the *Tutsis.* While it is notable that the majority of the accused persons before the ICTR are Hutus, one needs to note that even the Tutsis may have been perpetrators of genocide in Rwanda, at least against the Hutus. Kambanda has put it more succinctly above. In normal circumstances, one would have expected the ICTR to summon or subpoena President Kagame to tell the truth and assist the court in knowing about the events that caused genocide in Rwanda, not only by the Hutus, but also the Tutsis as claimed by Kambanda who testified whilst being a prisoner, serving sentence in Mali. It appears that President Kagame was responsible for genocide in Rwanda, particularly that of Hutus. This is supported by the international arrest warrant issued for nine senior Rwandan state officials, including Rose Kabuye, and others, who were leading the RPF. The French Judge, Jean-Louise Brugière, issued the arrest warrant in 2006 which also state Kagame's key role in participating in the genocide in Rwanda. However, since French law prohibits issuance of arrest warrants against serving presidents, Kagame was not specifically indicted, even though he was described as obstructing investigations on the shooting of a plane that carried Habyarimana.[lvii]

Conclusively, it is observed from the experience of the Trial Chamber of the ICTR that a *subpoena* is the correct procedural mechanism for seeking to compel a Heads of State or state official to appear before the international criminal tribunals in order to testify and make sure that justice is attained.

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THE OPERATION OF THE PRINCIPLE OF SUBPOENAS AGAINST HEADS OF STATE OFFICIALS UNDER THE SPECIAL COURT FOR SIERRA LEONE (SCSL)

Prosecutor V Norman Case and the Principle of Subpoena

The Trial Chamber of the SCSL has had also an opportunity to deal with the question of immunity of Heads of State officials in the case involving Charles Taylor. While it is undisputed fact that Charles Taylor is being prosecuted by the Special Court for Sierra Leone, it is also important to note that the Trial Chamber of the SCSL has inconsistently held that the then sitting president of the Republic of Sierra Leone, Dr. Ahmad Tejan-Kabbah was immune from being summoned as a witness, citing among others, an immunity of the serving president and that as a sitting head of state he could not be compelled to appear before the Special Court.[lviii] In the first subpoena decision of 2006 the two accused persons, Moinina Fofana and Samuel Hinga Norman had applied for the issuance of a subpoena ad testificandum against the then sitting president of Sierra Leone, Ahmad Tejan Kabbah. They wanted him to appear and testify on their behalf before the Trial Chamber of the SCSL. They believed that President Kabbah had refused to heed to their repeated requests for him to appear and testify on their behalf. Norman and Fofana, who had filed joint submissions for the *subpoenas* on 15th December 2005, contended that as their Civil Defence Forces (CDF) leader, and that since they had been indicted for crimes committed in the course of fighting against the rebel groups of RUF/AFRC to restore the democratically elected government of Tejan Kabbah, which had been removed from power by the rebel forces, former President Tejan Kabbah knew that they did not bear the greatest responsibility for such crimes. They further argued that President Kabbah was commanding and materially supporting and communicating with the leadership of the CDF which they had been heading. On the basis of his communication, command and support to them, former President Tejan Kabbah also bore the greatest responsibility for the crimes that Norman and Fofana were charged with, contending that the President was responsible both politically and militarily. Furthermore, Norman and Fofana contended that former President Kabbah had issued commands, communications and materially supported them '*both during his exile in Conakry [in Guinea] and from his presidential palace in Freetown*.' As such, they submitted that former President Kabbah 'may himself

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have been among a group or, at the very least, that he was in a position to give evidence regarding the relative culpability of the three accused persons.'[lix] The trial Chamber held that:

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

The trial Chamber of SCSL reached the above position and did not grant a request to issue *subpoena ad testificandum* against the incumbent President of Sierra Leone, because the Chamber found that the requirements set out in Rule 54 of the SCSL Rules of Procedure (the necessity and legitimate forensic purpose) had not been met, and that it had discretion to refuse the application. By refusing to allow President Kabbah to testify in the first *sub-poena* application, the SCSL denied the accuses their right to call witnesses to support their case, as per Article 17(4) (e) of the Statute of the SCSL, as well as to ensured fair trial and equality of arms. There could have been truth in him ordering and communicating with the CDF leadership in Sierra Leone during the armed conflict. Commenting on the inconsistency in the jurisprudence of the SCSL on the issue of *subpoenas*, Patrick Hassan-Morlai rightly observed that the jurisprudence of the court is highly inconsistent on this point, and that 'it is doubtful whether the *subpoena* decision created a precedent or made a positive contribution to the existing jurisprudence in this area of law.'[lxi]

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CONCLUSION

In this Article, since the time of Nuremberg and Tokyo tribunals, Heads of State Immunity was not recognized if the Heads of State has committed international crime. The {ICTY}, {ICTR} and SCSL have held that former Heads of state officials do not enjoy immunity from prosecution. This position is reflected in the cases of Miloševis, Karadžis, Kambanda and Charles Taylor respectively. It is also observed that the ICC has stated a clear position that a serving president of a state that has not ratified the Rome Statute does not enjoy immunity from prosecution before it. Thus, in summary, the {ICC} did in respect of former President Omar Al Bashir of Sudan who has been indicted by the Prosecutor of the ICC but remains at large. It is also the position as evidenced in the trial of the late President Saddam Hussein of Iraq that former state officials enjoyed no immunity from prosecution for international crimes. However, the Appeals Chambers of the ICTY and SCSL, and the trial Chamber of ICTR have also surprisingly held that a sitting Heads of State official cannot be *subpoenaed* in order to testify or appear for an interview or submit important documents to be used as evidence before the international criminal tribunals. These decisions are reflected in the Blaškis case[lxii], Norman and Moinina Fofana case[lxiii], and Karemera and Nzirorera case respectively. This position has created a state of 'confusion' and 'controversy' in the field of immunity of Heads of State officials in international law.[lxiv] It appears that both the SCSL and the ICTY have emphasised that while the immunity enjoyed by the state officials does not cover prosecution, such courts have stated that it covers *subpoenas ad testificandum and duces tecum,* However the key point is that on the trial Chamber of the ICTY in Blaškis case, and that of the Appeals Chamber of the ICTY in Krštis case, as well as the dissenting opinions of Judges Bankole Thompson and Geoffrey Robertson in the *subpoena* decisions before Trial Chamber and Appeals Chamber of the SCSL in Norman and Fofana, and the 2008 decision of the trial Chamber of SCSL in Sesay, Kallon and Gbao case respectively made different decisions which are very important in the arena of International Law on the treatment of Heads of State officials, particularly on issues of *subpoenas* that they should appear and testify in courts. These decisions help {ICC} to interpret and apply the provisions of article 64(6) (b) of the Rome Statute in a more progressive way. The ICC should not shy away from compelling Heads of State officials to appear before it, or to testify and produce important documents before it for the purposes of fair preparation or conduct of trials. It is the view of article that Heads of State officials enjoy no immunity from the normal legal processes to

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compel them to testify or give evidence before ICC and international criminal tribunals. This is particularly so because such leaders have a duty to assist the ICC and the international criminal tribunals especially when dealing with international crimes. Compelling such Heads of State officials to appear for interview or to testify inevitably renders fair trial for the accused in the courts especially when conditions for the issuance of *subpoenas* have been met and that, the efforts to secure their voluntary attendance have failed, and that such Heads of State officials may possess important information or evidence for the purpose of conducting or preparation of trials.

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[viii] Para 43.

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

[x] Prosecutor v Miloševis, Decision on Preliminary Motions, Trial Chamber, Decision of 8 November 2001, paras 26-34.

[xi] *R v Bow Street Metropolitan Stipendry Magistrate and Others , ex parte Pinochet Ugarte* {1998} 3 WLR 1465. Judge Philips defined Immunity as the ability of a State official to escape prosecution for crimes for which e would otherwise be held accountable.

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

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

[xxiv]. A Cassese (2008) International criminal law, 2nd revised edn, 313-313. The position stated by Cassese is that heads of state can be subpo-enaed to appear or testify, or produce evidence before international criminal courts

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[xxvi] Prosecutor v Miloševis, Case No. IT-02-54-T, Request for Bind ing Order to be Issued to the Government *of the United Kingdom for the Cooperation of a Witness pursuan t to Rule 54bis, 18 August 2005, para 19* which requested the Trial Chamber of ICTY to '(a) order the Government of the United Kingdom to arrange for the Assigned Counsel and an Associate of the Accused to interview the United Kingdom State Official: the Prime Minister the Right Hon. Mr. Antho ny Blair MP; and, (b) order the Government of the United Kingdom to make arrangements with the Assigned Cou nsel and an Associate for the Accused for the Witness… to give evidence in the defence stage o f the trial of Slobod an Milosevic if the Accused decides to call the same as a witness.'

[xxvii] Prosecutor v Miloševis, Case No. IT-02-54-T, Request for Bind ing Order to be Issued to the Government *of the Federal Republic of Germany for the Cooperation of Certain Witnesses pursuant to Rule 54bis, 26* August 2005, para 17.

[xxviii] United Kingdom and Germany were represented by Prof Christo pher Greenwood, QC, Mr. Chris Who mersley, and Mr. Dominic Raab, and Dr Ed mund Duckwitcz and Prof Christian Tomuschat respectively.

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[xxx] Paras 34-47.

[xxxi] Para 69 (b) and (c).

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

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[xxxviii] See, Reparation s for Injuries Suffered in the Service of the United Nations Case, 1949 ICJ Reports 171; *Effects of Awards of Compensation made by the United Natio ns Administrative Tribu nal Case, Advisory* Opinion of the ICJ of 13 July 1954, 1954 ICJ Reports 47; Certain Expenses of th e United Nations Case, 1962 ICJ Reports151.

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[xl] Para 31.

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

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[xliv] Ibid Para 66.

[xlv] Ibid Para 66.

[xlvi] Para 69.

[xlvii] Paras 7 2-73, 78.

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