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Head of State Immunity and Immunity Claims Against Witness Subpoena Requests. Specifically addressing the scope of head of state and state official immunity, and whether claims of immunity may successfully prevent witness subpoena requests at international and hybrid tribunals.

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MEMORANDUM FOR THE SPECIAL TRIBUNAL FOR LEBANON

ISSUE: HEAD OF STATE IMMUNITY AND IMMUNITY CLAIMS AGAINST WITNESS SUBPOENA REQUESTS

SPECIFICALLY ADDRESSING THE SCOPE OF HEAD OF STATE AND STATE OFFICIAL IMMUNITY, AND WHETHER CLAIMS OF IMMUNITY MAY SUCCESSFULLY PREVENT WITNESS SUBPOENA REQUESTS AT INTERNATIONAL AND HYBRID TRIBUNALS.

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I. INTRODUCTION

A. Scope[1]

This memorandum first discusses the scope of the doctrine of State official immunity. The memorandum addresses all possible individuals, organizations and entities that can successfully claim immunity from an international tribunal's jurisdiction as applied to the Special Tribunal for Lebanon (STL).

Second, this memorandum evaluates whether the doctrine of State official immunity prevents international tribunals and international or hybrid courts from subpoenaing witnesses. The memorandum will evaluate a national court's ability to subpoena State officials for witness testimony, applying International Court of Justice precedent. This memorandum will then analyze how previous ad hoc and hybrid tribunals have approached subpoenaing State officials for witness testimony looking at the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia. The memorandum will evaluate whether the Special Tribunal for Lebanon has the authority to subpoena witness testimony from State officials based on the international, hybrid and national tribunal precedent.

[1] Topic Question Presented: What is the current state of the law of the international tribunals (*e.g.*, ICC, ICTY/R and SCSL) relating to the functional and personal immunity of state officials who are called as witnesses before international and internationalized/hybrid courts? Please research who qualifies as a state official. In particular, what is the status of quasi-state actors and/or entities with regard to immunity?

B. Summary of Conclusions

1. Scope of State Immunity

a. State officials either have *ratione personae* or *ratione materiae* immunity or both depending on their rank and position. State official immunity protects State officials from a National court's jurisdiction for both crimes and civil suits and includes protection from subpoenas for witness testimony. State officials do not enjoy immunity for international crimes prosecuted in International Courts or Tribunals.

b. **Heads of State** are afforded both *ratione personae* and *ratione materiae* immunity while in office or for criminal acts committed while in office. Officials claiming head of State immunity must have either *de jure* or *de facto* head of state positions.

c. **Ministers of Foreign Affairs** enjoy *ratione personae* immunity from both civil and criminal jurisdiction.

d. **Ministers** and other High-Ranking officials enjoy *ratione materiae* immunities for acts completed in their official capacities while in office. International crimes may not be considered actions in a State official's official capacity.

e. **Diplomats** have immunity for both criminal and civil jurisdiction in descending degrees depending on whether the official is part of 1) the diplomatic staff, 2) the administrative and technical staff, or 3) the service staff.

f. **Constituent States** (territorial and constitutional entities forming part of a sovereign state, like Burma or federated States) may have *ratione materiae* but not *ratione personae* but many jurisdictions do not grant immunity because they lack individual personalities that have foreign relations with other nations.

g. **State agencies** are immune from criminal and civil jurisdiction if the entity 1) does not have a separate legal personality and 2) is entitled to perform and performs public acts under the State authority.

h. **Employees** who contract with State may have immunity if 1) the employee has official status and 2) performs functions in the exercise of governmental authority. Courts are careful to draw the line to not include administrative tasks not in the core area of sovereignty.

i. **Consuls on special mission** have immunity for special missions only under *ratione materiae* and not for their private acts.

j. **Armed forces** visiting in a foreign State have only the level of immunity as accorded in an Agreement with the visiting State.

2. Immunity from witness subpoenas at international tribunals

a. International and internationalized tribunal have the authority to subpoena witness testimony from State officials. Factors that determine whether the tribunal as the authority to subpoena State officials are the court

i. is predominantly an international court

ii. has a statute that explicitly grants the authority to prosecute State officials regardless of their rank

iii. has rules of evidence and procedure that allow the court to subpoena witnesses

b. **Nuremberg.** Fulfills all three elements: it is a purely international tribunal, the charter strips State official immunity from prosecuting criminals, and the charter grants the Judges authority to subpoena witnesses.

c. **International Criminal Tribunal for the Former Yugoslavia.** Has the authority to issue subpoenas to State officials. The ICTY was formed by a Security Council and has other features that make it an international tribunal. The Tribunal's statute strips State official immunity from prosecution of crimes under its jurisdiction. The ICTY also grants the Judges authority to issue subpoenas. The ICTY's *Krstic* decision allowed the tribunal to directly subpoena State officials and is commonly cited as authority for such powers.

d. **International Criminal Tribunal for Rwanda.** The ICTR has the authority to issue subpoenas to State officials. The ICTR was formed by the Security Council and has other features that make it an international tribunal. It strips State official immunity from prosecution of crimes under its jurisdiction. The ICTR grants Judges the authority to issue subpoenas. The ICTR's *Bagasora* case allowed witness subpoenas to State officials.

e. **Special Court for Sierra Leone.** The SCSL has the authority to subpoena State official witnesses. It is predominantly an

international tribunal based on its judicial composition and subject matter jurisdiction. The SCSL Statute contains a provision eliminating State official immunity for prosecution. The SCSL rules of evidence and procedure grant Judges the authority to subpoena witnesses. The SCSL case law has granted subpoenas for State officials.

f. **International Criminal Court.** The ICC may have difficulty issuing subpoenas to State officials not a party to the ICC statute. The Court is an international court treated by a universal multilateral treaty. Its Statute eliminates State official immunity for prosecution. Its Rules of Evidence and Procedure do not provide the Judges with authority to issue subpoenas. Only voluntary witness requests.

g. **The Extraordinary Chambers for the Criminal Court of Cambodia.** The ECCC may have the authority to issue subpoenas. It is a hybrid court but has subject matter jurisdiction over international crimes. It is not clearly an international court. It strips State official immunity from prosecution. Its Rules of Evidence and Procedure grant the Judges authority to subpoena witnesses. It has not been successful in obtaining State official witness testimony after subpoena and the issue is unresolved.

h. **The Special Tribunal for Lebanon.** The STL will have the authority to subpoena State officials if it is an international tribunal. The STL is predominantly an international tribunal but may have difficulty issuing subpoenas to State officials because its subject matter jurisdiction is not an international crime. It does not include a provision stripping State official immunity for prosecution, however such practice may be customary international law. The STL has the authority to subpoena witnesses generally.

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II. FACTUAL BACKGROUND

Former Prime Minister of Lebanon, Rafik Hariri and 22 other persons were killed in a car explosion in downtown Beirut on February 14, 2005.[2] Several investigations have not yet reliably determined the cause of the killings, however it is clear that political polarization regarding the strong Syrian influence in Lebanon significantly played a role in the events leading up to the killings.[3] Commissioner Mehlis' report concluded that "[t]here is probable cause to believe that the decision to assassinate former Prime Minister Rafik Hariri could not have been taken without the approval of top-ranked Syrian security officials and could not have been further organized without the collusion of their counterparts in the Lebanese security services."[4] The Special Tribunal for Lebanon thus likely will require access to Syrian high-ranking officials' witness testimony to determine the cause of the assassination and the true culpability.

A. Brief Historical Background on Lebanese/Syrian conflict

Lebanon was involved in the Arab-Israeli conflict during its civil war of 1975-1990 which had a destructive impact on Lebanese national unity and independence.[5] Lebanon

[2] U.N. S.C. Rep. of the Security Council, Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, Peter FitzGerald, S.C. Pres. Statement 2005/4, U.N. Doc. S/PRST/2005/4 (Feb. 15, 2005) ("It is also the Mission's conclusion that the Government of the Syrian Arab Republic bears primary responsibility for the political tension that preceded the assassination of the former Prime Minister, Mr. Hariri. The Government of the Syrian Arab Republic clearly exerted influence that went beyond the reasonable exercise of cooperative or neighborly relations.") *Id.* at 3. [reproduced in accompanying notebook at Tab 1].

[3] *Id.*

[4] U.N. S.C. Rep. of the Security Council, Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005), Detlev Mehlis, Commissioner Beirut, S.C. Doc. S/2005/662 [reproduced in accompanying notebook at Tab 2].

[5] *Id.*

consented to Syrian Arab Republic military occupation in May 1976 when the then-Syrian leader Hafez Al-Assad sent troops to strengthen the Lebanese Christian Maronite government.[6] Syria's escalating political influence in Lebanese affairs was sanctioned in 1991 by a treaty of "Brotherhood, Cooperation and Coordination."[7] In October of 1989 Lebanese political figures voiced their opposition to the Syrian influence after Israel withdrew its forces from South Lebanon in 2000 calling for the implementation of the full Taif Agreement of 1989.[8] During the debates that ensued, former Prime Minister Hariri's relations with Syrian President Emil Lahoud were strained.[9] The Security Council adopted a resolution (1559) in response to Lebanese efforts to achieve independence from Syrian influence which required all foreign forces to withdraw from Lebanon and supported a fair electoral process for their upcoming election."[10] The Fact Finding Mission after Hariri's assassination gathered from numerous sources that the Syrian leadership held Hariri "personally responsible for the adoption of the resolution, and that this

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[6] Katherine Iliopoulos, *Hariri Tribunal Opens in The Hague*, Crimes of War Project (2009), *available at*, http://www.crimesofwar.org/onnews/news-lebonon.html. [reproduced in accompanying notebook at Tab 3].

[7] U.N. S.C. Rep. of the Security Council, Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, Peter FitzGerald, S.C. Pres. Statement 2005/4, U.N. Doc. S/PRST/2005/4 ¶ 2 (Feb. 15, 2005) [reproduced in accompanying notebook at Tab 1].

[8] If the full Taif Agreement was implemented it "would have substantially reduced the Syrian presence in Lebanon to a possible complete pull-out." *Id.*

[9] "As a prominent security official close to the Syrian Arab Republic put it to the Mission, the two men had had repeated conflicts during Mr. Hariri's term (2000-2004) to a point that required 'external intervention and mediation on a daily basis.' The conflict between Mr. Lahoud and Mr. Hariri affected the latter's ability to run the Government and to carry out his policies, sometimes to the point of paralysis." *Id.*

[10] S. C. Res. 1559, Preamble and ¶ 2, U.N. Doc. S/RES/1559 (Sept. 4, 2004) (calling upon "all remaining foreign forces to withdraw from Lebanon" and declaring "its support for a free and fair electoral process in Lebanon's upcoming presidential elections conducted according to Lebanese constitutional rules devised without foreign interference or influence") [reproduced in accompanying notebook at Tab 4].

resolution marked the end of whatever trust existed between the two sides."[11] After the Syrian President's term was extended by another three years, Hariri resigned resulting in increased political tension between the two countries.[12] The UN Secretary General appointed a special envoy to implement the Resolution with which the Lebanese and Syrian officials began meeting in early February of 2005 to discuss how to accomplish the requests of the Resolution.[13] Hariri and 22 others were assassinated a few days later.

B. Formation of the Special Tribunal for Lebanon

The Security Council signed an agreement with Lebanon to form the Special Tribunal for Lebanon to "try the suspects in the 2005 assassination of former Lebanese Prime Minister Rafiq Hariri."[14] The Government of Lebanon requested that the Security Council establish an international tribunal to which the Security Council responded by adopting Resolution 1664 to negotiate an agreement with Lebanon for the establishment of the Tribunal.[15] The Tribunal has jurisdiction over attacks that occurred between October 1, 2004 and December 12, 2005 and attacks that are "connected in accordance with the principles of criminal justice and…of a nature

[11] U.N. S.C. Rep. of the Security Council, Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, Peter FitzGerald, S.C. Pres. Statement 2005/4, U.N. Doc. S/PRST/2005/4 ¶ 2 (Feb. 15, 2005) [reproduced in accompanying notebook at Tab 1].

[12] *Id.* at ¶ 3.

[13] Katherine Iliopoulos, *Hariri Tribunal Opens in The Hague,* Crimes of War Project (2009), *available at,* http://www.crimesofwar.org/onnews/news-lebonon.html [reproduced in accompanying notebook at Tab 3].

[14] Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007) [reproduced in accompanying notebook at Tab 5].

[15] *Id.* Resolution Annex, Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon.

and gravity similar to the attack of 14 February 2004."[16] The Tribunal may also have jurisdiction over similar crimes that occur after the specified date if the parties to the Statute, the Lebanese Government and the Security Council so agree. When the Lebanese parliament failed to ratify the agreement through its domestic legislative process by June 10, 2007 as required by the Statute, the Security Council authorized the formation of the tribunal under Chapter VII of the Security Council powers. [17]

III. LEGAL BACKGROUND

A. State Immunity Generally

The doctrine of State immunity is a bar from the exercise of jurisdiction over States and some of their officials to preserve the orderly conduct of international relations so that the States may carry out their public functions effectively.[18] The law of head of state immunity comes from notions of "sovereign equality and is aimed at ensuring that states do not unduly interfere with other states and their agents."[19] This principle "that a State may not exercise its authority on the territory of another State" based on the "principle of sovereign equality among all Members of the United Nations"[20] codified in Article 2, paragraph 1 of the Charter of the United Nations grants foreign State officials immunity so they may perform their official duties without

[16] *Id.*

[17] United Nations Security Council 5686 Meeting Record on the *Creation of the Special Tribunal for Lebanon*, S/PV.5685 30 (May 2007) [reproduced in accompanying notebook at Tab 6].

[18] HAZEL FOX, THE LAW OF STATE IMMUNITY 1 (2nd ed. 2008) [reproduced in accompanying notebook at Tab 7].

[19] Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 A.J.I.L. 407, 407 (July 2004) [reproduced in accompanying notebook at Tab 8].

[20] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Judgment, 2002 I.C.J. ¶ 2 (Feb. 14) [reproduced in accompanying notebook at Tab 9].

being subject to arrest or detention.[21] The immunity also applies to other high-ranking State officials in varying degrees, which this memorandum will address in Section IV(B) on page 26 below. The doctrine of head of State immunity is hereinafter referred to as "State official immunity."

Customary international law recognizes State official immunity through evidence of widespread state practice and *opinio juris*. The International Court of Justice ("ICJ") first applied the doctrine in *Arrest Warrant of 11 April 2000,* upholding an incumbent Minister of Foreign Affairs' immunity from criminal jurisdiction in the courts of Belgium.[22] The UN subsequently adopted the UN Convention on Jurisdictional Immunities of States and Their Property ("UNCISP")[23] in 2004 to create a uniform rule of law concerning the topic, where it recognizes State official immunity as an "accepted. . .principle of customary international law."[24] National courts are unable to prosecute, bring civil suit, or otherwise exercise jurisdiction over State officials based on the doctrine. However, as the *Arrest Warrant* case points out, the doctrine of State immunity does not apply in international criminal tribunals or courts.[25]

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[21] Jerrold L. Mallory, *Resolving the Confusion Over Head-of-State Immunity: the Defined Rights of Kings*, 86 COLUM. L. REV. 169, 179 (1989) [reproduced in accompanying notebook at Tab 10].

[22] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Judgment, 2002 I.C.J. ¶ 3 (Feb. 14) [reproduced in accompanying notebook at Tab 9].

[23] United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49) (Not yet in force). The UNCISP requires 30 States to ratify the treaty and currently the convention has 28 State signatories and 10 State parties. The United Nations Treaty Collection, "Databases," UN Chapter III Privileges and Immunities, Diplomatic and Consular Relations, Etc., 13. United Nations Convention on Jurisdictional Immunities of States and Their Property, Status as at: 04-11-2010 01:16:12 EDT, http://treaties.un.org/pages/ViewDetails.aspx?src= TREATY&mtdsg_no=III-13&chapter=3&lang=en [reproduced in accompanying notebook at Tab 11].

[24] *Id.* at preamble [reproduced in accompanying notebook at Tab 12].

[25] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Judgment, 2002 I.C.J. ¶ 61 (Feb. 14) [reproduced in accompanying notebook at Tab 9].

A. Vertical and Horizontal Models of State Cooperation with Courts

The cooperation of States and their leaders is crucial to the successful administration of justice in any international criminal tribunal or court. There are two models for State cooperation with international tribunals and courts: the *horizontal* and the *vertical* models. The *horizontal* model is based on the sovereign equality of the states, where a foreign State seeking to subject an individual to its jurisdiction must rely on treaties of judicial cooperation or on voluntary interstate cooperation.[26] Absent an agreement or voluntary cooperation, a State may not subject another State or its protected officials to its jurisdiction. This model inspires bilateral or multilateral treaties on judicial cooperation or extradition between States. In the *horizontal* model, the State requested to perform investigative or judicial acts to assist criminal proceedings in the requesting State operates through its own judicial authorities and delivers the result to the requesting State.[27] A well-accepted ground for State immunity under the *horizontal* model is the "independence and equality of the States," expressed in the maxim *par in parem non habet imperium* meaning "one sovereign State is not subject to the jurisdiction of another State," presumably because that State lacks the competence to exercise such jurisdiction.[28]

Under the *vertical* model, international tribunals and courts have the power to bind States and their officials to comply with orders without a specific agreement or the State's voluntary

[26] Prosecutor v. Blaskic, Case No. IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, ¶ 47 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 29 1997) [reproduced in accompanying notebook at Tab 13].

[27] Special Tribunal for Lebanon, Annual Report 2009-2010, Antonio Cassese, President of the STL *available at* http://www.stl-tsl.org/x/file/TheRegistry/Library/presidents_reports/Annual_report_March_2010_EN.pdf [reproduced in accompanying notebook at Tab 14].

[28] FOX, *supra* note 18, at 57; The notion of a State's lack of competence to exercise jurisdiction over another state was recognized by the League of Nations Committee of Experts for the Codification of International Law. Publications of the League of Nations, V:Legal (1927); V.9 No. 11 [reproduced in accompanying notebook at Tab 7].

compliance.[29] Rather, international tribunals created under the powers of the United Nations Security Council have the power to issue binding orders on States and their officials with the consequence that any non-compliance can be sanctioned.[30] States may not refuse to comply with any of the tribunal's requests on the grounds usually applicable in inter-State legal disputes.[31] A properly set up international tribunal requires no further consent to create jurisdiction over States and their nationals. No international tribunal or hybrid court to date has had difficulty prosecuting State officials under its jurisdiction. If the substantive law of a tribunal excludes any defense based on head of State status, then the individual's status of the capacity of their acts is not relevant to bar the court's jurisdiction for prosecuting the official's crimes.[32] International Tribunals since Nuremburg expressly provide that "the official position as head of State…shall not be considered as freeing them from responsibility or mitigating punishment."[33] This

[29] Special Tribunal for Lebanon, Annual Report 2009-2010, Antonio Cassese, President of the STL *available at* http://www.stl-tsl.org/x/file/TheRegistry/Library/presidents_reports/Annual_report_March_2010_EN.pdf [reproduced in accompanying notebook at Tab 14].

[30] Prosecutor v. Blaskic, Case No. IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, ¶ 47 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 29 1997) [reproduced in accompanying notebook at Tab 13].

[31] *Id.*

[32] FOX, *supra* note 18, at 667 [reproduced in accompanying notebook at Tab 7].

[33] Charter of International Military Tribunal of Nuremberg, Article 7, a statement affirmed as Principle III in UN Resolution 95/1). *See also* Statute of the International Tribunal for the Former Yugoslavia, Article 7(2) S.C. Res. 827, U.N. Doc. S/RES/827 (May 25 1993) and Statute of the International Criminal Tribunal for Rwanda, Art.7(2), S.C. Res. 955, U.N. SCOR 49th Sess., 3453d mtg. at 16, U.N. Doc. S/Res/955 (1994) both stating that "the official position of any accused persons, whether as head of state or government or as responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment"; Statute for the Special Court for Sierra Leone, Art. 6(2) S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 1994) which states that "the official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment"; The Law on the Establishment of the Extraordinary Chambers as amended Oct. 27, 2004, Art. 29 (NS/RKM/1004/006) stating "[a]ny Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime. The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment" [reproduced in accompanying notebook respectively at Tab 15, 16, 17, 18, and 19].

memorandum will also show that international and hybrid tribunals may use the vertical model to subpoena State official witnesses in Section V.

B. The STL Uses Both Vertical and Horizontal Models

The Special Tribunal for Lebanon uses a hybrid of the *horizontal* and *vertical* models. The *vertical* model governs the STL's relationship with Lebanon, requiring full compliance without undue delay with all the Tribunals requests and Article 4(1) granting the Tribunal primacy over the Lebanese Criminal Court.[34] The STL may take investigative acts without the assistance of the Lebanese prosecutorial or judicial authorities under Article 11(5) of the Statute. The Statute also provides enforcement mechanisms if Lebanon fails to comply with the Tribunal's requests. Article 20 of the Statute remedies non-compliance in a three-tier manner: first, the STL President consults with the relevant Lebanese authorities; second, the Pre-Trial Judge or Trial Chamber may make a judicial finding of non-cooperation; and third, the President of the STL may report the judicial finding to the Security Council for further action. The Statute also enables the Prosecutor to investigate Lebanese authorities, which includes on-site investigations or interviewing witnesses or suspects under Article 11(5). Article 77(B) mitigates the Prosecutor's investigative authorities with Lebanon by requiring the Prosecutor to get Pre-Trial Judge authorization for investigative acts without assistance from Lebanese National authorities.

The *horizontal* model governs the STL relationship with third States. States are only required to comply with the STL's requests if the State is under an agreement to do so with the

[34] Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007) [reproduced in accompanying notebook at Tab 5].

STL under rules 13, 14, and 15.[35] Under Rule 21(A), non-compliance by third States who have entered into an agreement is resolved by the dispute settlement mechanism provided for in the relevant agreement. Third States who have not formed an agreement with the STL are not bound to cooperate with the STL. The President of the Tribunal under Rule 21(B) may consult with the competent authorities of the State in order to secure their cooperation. Considering the foreseeable difficulty of obtaining Third Party State compliance, the STL Rules of Procedure and Evidence facilitate the formation of third State agreements allowing the President, (Rule 13), Prosecutor (Rule 14), the Head of Defense Office (Rule 15), and the Registrar acting under the authority of the STL President (Rule 39) to directly seek cooperation from any State.[36]

The STL may have issues prosecuting and issuing subpoenas to third States' officials because of the horizontal model it shares with those States. The STL will however have full authority to exercise jurisdiction over Lebanon. This memo will discuss the law of State official under both the vertical and horizontal models. It will then discuss the STL's best arguments for obtaining State cooperation with witness subpoenas under both models.

[35] Special Tribunal for Lebanon, Rules of Procedure and Evidence, STL/BD/2009/01, (March 20, 2009) [reproduced in accompanying notebook at Tab 20].

[36] *See* Special Tribunal for Lebanon, Annual Report 2009-2010, Antonio Cassese, President of the STL *available at* http://www.stl-tsl.org/x/file/TheRegistry/Library/presidents_reports/Annual_report_March_2010_EN.pdf [reproduced in accompanying notebook at Tab 14].

IV. Doctrine of State Official Immunity

A. Personal Immunity (*ratione personae*) and Functional Immunity (*ratione materiae*)

Ratione personae relates to the individual's official status and applies only to a limited categories of high ranking State officials while serving in office.[37] *Ratione personae* is a broad form of immunity that protects the individual from jurisdiction for any crimes he or she may commit while in office. The immunity does not apply once the individual no longer holds office.[38] (The specific categories of high-ranking officials are outlined in section IV(B) of this memo). Once the individual leaves office and no longer enjoys *ratione personae* immunity, a more limited immunity analysis applies: *ratione materiae*.

Ratione Materiae protects the State official's official acts carried out as a part of his or her official duties for his or her State. The immunity applies while the State official is in office and when he or she leaves office because it protects the official act itself.[39] It requires an analysis of whether the person committed a private act, for which there would be no immunity, or a public, official or governmental act for which there is immunity from civil and criminal jurisdiction.[40]

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[37] FOX, *supra* note 18, at 666 (citing Watts "The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers", R de C, 242 (1994-III) at 13.) [reproduced in accompanying notebook at Tab 7].

[38] Andrew D. Mitchell, *Leave Your Hat On? Head of State Immunity and Pinochet*, 25 MONASH L. REV. 225, 230 (1999) [reproduced in accompanying notebook at Tab 21].

[39] Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case,* 13 EUR. J. INT'L LAW 835, 863 (2002) [reproduced in accompanying notebook at Tab 22].

[40] *Id.*

B. Scope of State Official Immunity

State official immunity applies to either the *ratione materiae* or *ratione personae* (or both when applicable) immunities granted to State officials from a National court's jurisdiction based on the *horizontal* model of State cooperation. State officials who are immune from a National court's jurisdiction are not immune at international tribunals and courts, however, based on the *vertical* model developed through customary international law and supported at all international tribunals and recent ICJ decisions.[41] The International Court of Justice recognized State official immunity for Congo's Foreign Minister Abdulaye Yerodia Ndombasi and thereby established a framework for deciding Head of State and State official immunity in the *Arrest Warrant Case*.[42]

On April 11, 2000, a Belgian investigating judge issued an international arrest warrant against Congo's Foreign Minister Abdulaye Yerodia Ndombasi *in absentia* accusing him of crimes against humanity and grave breaches of the 1949 Geneva Conventions and their Additional Protocols for delivering speeches inciting racial hatred.[43] Belgium justified its actions stating that it was asserting universal jurisdiction to try international crimes and that Belgium did not recognize immunity for State officials.[44] The Democratic Republic of Congo, in protest of the arrest warrants validity under international law brought the case to the International Court of Justice for review.[45] At the same time, Belgium was considering whether to put Israeli

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[41] *See* Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Judgment, 2002 I.C.J. ¶ 3 (Feb. 14) [reproduced in accompanying notebook at Tab 9] and Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) Judgment, 2008 I.C.J. ¶ 194 (June 4) [reproduced in accompanying notebook at Tab 23].

[42] *See* Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Judgment, 2002 I.C.J. ¶ 61 (Feb. 14) (recognizing the immunity of Yerodia) [reproduced in accompanying notebook at Tab 9].

[43] *Id.* at ¶ 13.

[44] *Id.* at ¶¶ 15-16.

[45] *Id.* at ¶ 17.

Prime Minister Ariel Sharon, Cuban President Fidel Castro, and Iraqi Leader Saddam Hussein on trial for crimes against humanity.[46]

The International Court of Justice determined that it "has been unable to deduce from [recent State] practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs."[47] The court recognized that the performance of the Minister of Foreign Affairs' functions "is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise" without being exposed to legal liability or criminal punishment.[48]

The ICJ recognized four exceptions to a head of State's immunity under international law:

1) The head of State is not immune under international law from process in his or her own country;

2) The head of State's home country may waive the official's immunity in foreign courts;

3) A former head of State is not immune for acts committed before or after his period on office or for private acts committed while in office; and

4) The head of State has no immunity when the immunity has been validly abrogated by and international tribunal.[49]

State practice has generally accepted the ICJ's *Arrest Warrant Case* jurisprudence.[50] The ICJ applied its analysis of the Foreign Affairs Minister's immunity to other high-ranking State

[46] Michael A. Tunks, *Diplomats for Defendants? Defining the Future of Head-of-State Immunity*, 65 DUKE L.J. 651, 664 (2002) [reproduced in accompanying notebook at Tab 24].

[47] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Judgment, 2002 I.C.J. ¶ 61 (Feb. 14) [reproduced in accompanying notebook at Tab 9]

[48] *Id.* at ¶ 55.

[49] *Id.* at ¶ 61.

officials stating: "it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government, and Minister of Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."[51] This memo will use the ICJ's analysis in the *Arrest Warrant Case* and its four exceptions to immunity in discussing all State officials who have immunity below.

1. Heads of State

a. Current Status of Head of State Immunity

The Head of State enjoys immunity from jurisdiction in both its public capacity as a "State" (*ratione personae*) and from the actions committed under the official position itself (*ratione materiae*).[52] The UNCISP and many national statutes include the head of State in the definition of a State,[53] thereby directly extending the State's Immunity to the head of State. Even heads of State who are merely ceremonial leaders are also treated as the State and are entitled to immunity in some national jurisdictions.[54] The purpose of granting heads of State immunity is to (1) recognize an appropriate degree of respect for foreign leaders as a symbol of their State's

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[50] *See* Michael A. Tunks, *supra* note 40, at 665 (noting that Belgium no longer takes the position that putting a foreign head of State on trial is justified under international law and has declared the case against Ariel Sharon inadmissible) [reproduced in accompanying notebook at Tab 24].

[51] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Judgment, 2002 I.C.J. ¶ 61 (Feb. 14) (using the words "such as" suggests that there are other high-ranking State officials who enjoy immunity under international law other than those enumerated in the case) [reproduced in accompanying notebook at Tab 9].

[52] FOX, *supra* note 18, at 668 [reproduced in accompanying notebook at Tab 7].

[53] "'State' means. . .the State and its various organs of government;. . .representatives of the State acting in that capacity." United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49) (Not yet in force), Article 2.1(b)(i) and (iv) [reproduced in accompanying notebook at Tab 11].

[54] FOX, *supra* note 18 at 670; Fox notes that U.S. courts grant immunity in proceedings brought against the United Kingdom's head of State, the Queen, and its Prime Minister as head of government. *Id.* Fox also notes that religious, spiritual leaders, or rulers or particular peoples may enjoy immunity, citing the US treatment of the Pope as the "head of the Vatican State," however; such treatment is not widespread [reproduced in accompanying notebook at Tab 7].

sovereignty, and (2) ensure that State leaders are not inhibited from performing their State functions.[55]

b. Indentifying the Head of State

The relevant factors for determining whether an individual is entitled to Head of State immunity are (1) the method of the individual's acquisition of power [56], (2) evidence that the individual actually exercised power[57], and (3) the individual's receipt of implicit or explicit recognition as the Head of State from other States and their leaders.[58]

1) Acquisition of Power

The ICJ has granted immunity for heads of State who can prove that they are either *de jure* or *de facto* heads of State.[59] *De jure* heads of State include constitutionally elected presidents or prime ministers, reigns to throne and those heads of State holding their position by right or according to law. *De facto* Heads of State attain power through non-legal means, for

[55] Michael A. Tunks, *Diplomats for Defendants? Defining the Future of Head-of-State Immunity*, 65 DUKE L.J. 651, 654 (2002) [reproduced in accompanying notebook at Tab 24].

[56] *Id.* at 17.

[57] United States v. Noriega, 746 F.Supp.1507 (S.D. Fla., 1999) (holding that "being the strong man behind a governmental apparatus formally held by others does not amount to a position of de facto Head of State" and presumably extends such analysis to de jure Heads of State who must obtain power through proper state procedures) [reproduced in accompanying notebook at Tab 25].

[58] Diego A. Archer, MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR-ISSUE 5: HEAD OF STATE DOCTRINE AND INTERNATIONAL LAW VIOLATIONS, Case Western Reserve University School of Law War Crimes Research Project 17-32 (2003) (citing Federal Department of Foreign Affairs (DFA) Directorate of International Law, *Recognition of States and Governments, available at* http://www.eda.admin.ch (Switzerland 2000)) [reproduced in accompanying notebook at Tab 26].

[59] *Id.*

example a leader chosen to run a country after a military coup.[60] The analysis of the *Noriega* case below describes an example of *de facto* Head of State immunity.

2) Actual exercise of power

Regardless of how the head of State acquires power, he or she must actually exercise it over a substantial part of the State and its population. *De facto* Heads of State enjoy immunity by exercising sovereign authority over a substantial part of a territory and over most of the administrative apparatus.[61] For *de facto* heads of State, courts grant immunity only to rulers who directly exercise power. In *United States v. Noriega*[62], the United States Appeals Court denied immunity to General Manuel Noriega in part because "Noriega never served as the constitutional leader of Panama,. . .[and] Panama has not sought immunity for Noriega."[63] In 1988, a power struggle for Head of State in Panama ensued when Panama's President Eric Arturo Delvalle removed Noriega from his position has commander of Panama's defense forces.[64] Noriega took control after a disputed presidential election. The United States did not recognize Noriega as head of State, and instead recognized Guillermo Endara as the legitimate constitutional Head of State.[65] After Noriega declared a state of war with the United States in December 1989, the U.S

[60] *Id.*

[61] *Id.* (citing Federal Department of Foreign Affairs (DFA) Directorate of International Law, *Recognition of States and Governments*, *available at* http://www.eda.admin.ch (Switzerland 2000)).

[62] U.S. v. Noriega, 117 F.3d 1206 (11th Cir. 1997) (In *Noriega,* the United States convicted General Noriega for crimes including distribution of cocaine and affirmed that the defendant was properly denied immunity from prosecution for the drug-related offenses based on head-of state immunity) [reproduced in accompanying notebook at Tab 27].

[63] *Id.* at 1211.

[64] *Id.* at 1209-10.

[65] *Id.*

responded with military force in order to seize him.[66] The lower court held that being a "strong man" behind a governmental apparatus held by others does not amount to a position of *de facto* head of State.[67] This memorandum discusses the three separate *Pinochet* holdings in Section IV(C)(2) on page 47 below in support finding that treaties could serve as a governmental waiver to State official immunity under the first out of four exceptions to State immunity discussed in the *Arrest Warrant Case*. *Pinochet* also involved a *de facto* head of State claiming State official immunity.

3) Recognition of Head of State authority from other States

A foreign State's implicit or explicit recognition that an individual is the head of State is a strong indication that that person will enjoy immunity. In *United States v. Noriega*,[68] the court denied immunity to General Manuel Noriega in part because the "United States government never recognized Noriega as Panama's legitimate, constitutional leader."[69] As mentioned in the immediately preceding section, the United States instead recognized Guillermo Endara as the legitimate constitutional Head of State. The Court determined that the former General Manuel Noriega or Panama could not be afforded immunity for two reasons. First, he was not recognized as a head of State and was discharged from his position when the case began.

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[66] *Id.*

[67] U.S. v. Noriega, 746 F. Supp 1506, 1520-21 (S.D.Fla. 1990) ("The 'head of state' argument comes to the Court unencumbered by evidence; the arguments were made largely on the basis of general information made available by the media. However, accepting as true statements of counsel regarding Defendant's position of power, to hold that immunity from prosecution must be granted 'regardless of his source of power or nature of rule' would allow illegitimate dictators the benefit of their unscrupulous and possibly brutal seizures of power. No authority exists for such a novel extension of head of state immunity, and the Court declines to create one here.") [Reproduced in accompanying notebook at Tab 25].

[68] U.S. v. Noriega, 117 F.3d 1206 (11th Cir. 1997) [reproduced in accompanying notebook at Tab 27].

[69] *Id.* at 1211.

Second, the court found that his crime of narcotics trading would not be considered an activity under the official capacity of a high-ranking official.[70]

3) Government Ministers

Ministers of Foreign Affairs enjoy immunity from criminal and civil jurisdiction.[71] In *Arrest Warrant*, the ICJ declared that

> a Minister of Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State, or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his of her office. He or she does not have to present letters of credence.[72]

The court further noted that there was no distinction between actions committed in an "official capacity" and those performed in a "private capacity."[73] The Vienna Convention on Treaties, Article 7(2) also recognizes that the Minister of Foreign Affairs represents the State and has the authority to perform all acts relating to a treaty without production of full powers.[74]

4) Other Ministers

[70] U.S. v. Noriega, 746 F.Supp.1506 (SDFL 1990) 1519, United States v. Noriega 117 F.3d 1206 (11th Cir. 1997) [reproduced in accompanying notebook at Tab 25].

[71] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Judgment, 2002 I.C.J. ¶ 53 (Feb. 14) [reproduced in accompanying notebook at Tab 9].

[72] *Id.*

[73] *Id.* at 55; *see also* Armed Activities on the Territory of the Congo (Democratic Republic of the Congo/Rwanda), 2006 I.C.J. Jurisdiction and Admissibility of the Claim (Feb. 3) [reproduced in accompanying notebook at Tab 28].

[74] Vienna Convention on the Law of Treaties, May 23, 1969, T.S. 1155 p. 331 (entered into force Jan. 27, 1980) [reproduced in accompanying notebook at Tab 29].

Ministers of the State are not afforded immunity unless their position is specified as immune under international treaty or an ICJ decision.[75] Recently, the ICJ decided in *Djibouti v. France* that a Head of National Security does not enjoy immunity because there were no grounds in international law upon which such official could claim immunity, citing that the position was not that of a diplomat or other official protected in the Vienna Convention on Diplomatic Relations of 1961 and the Convention on Special Missions of 1969.[76]

In *Djibouti v. France*, a dispute between the two countries arose in relation to France's cooperation with the investigation into the death of the French Judge Bernard Borrel in Djibouti in 1995. Djibouti sought enforcement of the Treaty of Friendship and Co-operation signed by the two States on June 27, 1977 and the Convention on Mutual Assistance in Criminal Matters between France and Djibouti, dated September 27, 1986 in order to obtain documentation and witness testimony from France's head of National Security. The ICJ found that France did violate the treaty and therefore had to give Djibouti reasons for its refusal to cooperate, that Djibouti could not subpoena the head of State, but that Djibouti could subpoena the Head of National Security. The ICJ affirmed the long standing rule that a head of State did enjoy immunity from another State's jurisdiction, but seemed to apply a narrower standard for other high ranking officials, requiring some basis in treaty or international law before granting such immunity.[77]

The ICJ in *Democratic Republic of Congo vs. Belgium* enumerated positions that receive immunity protections: "certain holders of high ranking office in a State, *such as* the Head of

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[75] Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) Judgment, 2008 I.C.J. ¶ 194 (June 4) [reproduced in accompanying notebook at Tab 23].

[76] *Id.*

[77] *Id.*

State, Head of Government, and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal" suggesting that the list is not exhaustive.[78] The court did not indicate what other officials have immunity. It appears the *Djibouti v. France* narrowed the scope of immunity.

5. Diplomats

Diplomats enjoy extensive privileges and immunities under international law for the diplomat's mission in the receiving State.[79] The 1961 Vienna Convention on Diplomatic Relations ("VCDR") is the principle codification of their immunities.[80] A diplomat in post enjoys both *ratione materiae* and *ratione personae* immunity and is protected from both criminal and civil liability while in office. However, once the diplomat is out of office, a municipal court might prosecute him or her for private acts committed with criminal intent.[81] Diplomats have immunities in the "receiving State" they visit, which accepts their credentials as diplomats or they receive immunities when they are experts on mission.[82]

VCDR divides immunity into three categories and gives degrees of immunity on a descending scale of protection to (1) the diplomatic staff, (2) the administrative and technical staff, and (3) the service staff.

a. The **diplomatic staff** gets immunity to his person, property, residence, and immunity from criminal and civil proceedings, and execution provided he or she

[78] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Judgment, 2002 I.C.J. ¶ 51 (Feb. 14) [reproduced in accompanying notebook at Tab 9].

[79] Vienna Conventions on Diplomatic Relations Art. 3(1), Apr. 18, 1961, T.S. No. 500 p. 95 (entered into force Apr. 24, 1964) [reproduced in accompanying notebook at Tab 30].

[80] *Id.*

[81] FOX, *supra* note 18 at 709 [reproduced in accompanying notebook at Tab 7].

[82] See Section IV(B)(4) analyzing consular immunity for special missions.

is not a national or permanent resident of the receiving State.[83] Diplomats also enjoy, among other protections, exemptions from personal service.[84] All immunities also apply to the diplomat's family who form a part of his or her household, as long as they are also not nationals of the receiving State.

b. The **administrative and technical staff** and their family members who constitute part of their household in the receiving State have immunity (provided they are not nationals of the receiving State) from criminal jurisdiction, but no civil jurisdiction for actions outside of their official duties.[85]

c. The **service staff** and not their families are immune only from criminal and civil jurisdiction for acts performed in the course of their duties.[86]

The immunities accorded to diplomats exist regardless of an armed conflict.[87] In the event of a disruption of diplomatic relations, States typically entrust residual diplomatic functions in order to preserve protective powers. The Diplomat loses immunity on the termination of his or her office (*ratione personae*) but retains immunity *ratione materiae* for acts conducted on behalf of the State while serving in the official position.[88]

A diplomat's immunity likely only applies in the receiving State and not to third States who have not consented to the diplomat's presence in the receiving State.[89] In *The Former Syrian Ambassador*, the German Federal Constitutional Court ruled (1) that there was no rule of customary international law granting diplomats continuing immunity under Article 39(2) of the

[83] Vienna Conventions on Diplomatic Relations Art. 29, 30, and 31(3), Apr. 18, 1961, T.S. No. 500 p. 95 (entered into force Apr. 24, 1964) [reproduced in accompanying notebook at Tab 30].

[84] *Id.* at Art. 35.

[85] *Id.* at Art. 37(2).

[86] *Id.* at Art. 37(3).

[87] US Diplomatic and Consular Staff and in Tehran, Judgment 1980 I.C.J. p. 3 ¶ 86 (May 24) [reproduced in accompanying notebook at Tab 31];

[88] FOX, *supra* note 18, at 708 [reproduced in accompanying notebook at Tab 7].

[89] *Id.* at 713 citing Former Syrian Ambassador to the German Democratic Republic, Case No. 2 BvR 1516.96; 115 ILR 596, German Fed. Const. Ct, 10 June 1997, Legal Opinion of Georg Ress and Larl Doehring delivered to the German Fed. Const. Ct., Archiv des Volkerrechts 1999, ¶ 68 [reproduced in accompanying notebook at Tab 32].

VCDR from jurisdiction from third States and (2) that there was no rule in customary international law requiring the Federal Republic of Germany to recognize diplomatic immunity formerly accredited by the German Democratic Republic.

The Former Syrian Ambassador dealt with a warrant issued for the arrest of a former ambassador for charges of assisting in murder and bringing about an explosion in West Berlin when in 1983, a bomb set off in an arts center killed one person and seriously injured 20 people. The Ambassador was allegedly implicated in the attacks and allegedly failed to prevent the terrorist group from removing a bag of explosives from the Syrian Embassy. The Federal Constitutional Court upheld the warrant. Although it found that the acts were performed in the course of the diplomat's official functions (because he acted according to instructions telegraphed from his sending State),[90] Germany, as a third State, was not under any obligation to respect the immunity *ratione materiae* of the former diplomat. The Court found that the immunity is based on consent of the receiving State in the form of an agreement granting reciprocal obligations to the diplomat and receiving State. The Court determined that consent "legalizes the personal as well as functional diplomatic immunity."[91] This diplomat did not have such consent.

6. Constituent States

Debate whether Constituent States are entitled to immunity is unresolved. Constituent States are territorial and constitutional entities forming part of a sovereign State. A constituent State holds administrative jurisdiction over a defined geographic territory and is a form of

[90] *Id.* at ¶ 606.

[91] *Id.* at ¶ 610.

regional government. The UNCISP includes in its definition of a State the "constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity."[92] International case law is divided between granting administrative portions of a State immunity by affiliation with the State, and denying immunity unless the constituent has its own legal personality in its foreign relations with other countries.[93]

In *Van Heynigen v. Netherlands Indies Government*[94], the defendant was an administrative body of the government that claimed it derived its power from the Netherland's government from a letter by the Dutch Department of External Affairs. The Austrian High Court found that the Dutch East Indies Company did have immunity because it was "a part of a foreign sovereign State."[95] Judge Philipps opined that "where a foreign sovereign sets up as an organ of its government a governmental control of part of its territory which it creates into a legal entity,. . . the legal entity cannot be sued…because that would mean the authority and territory of a foreign sovereign would be subjected in the ultimate result to the jurisdiction and execution of this court."[96]

A French court followed the *Van Heynigen* reasoning in *Neger v. Land of Hesse*. The court denied immunity to a constituent of West Germany on the ground that immunity could only benefit "sovereign States…and not…member States of a federation which are under the

[92] United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49) (Not yet in force), Article 2.1 [reproduced in accompanying notebook at Tab 11].

[93] FOX, *supra* note 18, at 432 [reproduced in accompanying notebook at Tab 7].

[95] QWN 22l (1949) st. RQ; 15 ILR 138 at 140 [reproduced in accompanying notebook at Tab 33].

[96] *Id.*

supervision of the central government."[97] The court found that immunity would only apply to an entity with its own personality such that it can conduct foreign relations with other countries.

The European Convention on State Immunity of 1972 determined that Constituent States are not entitled immunity *ratione personae* but that they might enjoy immunity *ratione materiae*.[98] The Convention provides that a contracting State may include a declaratory notice to the Secretary General of the Council of Europe that for the purposes of the Convention, the Constituent State is entitled to the same obligations as the contracting State.[99] Service of documents must go through the Ministry of Foreign Affairs of the federal State.[100]

British and French courts do not grant immunity to political subdivisions, municipalities, or regional autonomous districts because they lack the individual authority to engage in foreign relations.[101] The United States, however includes political subdivisions and "all government units beneath the central government including local government but not cities or towns" in the definition of a "State" for the purposes of immunity in Article 1603 of the FSIA.[102]

7. State Agencies

[97] Neger v. Land of Hesse, Tribunal de grand instance Paris, 15 January 1969, Rev. Crit. DIP 1070 99-101, Hafner F/4 [reproduced in accompanying notebook at Tab 34].

[98] European Convention on State Immunity, May 16, 1972, Europ. TS No. 74, (1972) (entered into force June 11, 1976) Articles 28(1) and 27(1) [reproduced in accompanying notebook at Tab 35].

[99] FOX, *supra* note 18, at 433 [reproduced in accompanying notebook at Tab 7].

[100] *Id.*

[101] *Id.* at 434 (Citing Ville de Geneve v. Consorts de Civry, French C of Appeal, 11 June 1984.

[102] *Id.* citing House Report 15, U.S. Restatement (Third), para. 452, Reporter's note 1.

State Agencies are likely immune from criminal and civil jurisdiction if the entity (1) does not have a legal personality separate from the State[103] and (2) is entitled to perform and performs public acts under the authority of the State.[104] In other words, agencies and instrumentalities are accorded immunity based on their status and performance under State authority. However, there is no international consensus on how to evaluate *which* agencies or instrumentalities have immunity.

State agencies are entities that enable a State to participate in commercial and economic activities.[105] Examples of State agencies are sub-units of government departments, public corporations established by charter or decree, or companies established under private law in which the government is a majority shareholder.[106]

The UNCISP includes agencies or instrumentalities "or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State."[107] The commentary to the UNCISP explain that the term "other entities" covers situations where the State entrusts a private entity with governmental authority to perform public acts, such as a commercial bank dealing with import and export licensing.[108] Determining

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[103] Baccus SRL v. Servicio Nacional del Trigo [1957] 1 Q.B. 438 [reproduced in accompanying notebook at Tab 36].

[104] United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49) (Not yet in force), Art. 2(b)(iii) ("'State' means. . .agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State") [reproduced in accompanying notebook at Tab 11].

[105] FOX, *supra* note 18, at 437 [reproduced in accompanying notebook at Tab 7].

[106] *Id.*

[107] United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49) (Not yet in force), Art. 2(b)(iii) [reproduced in accompanying notebook at Tab 11].

[108] *Id.* at Commentary Art. 2.1(b)(iv) ¶ 14-15.

whether the agency's acts are in the exercise of sovereign authority is a question of fact determined by the national court of the State agency.

In the *Empire of Iran*, the German court held that a contract for the repair of embassy premises was not in the essential sphere of State authority.[109] The court determined that while State immunity requires a look at customary international law, "qualification of State activity as sovereign or non-sovereign must in principle be made by national law, since international law, at least usually, contains no criteria for this distinction."[110] However the court restricted the national law inquiry to "international law restrictions," stating that "[n]ational law can only be employed to distinguish between a sovereign and non-sovereign activity of a foreign State insofar as it cannot exclude from the sovereign sphere, and thus from immunity, such State dealings as belong to its field of State authority in the narrow and proper sense, according to the predominantly held views of the States."[111] Therefore, courts will evaluate the two prongs (status and performance) using a mix of both international and national law.

The International Law Commission (ILC) Working Group enumerates several factors to consider in determining the first prong: status of the agency. The factors courts will consider in determining the status of the agency are (1) independence from the sovereign, (2) linkage to the State either by being a subdivision or by having a majority of shares owned by the State, (3) the performance of functions traditionally performed by an initial government operating within the States boundaries, (4) separate legal personality, (5) the core function of the entity being either an integral part of the State (like armed forces) or predominantly commercial, (6) performance of

[109] Empire of Iran case, German Federal Constitutional Court, 30 April 1963; UN Legal Materials 282; 45 ILR 57 at 81 [reproduced in accompanying notebook at Tab 37].

[110] *Id.*

[111] *Id.*

core public functions, (7) active supervision of the entity, (8) employees hired in accordance with public employment conditions, and (9) the agency's constitution, powers, duties, and source of funding.[112]

Factors that courts will likely not consider are: (1) the opinion of the foreign State or its Ambassador and, (2) the conferment of separate legal personality under the law of the foreign State. The greater the divergence of the agency from the political organization of the State and the greater its enjoyment of a separate legal personality, the closer the State agency is to being considered a private corporation and therefore not entitled to State immunity.[113] Further, the establishment of private market forms weakens the presumption of the State agency's status as a part of the State.[114] The determining factor becomes the extent to which the State retains control and the nature of the agency's acts.[115] State agency actions may be protected under the Act of State doctrine, except where the acts constitute a breach of international human rights or other clearly established international law.[116]

Courts will evaluate the second prong, performance, by looking at the entitlement to perform such acts under State authority. Such evaluation must look to the State's national law because it requires analysis on the circumstances by which the entity is established and acquires its power. Determining, next, whether the agency actually performed those duties, the court must evaluate the categorization of those acts as "public" under the authority of the State's laws. This prong uses the *Empire of Iran* analysis which determined that international standards could

[112] FOX, *supra* note 18, at 446-7 [reproduced in accompanying notebook at Tab 7].

[113] *Id.* at 437.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 136.

trump the State's agency laws, holding that "international law restrictions" identified State agency activities as performed in the sovereign sphere and therefore entitled to immunity.[117]

Some jurisdictions automatically grant State agencies immunity. The United States uses this approach and it is codified in 1976 FSIA section 1603(a) stating that a political subdivision, agency or instrumentality is immune upon three conditions (1) separate legal entity, (2) a close link with the State, and (3) no incorporation in a third State.

8. Employment Contracts

Analysis of immunity for actions committed under contractual agreements with the State is similar to the analysis for State agency immunity claims. Some jurisdictions grant absolute immunity to State employees treating those agreements as different from private contracts. International law recognizes a general rule that protects the internal administration of the State allowing the State to designate individuals to act on its behalf. The ICTY supported this method in the *Blaskic* case stating "[i]t is well known that customary international law protects the internal organization of each sovereign State; it leaves to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State organs or agents."[118] However the Appeals Chamber applied this standard to State officials acting in their official capacity rather than to private contracting parties.[119]

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[117] Empire of Iran case, German Federal Constitutional Court, 30 April 1963; UN Legal Materials 282; 45 ILR 57 at 81 [reproduced in accompanying notebook at Tab 37].

[118] Prosecutor v. Blaskic, Case No. IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, ¶ 41 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 29 1997) [reproduced in accompanying notebook at Tab 13].

[119] *Id.* (applying the international standard to the facts by determining that "State officials" are "mere instruments of the 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 the State.")

The more common State practice is to cautiously apply the two-prong status and performance test outlined in Section IV(B)(6) State Agencies above. The UNCISP codified the general State practice in Article 11, Contracts of Employment, allowing immunity only in certain circumstances of employment. The convention provides

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceedings which relates to a contract of employment between the State and an individual for work performed or to be performed, in whose or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:
   a. The employee has been recruited to perform particular functions in the exercise of governmental authority;
   b. The employee is
      i. Diplomatic agent
      ii. Consular officer
      iii. Person on Special Mission
      iv. Any other person enjoying diplomatic immunity…[120]

Like the State agency analysis, the UNCISP article requires both that the employee has an official status and performs "particular functions in the exercise of governmental authority."[121] The court should determine the duties of the employee that constitute participation in the exercise of government power. However, there is a risk of unequal treatment because nations with large public sectors may enjoy a disproportionately wide immunity for State actions. One proposition is that the powers exercised in public service should be for the protection of general

[120] United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49) (Not yet in force), Art. 11 [reproduced in accompanying notebook at Tab 11].

[121] *Id.*

interests, like powers relating to policing, defense of the State, administration of justice, and assessment to tax.[122]

Some countries have limited the scope of government employee immunity. The German Federal Labour Court found that where an employee's administrative task is concerned with "a core area of sovereignty" like issuing passports and visas, the employment dispute is immune.[123] However, merely having access to confidential information is not sufficient to warrant immunity. The Swiss Federal Tribunal determined that the confidential nature of the work of an interpreter was not a ground for immunity just as it is not in the case of subordinate positions like those of secretaries, typists, archivists, chauffeurs and security men.[124]

9. Consular immunity for special missions

Consuls and their staff are entitled to *ratione materiae* immunity from suit in respect to their official acts, but not in respect of their private acts. The law is codified in the Vienna Convention on Consular Relations 1963. Case law too determines that consul's actions that are not in the scope of employment are not immune. In *Gerristen v. de la Madrid Hurtado,* the court determined that kidnapping and assault were not acts within an official's functions even though the acts committed were for the purpose of interfering with the distribution of leaflets outside the Mexican Consulate.[125] States may give consuls additional immunities through a bilateral

[122] Judgment of 3 June 1986, Commission / France (307/84, ECR 1986 p. 1725) [reproduced in accompanying notebook at Tab 38].

[123] Argentine Citizen v. Argentine Republic, 3 July 1996; Hafner D/14, p. 374-5.

[124] R. v. Republic of Iraq, 13 December 1994, ATF 120 II 408, Hafner Ch. 5 [reproduced in accompanying notebook at Tab 39].

[125] 819 F.2d 1511 (9th Cir. 1987) [reproduced in accompanying notebook at Tab 40].

agreement, as the United Kingdom and China did in their UK/China Consular Agreement of 1984.[126] Consuls may obtain the broader diplomatic immunity if the sending State has no diplomat in post and if the receiving State gives consent.[127]

10. Armed Forces

Immunities granted to armed forces vary depending on bilateral and multilateral agreements established for visiting armed forces and the treatment of armed forces in national legislation.[128] Visiting troops in a foreign State upon the State's consent are typically granted immunity under customary international law subject to limitations in agreements between the visiting and receiving States.[129] Military authorities of the force typically have exclusive jurisdiction in matters concerning discipline and the internal administration of the force.[130]

C. Exceptions to State Official Immunity

As discussed in Section IV(B) at page 25 above, the ICJ's *Arrest Warrant* case decision recognized four exceptions to a head of State's immunity under international law:

1) the head of State is not immune under international law from process in his or her own country;

2) the head of State's home country may waive the official's immunity in foreign courts;

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[126] Cmnd. 9247 (April 17, 1984) [reproduced in accompanying notebook at Tab 41].

[127] Vienna Convention on Consular Relations, Art. 17(10), T.S. No. 569 p. 261 (entered into force March 19 1967) [reproduced in accompanying notebook at Tab 42].

[128] FOX, *Supra* note 18, at 717 [reproduced in accompanying notebook at Tab 7].

[129] *Id.*

[130] FOX, *supra* note 18, at 717 (citing Reference re Exemption of United States Force from Canadian Criminal Law [1943] SCR 483) [reproduced in accompanying notebook at tab 7].

3) a former head of State is not immune for acts committed before or after his period on office or for private acts committed while in office; and

4) the head of State has no immunity when the immunity has been validly abrogated by and international tribunal.[131]

These four exceptions are discussed in depth in Heather Ludwig's Memorandum to the Prosecutor for the Special Tribunal for Lebanon entitled "STL: Would an Accused or Witness Who is a State Official be Able to Claim Immunity from Prosecution Before the STL? If so, What Type of Immunity and What Would the Consequences of Such a Successful Claim be?" beginning on page 27 of her Memorandum.[132] This section of the memorandum will briefly highlight Heather Ludwig's key points under each exception and will discuss additional arguments that the STL Prosecutor may make under each of the four exceptions to State official immunity.

1. Waiver of immunity in a State's own courts

The waiver of immunity in a State's own courts is not entirely applicable to the STL because the STL is not a Lebanese tribunal and officials from third States will not be tried under that State's jurisdiction.[133] Article 4 of the Tribunal's Statute explicitly separates the STL from Lebanese national courts, indicating that the two courts will have concurrent jurisdiction but that the STL will have primacy over the national courts of Lebanon. Lebanon has effectively waived

[131] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Judgment, 2002 I.C.J. ¶ 61 (Feb. 14) [reproduced in accompanying notebook at tab 9].

[132] Heather Ludwig, STL: WOULD AN ACCUSED OR WITNESS WHO IS A STATE OFFICIAL BE ABLE TO CLAIM IMMUNITY FROM PROSECUTION BEFORE THE STL? IF SO, WHAT TYPE OF IMMUNITY AND WHAT WOULD THE CONSEQUENCES OF SUCH A SUCCESSFUL CLAIM BE?, Case Western Reserve School of Law War Crimes Research Project (2009) [reproduced in accompanying notebook at tab 43].

[133] Melia Amal Bouhabib, *Power and Perception: The Special Tribunal for Lebanon,* 5 J. INT'L CRIM. JUST. 1061, 1062-1063 (2009) [reproduced in accompanying notebook at tab 44].

immunity because the STL's Rules of Procedure and Evidence require extensive cooperation from Lebanon and it's officials. As discussed above in Section III(B) the STL's relationship with Lebanon is governed by the *vertical* model requiring full compliance without undue delay with all the Tribunals requests and Article 4(1) granting the Tribunal primacy over the Lebanese Criminal Court. However, Lebanon's requirement to cooperate with the STL fits better under the forth exception to State official immunity, indicating that State officials have no immunity at international tribunals.

2. Waiver of immunity in foreign courts

The second possible waiver to State official immunity is the government's waiver of the official's immunity at foreign tribunals. The government may voluntarily consent to the foreign court's jurisdiction or may waive the immunity through a treaty or agreement. The waiver of immunity for treaty-based crimes is limited to the provisions of the treaty and does not provide universal jurisdiction for all crimes committed outside the prohibitions of the treaty.[134] The waiver will only be applicable if both States are a member to the treaty.

The House of Lords in the *Pinochet* case removed State official immunity from the former Head of State because Chile had ratified the Torture Convention of 1988 and consequently waived head of State immunity protections for the acts of torture.[135] *Pinochet* was decided after three decisions. At the Queen's Bench trial, the court determined that Pinochet was entitled to immunity even though the crimes were "crimes against humanity" because unlike Nuremberg and the ICTY, the current tribunal violates the principle that a State will not implead

[134] Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2140 (1999) [reproduced in accompanying notebook at Tab 45].

[135] Pinochet (No. 3) (1999) 2 WLR 827, 844B-848D [reproduced in accompanying notebook at Tab 46].

another State in relation to its sovereign acts, whereas the international tribunals were formed under an international agreement.[136] The court determined that "a former head of State is clearly entitled to immunity in relation to criminal acts performed in the course of exercising public functions."[137]

A 3/2 majority of the appeals court in the November 1998 determined that acts "condemned by international law" do not "amount to acts performed in the exercise of the [official] function of a Heads of State."[138] The Court held that not holding these officials accountable would be a travesty of international law and that State immunity only applied to acts which international law recognized as being among the functions of a head of State. The Lords disagreed between two extreme interpretations on the scope of head of State immunity for international crimes.[139] Lord Nicholls, Lord Steyn and Lord Hoffman ruled that official act did not include torture or hostage taking. Lord Slynn and Bringham disagreed. Lord Slynn first looked whether "the conduct was engaged under the colour of or in ostensible exercise of the Head of State's public authority." If it was, he determined "it must be treated as official conduct." Although Lord Slynn found no basis in international law requiring that immunity be denied, he recognized that an international convention that clearly establishes an international crime, gives universal jurisdiction, and declares that immunity cannot be pleaded would effectively strip immunity.[140]

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[136] Pinochet (No. 1) (1993) 38 ILM 68, 84 (Lord Bingham of Cornhill CJ).

[137] Pinochet (No. 3) (1999) 2 WLR 827, 844B-848D [reproduced in accompanying notebook at Tab 46].

[138] Pinochet, 2 W.L.R. 827 (1999).

[139] Andrew D. Mitchell, *Leave Your Hat On? Head of State Immunity and Pinochet*, 25 MONASH L. REV. 225, 230 (1999) [reproduced in accompanying notebook at Tab 21].

[140] Pinochet (No. 2) (1998) 4 All Er 896, 915c-e (Lord Slynn).

It was discovered that Lord Hoffman was the chairman and a director of Amnesty International Charity Limited, which has been given permission to take part in the earlier hearing before Lord Hoffman and four other Lords. The decision was not allowed to stand and there was a new Appeal. The final appeal for Pinochet determined his *ratione materiae* immunity did not protect him for the alleged acts of torture because (1) the Torture Convention provides worldwide universal jurisdiction; (2) it requires all States to ban and outlaw torture; (3) torture is a crime that must be committed "with the acquiescence of a public official" or a person acting in "an official capacity" therefore applying to heads of State; and (4) allowing *ratione materiae* immunity for torture would prevent all prosecution of the crime of torture.[141] The Lords determined he could only be extradited in respect to the torture charges relating to the period after 8 December, 1988, when the British government had ratified an international agreement making it an offense in the United Kingdom to commit torture abroad. Since Pinochet stepped down as president of Chile in 1990, he could only be charged for crimes between 1988 and 1990.

Heather Ludwig discusses on page 74 in her Memorandum to the Prosecutor of the STL that Syria's ratification of several UN anti-terrorism treaties are evidence of a waiver of State official immunities for the terrorist attacks through a treaty. Both Syria and Lebanon ratified the 1997 International Convention for the Suppression of Terrorist Bombings ("ICSTB"), which requires that all parties to the treaty criminalize certain types of conduct, surrender for prosecution, or extradite people apprehended in national boundaries that are suspected of the terrorist crimes, and assist in the investigation and trial of the crimes.[142] She notes that while

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[141] Andrew D. Mitchell, *Leave Your Hat On? Head of State Immunity and Pinochet*, 25 MONASH L. REV. 225, 247 (1999) (citing *Pinochet (No. 3)* (1999) 2WLR 827, 844B-848D (Lord Hope and Lord Browne-Wilkinson) [reproduced in accompanying notebook at Tab 21].

[142] UN General Assembly, U.N. Doc. A/52/653 *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, No. 37517, available at: http://www.unhcr.org/refworld/docid/3dda06ddc.html [accessed 15 November 2010] [reproduced in accompanying notebook at Tab 47].

Syria will argue that nothing in the treaty addresses the waiver of immunity, the argument would likely fail because the Torture Convention in Pinochet did not explicitly waive immunity claims either. She notes that the purpose of the ICSTB was to facilitate the prevention, investigation, and prosecution of terrorist attacks, explicitly providing a provision for extraditing individuals responsible for the offenses. While the ICSTB also contains a provision that would allow Syria to prosecute the terrorists before its own courts, Heather Ludwig argues that STL prosecutor still may be able to access Syrian State officials by arguing that the Syrian prosecutions would be inadequate.

3. A former head of State is not immune for acts committed before or after his period in office or for private acts committed while in office

Former State official's claims to immunity are susceptible to two exceptions to their immunity. After a State official leaves office, he or she may be tried for acts committed outside the scope of the official's State duties. Additionally, the former State official will not be afforded immunity for acts committed before or after the official's term in office. Heather Ludwig's memorandum to the STL Prosecutor discusses both immunities in detail starting on page 81.

4. Absence of State immunity at international courts and tribunals

The last exception to State official immunity occurs when an international court or tribunal prosecutes the accused. A detailed analysis of this argument is in Heather Ludwig's Memorandum to the STL Prosecutor on page 28 of her Memorandum. The Nuremberg Tribunal

first eliminated State official immunity stating, "crimes against international law are committed by men, and not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[143] The *Arrest Warrant* case upheld the notion that State officials have no immunity at international tribunals stating that "certain international criminal courts" may try State officials when those courts have jurisdiction.[144] The court did not define what "international criminal courts" were but clearly distinguished them from "foreign jurisdiction[s]" and courts of "one State."[145]

a. STL's International Character

Heather Ludwig's Memorandum to the STL Prosecutor goes further to identify three factors in determining whether the STL is considered an international criminal court analyzing 1) the authority vested to the court, 2) the characteristics of the court, and 3) the subject matter jurisdiction of the court.[146] She analyzes the level of authority vested to the STL by looking at the mode of establishment noting that the STL's formation under the UN's Chapter VII powers suggests it is primarily an international tribunal. However, her memorandum points out that the formation of a tribunal through a bilateral treaty affords the court no enforcement powers for orders or requests outside of Lebanon.[147] The STL's capabilities of enforcing orders will be

[143] International Military Tribunal (Nuremberg) Judgment and Sentences, 41 AM. J. INT'L L. 172, 221 (1946) [reproduced in accompanying notebook at Tab 51].

[144] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) Judgment, 2002 I.C.J. (Feb. 14) [reproduced in accompanying notebook at Tab 9].

[145] *Id.*

[146] Heather Ludwig, STL: WOULD AN ACCUSED OR WITNESS WHO IS A STATE OFFICIAL BE ABLE TO CLAIM IMMUNITY FROM PROSECUTION BEFORE THE STL? IF SO, WHAT TYPE OF IMMUNITY AND WHAT WOULD THE CONSEQUENCES OF SUCH A SUCCESSFUL CLAIM BE?, Case Western Reserve School of Law War Crimes Research Project (2009) [reproduced in accompanying notebook at tab 43].

[147] *Id.*

discussed in the Section V below analyzing a State's potential immunity from witness subpoena orders at International courts.

Heather Ludwig's memorandum continues to analyze the STL's history of establishment, the judicial composition, the location and Court Headquarters, and the subject matter of the STL to conclude that the STL is characteristically similar to international hybrid tribunals, but hedges her declaration that the Tribunal is international by noting that "terrorism is not a universally recognized "international" crime and has never been the sole subject matter jurisdiction basis of an international tribunal. Essentially, the question of the STL's international character will likely be determined based on it's subject matter jurisdiction because the authority vested in the court and the characteristics of the court are predominantly international.[148]

b. Terrorism as an international crime

The STL's subject matter jurisdiction is for the crime of terrorism and other crimes and offenses against life and personal integrity, illicit associations and failures to report crimes and offenses as defined only by the Lebanese Penal Code.[149] The STL's prosecution of crimes interpreted solely under "domestic" law may hinder the Tribunal's ability to circumvent State official immunity. Historically, no other international court or Tribunal has tried *only* domestic crimes, while the SCSL and ECCC have prosecuted domestic crimes. If the acts of terrorism being tried at the STL are considered international in nature, then the STL will likely be able to exercise jurisdiction over States and their officials.

Refer to Heather Ludwig's memorandum starting from page 57 where she discusses at length whether terrorism is an international crime. Her memorandum looks at the definitions of

[148] *Id.* and Section V of this memorandum.

[149] Nidal Nabil Jurdi, *The Subject Matter Jurisdiction of the Special Tribunal for Lebanon,* 5 J. INT'L CRIM. JUST. 1125, 1126 (2007) [reproduced in accompanying notebook at Tab 49].

the Lebanese Penal Code defining terrorism as those activities "intended to create a State of panic committed by using such means as explosives, inflammable materials, toxic or incendiary products, and infectious and microbial agents that cause public danger."[150] Her memorandum then discusses whether terrorism is an independent international crimes defined by treaty or customary international law. She goes through the 1926 International Congress of Penal Law's recommendation to internationally criminalize threats to world peace, the 1937 Conference for the Repression of Terrorism, the 1994 General Assembly Resolution on "Measures to Eliminate International Terrorism noting that several multi-lateral anti-terrorism conventions exist that focus on the domestic enforcement of terrorism through international cooperation.

1) UN Resolution 1373

The Security Council issued Resolution 1373 under it's Chapter VII powers enforcing that "every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts." The Resolution requires that all States "criminalize the funding of terrorist groups or acts,"[151] and "[e]nsure that any person who participates" in any aspect of terrorism "is brought to justice."[152] The Resolution requires that all States make terrorist acts "serious criminal offenses in domestic laws and regulations" thereby creating a widespread State practice of criminalizing terrorism. The 1373 Resolution's mandate in addition to the numerous bilateral and multilateral treaties already in existence suggests that the two

[150] Lebanese Penal Code, Articles 270, 271, 314, 335, 547, and 549 [reproduced in accompanying notebook at Tab 50].

[151] Threats to International Peace and Security Caused by Terrorist Acts, S.C. Res. 1373, Art. 1(b), U.N. Doc. S/RES/1373 (Sept. 28, 2001) [reproduced in accompanying notebook at Tab 51].

[152] *Id.* at Art. 1(e).

elements for customary international law are present 1) widespread State practice and 2) *opinio juris*.

The Prosecutor can argue that the STL does prosecute an international crime because the 1373 Resolution suggests that terrorism is an internationally accepted crime. Further, the prosecutor will argue that Resolution 1373 mandates that States provide "assistance in connection with criminal investigations or criminal proceedings" relating to the prosecution of terrorist acts, including "assistance in obtaining evidence in their possession necessary for the proceedings." If Resolution 1373 is indeed binding on all Member States, then Syria must comply by providing all the suspects and necessary witnesses to the STL for proper prosecution of terrorism. There is, however, some controversy as to whether Resolution 1373 is indeed binding on Member Parties. Keith White's memorandum to the STL Prosecutor, issue 12, discusses whether Resolution 1373 is binding at length and has been submitted to the STL for review this November 2010.[153]

2) Terrorism as a Crime Against Humanity

Refer to Heather Ludwig's memorandum on page 66 where she discusses whether terrorism is a crime against humanity. Crimes against humanity are criminal acts that equate to "a widespread or systematic attack directed against a civilian population."[154] The Security

[153] Issue prompt 12: How does the STL's creation, pursuant to Chapter VII powers of the UN SC, affect (a) the obligations, respectively, of Lebanon and third states vis-à-vis the STL; and (b) the powers of the STL vis-à-vis Lebanon and third states? With regard to Lebanon, does the Chapter VII nature of UN SC resolution 1757 "attach" only to the text of the resolution itself or also to some or all of the language of the annexed documents (Agreement between the United Nations and Lebanon and Statute of the Tribunal)? For example, what is the impact of UN SC 1757 on Article 15 of the Agreement, and/or other key provisions of the Agreement and Statute?

[154] Ludwig, *supra* note 131, at 66 citing Michael P. Scharf and Michael A. Newton, "Terrorism and Crimes Against Humanity" in Leila Sadat, CRIMES AGAINST HUMANITY [reproduced in accompanying notebook at Tab 43].

Council specifically agreed to remove crimes against humanity from the STL's Statute[155] although the Secretary General suggested that the attacks could be considered crimes against humanity.[156] Yet, considering the relatively small number of deaths (22) and injuries (about 500), and that the supposed intentions behind the attacks were "political destabilization" of the State and not widespread attacks against the civilian population, it will be a tougher burden to prove that the crimes are crimes against humanity.[157] Terrorism as it occurred in Lebanon may be a crime against humanity if the Prosecution can prove that the bombing was "expressly intended to provoke terror in the civilian population or political structure of [the] nation."[158]

V. Immunity from Witness Subpoenas at International Tribunals

This Section will analyze the current law on whether international tribunals and courts have the authority to subpoena heads of State or other State officials claiming immunity. The section will review decisions from international and hybrid tribunals in making a comparative analysis to the Special Tribunal for Lebanon. This section relies on the preceding section analyzing State official immunity and determines whether State officials who have immunity as determined above may avoid witness subpoenas at international tribunals.

Generally, international tribunals do have the authority to subpoena witness testimony from State officials claiming immunity. As discussed in section III(B) above, international

[155] Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon to the Security Council of U.N. Doc. S/2006-893 (Nov. 15 2006) ¶ 23-25 [reproduced in accompanying notebook at Tab 52].

[156] *Id.* at ¶ 24.

[157] Jan Erik Wetzle and Yvonne Mirti, *The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country*, 7 The Law and Practice of International Courts and Tribunals, 81, 103 (2008) [reproduced in accompanying notebook at Tab 53].

[158] Prosecutor v. Stanislav Galic, Case No. IT-98-29-T, Decision on Rebuttal Evidence, Trial Chamber, (Int'l Crim. Trib. For the Former Yugoslavia Dec. 5, 2003 [reproduced in accompanying notebook at Tab 54].

tribunals and courts have the power to bind States and their officials to comply with orders without a specific agreement or the State's voluntary compliance under the *vertical* model of State cooperation with courts.[159] States may not refuse to comply with any of the tribunal's or court's requests on the grounds that are usually applicable in inter-State legal disputes. Therefore, a properly set up international tribunal with the consent of relevant States requires no further consent to create jurisdiction over States and their nationals.

In the recent *Djibouti v. France* decision, the ICJ determined that national courts may not issue witness subpoenas to those State officials who have immunity under customary international law presumably because of the *horizontal* relationship national jurisdiction have with other States.[160] As this section will show, international tribunals and courts have granted their respective courts jurisdiction to issue witness subpoenas to State officials who would normally enjoy State immunity protection based on the *vertical* relationship the courts have with other States. The relevant factors for determining whether the tribunal or court is able to issue subpoenas are:

1. Whether the tribunal or court is primarily an international court;
2. Whether the tribunal or court's statute strips State official immunity for prosecuting crimes under its jurisdiction; and
3. Whether the tribunal has the authority to issue witness subpoenas.

A. Nuremberg Trials

1. Was Nuremberg an International or National Tribunal?

[159] *Id.*

[160] Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) Judgment, 2008 I.C.J. ¶ 194 (June 4) [reproduced in accompanying notebook at Tab 23].

The Nuremberg Trial was the first time an international tribunal prosecuted heads of State and other State officials for international crimes. At the end of World War II, the victorious Allies formed the International Military Tribunal to try Nazi German leaders on war crimes charges. It is arguably the precedent for "the collective delegation through a treaty mix of territorial and universal jurisdiction to an international criminal court."[161] The international community outraged at the atrocities committed by the Nazi regime, held the Nuremberg Trials and prosecuted leaders who were responsible for egregious violations. Nuremberg established a basic framework and precedent for the prosecution of war crimes and crimes against humanity and was the basis of the formation of the subsequent international tribunals and courts. The International Military Tribunals "were made up of rules of procedure tailored to that tribunal, and differed markedly from most National procedural systems, probably being a composite of several systems."[162] Nuremberg therefore was an international tribunal based on its formation under the consent of the Allied nations, which later formed the United Nations, and its prosecution of war crimes and crimes against humanity.

Professor Michael Scharf describes Nuremberg's international character listing a number of factors including it's name (The International Military Tribunal), the Preamble's reference that the four Signatories are "acting in the interests of all the United Nations"; Article 5 of the Agreement giving any government of the United Nations the right to adhere to the Agreement, Article 6 of the Charter not limited the prosecution to German war criminals, Article 10 of the Charter binding Tribunals decisions to Signatory countries, and noting that the Tribunal punished

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[161] Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 Law & Contemp. Probs. 67, 103 (2001) [reproduced in accompanying notebook at Tab 55].
[162] *See* Howard S. Levie, *Prosecuting War Crimes Before an International Tribunal*, 28 AKRON L. REV. n.429 (1995) [reproduced in accompanying notebook at Tab 56].

individuals for violations of international law[163].

2. Does Nuremberg's statute eliminate State official immunity for prosecution?

The Tribunal's Charter specifically condoned the prosecution of war criminals stating:

> The official position of defendants whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.[164]

The ICTY, ICTR, ICC, SCSL and ECCC later used a version of this provision in their own Statutes. The Nuremberg judgment explained the basis for stripping State immunity:

> It was submitted that international law is concerned with the action of sovereign States, and provides no punishment for individuals; and further, where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. . . .The principle of international law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. . . *On the other hand, the very essence of the Charter is that individuals have international duties, which transcend the national obligations of obedience imposed by the individual State.* He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.[165]

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[163] Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 103-104 (2001) (citing Egon Schwelb *Crimes Against Humanity*, 23 BRITISH Y.B. INT'L L. 178, 208 (1946) [reproduced in accompanying notebook at Tab 55].

[164] Nuremberg Charter, Art. 7. See also Article II of Control Council Law No. 10 [reproduced in accompanying notebook at Tab 15].

[165] Prosecutor v. Blaskic, Case No. IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, ¶ 47 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 29 1997) citing Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945- 1 October 1946 (1947), pp 222-223 [reproduced in accompanying notebook at Tab 13].

The quotation points out that Nuremberg indeed was a tribunal of international character, suggesting that the *vertical* model prevailed and "transcended the national obligations…imposed by the individual State." Therefore, the Tribunal claimed superiority over a State's immunity claims.

3. Did Nuremberg have the authority to subpoena witnesses?

Nuremberg's Charter expressly granted the Tribunal the authority to subpoena witnesses. Article 17 of the charter provides that the "Tribunal shall have the power…(a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them." Nuremberg had the authority to subpoena witnesses regardless of their official status because the tribunal had a *vertical* relationship with States, the tribunal had the authority to prosecute State officials and it had the express authority to summon and interrogate witnesses.

B. International Criminal Tribunal for the former Yugoslavia

The ICTY determined in the *Krstic* case that it had the authority to issue witness subpoenas to State officials based on the above three factors: the Tribunals international character, its ability to prosecute State officials, and its ability to subpoena witnesses.[166] The Tribunal interpreted customary international law to allow subpoenas for State officials witness testimony because

1) the State official immunity does not apply to international criminal tribunals;
2) the ICTY statute expressly strips State officials from immunity from prosecution; and
3) the requirement to send subpoenas to the State and not the individual State official only applies to document production.

[166] Prosecutor v. Krstic, Case no. IT-98-33-A, Decision on Application for Subpoenas, Appeals Chamber, ¶ 1 (Int'l Crim. Trib. For the former Yugoslavia July 1, 2003) [reproduced in accompanying notebook at Tab 57].

1. Is the ICTY a national or international tribunal?

The ICTY is an international ad hoc tribunal and does not have any national tribunal characteristics. It is an international tribunal based on it's a) creation, b) judicial composition, c) funding, d) location, and e) its subject matter jurisdiction.

a. ICTY's Creation

The Security Council under their Chapter VII Powers in Resolution 827 created the ICTY by a unanimous vote.[167] This is a valid method of establishment for an international tribunal because States may choose to prosecute suspected perpetrators of international crimes under international criminal law before an international tribunal rather than an international court.[168] The option to prosecute international crimes in such a manner is recognized in Article VI of the Genocide Convention, the commentary to the 1949 Geneva Conventions, and through the Nuremberg Judgment.[169]

b. ICTY's Judicial Composition

All of the Judges at the ICTY ad hoc tribunal are international with no national judges serving in Chambers.

c. ICTY's funding

[167] Statute of the International Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25 1993) [reproduced in accompanying notebook at Tab 16].

[168] Ludwig, *supra* note 131, at 34 citing Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* Vol. 1, Transnational Publishers Inc., New York, NY 37 (1995) [reproduced in accompanying notebook at Tab 43].

[169] *Id.*

The ICTY receives funding in the same manner as other UN established program activities because the ad hoc tribunal is a subsidiary body of the Security Council and reports directly to it.[170] The Member States of the UN fund the Tribunal and review its expenses. The General Assembly budgetary body determines each Member State's contribution.[171]

d. ICTY's location and headquarters

The ICTY is located among the principle judicial organs of the UN including the International Court of Justice and the International Criminal Court in The Hague, Netherlands.[172] The ICTY may have been placed there because the UN determined that the former Yugoslavia was too war torn to be able to successfully hold an international tribunal.

e. ICTY's Subject matter jurisdiction

The ICTY has the subject matter jurisdiction to prosecute "persons responsible for serious violations of *international* humanitarian law" pursuant to Article 1 of its Statute.[173] Furthermore, the ICTY has the jurisdiction to prosecute grave breaches of the Geneva Conventions of 12 August 1949,[174] violations of the laws and customs of war,[175] genocide,[176] and

[170] Larry D. Johnson, *Myers S. McDougal Lecture: UN-based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L.& POL'Y 275, 279 (2008) [reproduced in accompanying notebook at Tab 58].

[171] *Id.*

[172] *Id.*

[173] International Criminal Tribunal for the Former Yugoslavia, Art. 1 ICTY Statute [reproduced in accompanying notebook, tab 16].

[174] *Id.* at Art. 2.

[175] *Id.* at Art. 3.

[176] *Id.* at Art. 4.

crimes against humanity.[177] All the crimes the Tribunal prosecutes are international crimes and they are expressly interpreted by international law standards.

2. Does the ICTY's Statute expressly eliminate State official immunity for prosecution?

The ICTY Statute expressly strips State official immunity for the prosecution of criminals under its jurisdiction. Article 7(2) of the Statute provides that "the official position of any accused persons, whether as head of State or government or as responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[178] The ICTY decisions declare that the ICTY has such authority because it enjoys the *vertical* model of interstate relations, as do all international tribunals.[179]

3. Does the ICTY have the authority to issue witness subpoenas?

The ICTY has the express authority to issue subpoenas to witnesses in its RPE. Rule 54 of the RPE provides:

> At the request of either party of proprio motu, a Judge or 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.[180]

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[177] *Id.* at Art. 5.

[178] *Id.* at Art. 7(2).

[179] Prosecutor v. Blaskic, Case No. IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, ¶ 47 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 29 1997)[reproduced in accompanying notebook, tab 13].

[180] Rules of Procedures and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia, 14 March 1994, Rule 54 [reproduced in accompanying notebook at Tab 60].

4. The ICTY case law supports the conclusion that the ICTY may issue witness subpoenas to State officials

The ICTY Appeals Chamber held that it is capable of issuing subpoenas to witnesses who are heads of State or State officials in *Prosecutor v. Krstic.*[181] This opinion overruled the *Prosecutor v. Blaskic*[182] opinion, which determined that the ICTY did not have the authority to subpoena a State official for testimony regarding information gathered through his or her official capacity. Each case will be discussed in turn.

a. *Prosecutor v. Blaskic*

The Appeals Chamber[183] in *Blaskic* determined (1) whether the ICTY could issue a subpoena for official State documents to a State, (2) whether the Tribunal could issue a subpoena to a high government official of the State, (3) whether claims of national security privilege must be accepted, and (4) the appropriate remedies in the event of non-compliance. The Trial Chamber issued subpoenas to the government of Croatia, Croatian Defense Minister Gojko Susak, the Government of Bosnia and Herzegovina and the custodian of records of the former Defense Ministry of Herceg-Bosna. Croatia disputed the International Tribunal's authority to issue the subpoena. At the trial level, the court determined that the Tribunal has the power to issue binding orders both to States and private individuals.[184] The Appeals Chambers disagreed.

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[181] Prosecutor v. Krstic, Case no. IT-98-33-A, Decision on Application for Subpoenas, Appeals Chamber, (Int'l Crim. Trib. For the former Yugoslavia July 1, 2003) [reproduced in accompanying notebook at Tab 57].

[182] Prosecutor v. Blaskic, Case No. IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, (Int'l Crim. Trib. For the Former Yugoslavia Oct. 29 1997) [reproduced in accompanying notebook, tab 13].

[183] The Appeals Chamber for the Blaskic decision consisted of Presiding Judge Antonio Cassese, Judge Adolphus Karibi-Whyte, Judge Haopei Li, Judge Sir Ninian Stephen and Judge Lal Chand Vohrah. Presiding Judge Cassese wrote the Blaskic opinion ,which decided that subpoenas could not be issued to State officials except under the circumstances discussed above in this memorandum.

[184] Prosecutor v. Blaskic, Case No. IT-95-14-PT, Tr. Ch. II, Decision on the Objections of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, 18 July 1997, *reversed in part, affirmed in part* in judgment on the Request

It outlined the following specific situations when the tribunal has the authority to issue subpoenas to heads of State:

1) The tribunal may not issue binding orders (subpoenas) to current State officials or State officials who at the relevant time of the subpoena were acting in their official capacities.

2) The tribunal may issue binding orders (subpoenas) to State officials who at the relevant time at issue in the subpoena were acting in a private capacity.

3) The Tribunal may issue binding orders (subpoenas) to individuals acting in their private capacity.

The court based its decision on two determinations (1) its analysis of customary international law in contrast with the rules of procedure in common law States and, (2) the lack of any provision in the Statute of the Tribunal allowing subpoenas to State officials.[185]

First, the court contrasted nations where State organs, "including State officials, and the Prime Minister or the Head of State…can be summoned to give evidence, can be compelled to produce documents, can be requested to appear in court" based on the notion that "nobody, not even the Head of State, is above the law."[186] The international community on the other hand does not "possess the same powers which accrue to national courts" and therefore must use customary international law in order to avoid applying a single nations principles in an international tribunal. The Court determined that "[e]ach sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the

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of the Republic of Croatia for Review of the Decision of the Trial Chamber II, of July 1997, Case No. IT-95-14-AR108 *bis*, A. Ch. 2 October 1997 ("the International Tribunal must have powers that are both practical and effective and, as a criminal institution, this dictates that it seek the most direct route to any evidence which may have a bearing on the finding of guilt or innocence of the accused.") [reproduced in accompanying notebook at Tab 59].

[185] *Id.* at ¶ 40.

[186] *Id.*

field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions."[187]

Second, the Appeals Chambers found no provision in the ICTY statute granting the tribunal authority to issuing subpoenas to State officials. The court first looked at Article 7(2), which States "the official position of any accused persons, whether as head of State or government or as responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[188] The court found that this provision was irrelevant because it specifically addresses *criminal responsibility* rather than evidence gathering procedures.[189] Next, the court dismissed Article 18(2) stating "[t]he Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations…[i]n carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned."[190] The Court determined that it would be "fallacious to infer form a provision which simply lays down the power to seek assistance from a State official, the existence of an obligation for such State official to cooperate."[191]

Based on the above analysis, the court determined that "both under international law and the Statute itself, Judges or Trial Chambers cannot address binding orders to State officials."[192]

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[187] *Id.* at ¶ 41.

[188] International Criminal Tribunal for the former Yugoslavia, Art. 7(2) ICTY Statute [reproduced in accompanying notebook, tab 16].

[189] Prosecutor v. Blaskic, Case No. IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, (Int'l Crim. Trib. For the Former Yugoslavia Oct. 29 1997) [reproduced in accompanying notebook at Tab 13].

[190] International Criminal Tribunal for the former Yugoslavia, Art. 18(2) ICTY Statute [reproduced in accompanying notebook at Tab 16].

[191] *Id.*

[192] Prosecutor v. Blaskic, Case No. IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, ¶ 43 (Int'l Crim. Trib. For the Former Yugoslavia

Rather, the tribunal must request the documents or individual testimony directly from the State.[193]

The Appeals Chamber next determined that the tribunal does not have the authority to impose sanctions on States for non-compliance. The legal remedies for non-compliance are (1) appealing to the State itself for enforcement by issuing a binding order pursuant to Article 29 of the Statute to produce to information required (leaving it to the State to identify the person responsible for providing the State's compliance with that order)[194] or (2) report the matter to the Security Council.[195] The Appeals Chamber explains the limitation in enforcement power by stating "the International Tribunal does not possess any power to take enforcement measures against States. Had the drafters of the Statute intended to vest the International Tribunal with such a power, they would have expressly provided for it."[196]

b. *Prosecutor v. Krstic*

Six years later, the Appeals Chambers in *Krstic* directly disagreed with the *Blaskic* decision on whether the Tribunal may subpoena witnesses. Radislav Krstic applied for subpoenas to be issued to two prospective witnesses, requiring each of them to attend a location in Bosnia and Herzegovina in order to give Krstic's counsel the opportunity to interview them in

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Oct. 29 1997) (determining that in order to obtain "the production of documents, the seizure or evidence, the arrest of suspects, etc., being acts involving action by a State, its organs or officials, they must turn to the relevant State.") [reproduced in accompanying notebook at Tab 13].

[193] *Id.*

[194] *Id.* at ¶ 43 and 58.

[195] *Id.* at ¶ 33 ("[i]t is primarily for its parent body, the Security Council, to impose sanctions, if any, against a recalcitrant State, under the conditions provided for in Chapter VII of the United Nations Charter.).

[196] *Id.* at ¶ 25.

order to add evidence in support of his appeal against conviction.[197] The issue of subpoenas would be made under the Tribunal's Rules of Evidence and Procedure, which provides:

> At the request of either party or *proprio motu*, a Judge or 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.[198]

The Court determined that subpoenas may be issued to prospective witnesses to be interviewed in anticipation of tendering that evidence on appeal if the appellant establishes there is (1) a reasonable basis for his belief that there is a good change that the prospective witness give information that (2) will materially assist in the appellant, and (3) that it is at least reasonably likely that an order would produce the degree of cooperation needed for the defense to interview the witness.[199]

Krstic disregarded much of the *Blaskic* decision's analysis regarding witness testimony because the *Blaskic* decision was "concerned with the production of documents" and not witness testimony.[200] The Appeals Chamber determined that "it is common place in law that, where the documents to be produced are the documents of either a State or a corporation, only the State or the corporation can be required to produce them, and that it is for the State or the corporation to do so through its proper officer."[201] However, such analysis is different for witness testimony.

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[197] Prosecutor v. Krstic, Case no. IT-98-33-A, Decision on Application for Subpoenas, Appeals Chamber, ¶ 1 (Int'l Crim. Trib. For the former Yugoslavia July 1, 2003) [reproduced in accompanying notebook at Tab 57].

[198] Rules of Procedures and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia, 14 March 1994, Rule 54 [reproduced in accompanying notebook at Tab 60].

[199] Prosecutor v. Krstic, Case no. IT-98-33-A, Decision on Application for Subpoenas, Appeals Chamber, ¶ 17 (Int'l Crim. Trib. For the former Yugoslavia July 1, 2003) [reproduced in accompanying notebook at Tab 57].

[200] *Id.* at ¶ 23.

[201] *Id.* at ¶ 23.

The court examined *Blaskic's* reasoning, looking at the customary international law of State official immunity, in particular the *Blaskic* determination that a "State official has acted on behalf of the State" and "only the State can be responsible for the acts of that official" and determined instead that State official immunity was inapplicable at International Tribunals.[202] The *Krstic* Appeals Chamber found that all of the authorities the *Blaskic* case relied on related to immunity against prosecution and not against witness testimony.[203] *Krstic* then notes that the customary international law *Blaskic* cites is incorrect because State officials do not have immunity in international criminal courts, citing to the Nuremberg statute and to the Nuremberg Judgment. Instead, the Appeals Chamber found "no authority" "giving such an immunity to officials of the nature whose testimony is sought."[204] The court, however, upholds the *Blaskic* exceptions to witness testimony where the information is privileged[205] and where the witness may be asked questions raising national security issues.[206]

The ICTY therefore interprets customary international law to allow subpoenas for State officials witness testimony because

1) the State official immunity does not apply to international criminal tribunals;
2) the ICTY statute expressly strips State officials from immunity from prosecution; and
3) the requirement to send subpoenas to the State and not the individual State official only applies to document production.

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[202] *Id.* at ¶ 26.

[203] *Id.*

[204] *Id.* at ¶ 28.

[205] *Id.* (citing Rules of Procedure and Evidence, Rule 70 "notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.")

[206] *Id.* (providing under the national security circumstances that a version of Rule 54 where the "Judge or Trial Chamber may issue orders, summonses and warrants as may be necessary for the purpose of an investigation or for the preparation or conduct of the trial").

C. International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda closely follows the ICTY *Krstic* precedent granting the Tribunal the authority to subpoena witnesses who are State officials. The ICTR has the authority to subpoena witnesses because

1) the State official immunity does not apply to international criminal tribunals;

2) the ICTR statute expressly strips State officials from immunity from prosecution; and

3) the ICTR has the authority to subpoena witnesses.

1. Is the ICTR a national or international tribunal?

The ICTR, an international ad hoc tribunal, was formed in the same fashion as the ICTY and does not have any national tribunal characteristics. It is an international tribunal based on it's a) creation, b) judicial composition, c) funding, d) location, and e) its subject matter jurisdiction.

a. ICTR's Creation

The Security Council under their Chapter VII Powers in Resolution 955 created the ICTR by a unanimous vote.[207] As Stated in the ICTY analysis above, this is a valid method of forming the international ad hoc tribunal.

b. ICTR's Judicial Composition

All of the Judges at the ICTR ad hoc tribunal are international with no national judges serving in Chambers.

c. ICTR's funding

[207] Statute for the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/995 (Nov. 8, 1994) [reproduced in accompanying notebook, tab 17].

The ICTR receives funding in the same manner as other UN established program activities because the ad hoc tribunal is a subsidiary body of the Security Council and reports directly it.[208]

d. ICTR's location and headquarters

The ICTR is located among the principle judicial organs of the UN including the International Court of Justice and the International Criminal Court in The Hague, Netherlands.[209]

e. ICTR's Subject matter jurisdiction

The ICTR has the subject matter jurisdiction to prosecute "persons responsible for serious violations of *international* humanitarian law" pursuant to Article 1 of its Statute.[210] Furthermore, the ICTY has the jurisdiction to prosecute grave breaches of the Geneva Conventions of 12 August 1949,[211] genocide,[212] and crimes against humanity.[213] All the crimes are international crimes and they are expressly interpreted by international law standards.

2. Does the ICTR's Statute expressly eliminate State official immunity for prosecution?

The ICTR Statute expressly strips State official immunity for the prosecution of criminals under its jurisdiction. Article 7(2) of the Statute provides that "the official position of any

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[208] Larry D. Johnson, *Myers S. McDougal Lecture: UN-based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L.& POL'Y 275, 279 (2008) [reproduced in accompanying notebook at tab 58].

[209] *Id.*

[210] International Criminal Tribunal for Rwanda, Art. 1 ICTR Statute [reproduced in accompanying notebook, tab 17].

[211] *Id.* at Art. 4.

[212] *Id.* at Art. 2.

[213] *Id.* at Art. 3.

accused persons, whether as head of State or government or as responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[214]

3. Does the ICTR have the authority to issue witness subpoenas?

The ICTR has the express authority to issue subpoenas to witnesses in Article 28 of its Statute and Rule 54 of its RPE.

Article 28 States:

> 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.[215]

Rule 54 States:

> 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 purpose of an investigation or for the preparation or conduct of the trial.[216]

[214] *Id.* at Art. 7(2).

[215] *Id.* at Art. 28.

[216] Rules of Procedure and Evidence, International Tribunal for Rwanda, 29 June 1995, Rule 54; Note that the rule is identical to Rule 54 from the ICTY RPE, which the *Krstic* case cites. [reproduced in accompanying notebook at Tab 61].

The provisions indicate that the Trial Chamber has the authority to issue subpoenas and that States must comply with the Tribunal's requests.

4. The ICTR case law supports the conclusion that the ICTY may issue witness subpoenas to State officials

This section of the memorandum will discuss two pertinent decisions that determined the ICTR's authority on this matter: *the Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiymva,*[217] and *Prosecutor v. Laurent Semanza.*[218] The Trial Chamber in both decisions determined that the Tribunal has full authority to issue subpoenas to witnesses.

1. *Prosecutor v. Bagosora, et al* (particularly, Nsengiyamva)

Nsengiyumva's Defense counsel requested that a subpoena be issued to compel Major Jaques Biot's testimony. Three months before this decision (on April 21 2006), the Chamber granted the Defense Article 28 request for assistance from the Kingdom of Belgium to order an interview with Major Biot. The Defense was unsatisfied with this meeting because Major Biot refused to testify and asked to Trial Chamber to issue a subpoena to Major Biot. The Court first determined the proper circumstances in which it would issue a subpoena for witness testimony. The court then analyzed its ability to issue such subpoenas to State officials.

First, the Trial Chambers found that in order to successfully request that the court issue a

[217] Case No. ICTR-98-41-T, Decision on Request for a Subpoena for Major Jaques Biot, Judgment (July 14, 2006) [reproduced in accompanying notebook at Tab 62].

[218] Case No. ICTR-97-20-1, Decision on Semenza's Motion for Subpoenas, Depositions, and Disclosure, Judgment (Oct. 20, 2000) [reproduced in accompanying notebook at Tab 63].

subpoena, the prosecutor or defense must show must demonstrate a reasonable basis for the belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial.[219]

Second, the Trial Chamber found that "government officials enjoy no immunity from subpoena, when the subject matter of their testimony was obtained in the course of government service."[220] The court found that the unsuccessful reasonable efforts at securing the witness' voluntary appearance necessitated a subpoena for "the fair conduct of trial."[221] The Trial Chamber quoted *Krstic*, stating that addressing subpoenas to the State is only justified for document production and not for witness testimony. Further, the court cited *Milosevic* stating, "a subpoena is the correct procedural mechanism for seeking to compel a State official to testify."[222]

2. *Prosecutor v. Laurent Semanza*

Laurent Semanza did not directly determine the issue of whether the Trial Chamber can issue subpoenas State officials but implied such a determination. It determined whether the Chamber should issue subpoenas to witnesses generally.[223] The court found that it could, based on ICTR RPE 54. It also found support in Rule 17 of the United States Federal Rules of Criminal Procedure which reads in part that a "subpoena shall be issued by the clerk under the

[219] *Id.* at ¶. 2 (using rule 54 as a basis and citing Halilovic, Decision on the Issuance of Subpoenas (AC), 21 June 2004, ¶ 6; 9rdanin and Talk, Decision on Interlocutory Appeal (TC), 11 December 2002, ¶ 3 1; Milosevic, Decision or Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Shrider (TC), December 2005 ("Milosevic Decision"), ¶ 35.).

[220] *Id.* at ¶ 4.

[221] *Id.*

[222] *Id.* citing Milosevic, ¶ 16.

[223] Case No. ICTR-97-20-1, Decision on Semenza's Motion for Subpoenas, Depositions, and Disclosure, Judgment ¶ 16 (Oct. 20, 2000) [reproduced in accompanying notebook at Tab 63].

seal of the court…and shall command each person to which it is directed to attend and give testimony at the time and place specified therein." The court also found support in the ICTY's issuance of numerous subpoenas for decisions *Prosecutor v. Delalic and others, Prosecutor v. Blaskic,* and *Prosecutor v. Kuperskic and others* all of the cases relying on an identical rule 54 and Article 29, which is identical to the ICTR Article 28.

The Trial chamber concluded that under Article 28 and Rule 54, the Trial Chamber has the authority to issue subpoenas to witnesses, "but must primarily rely on State cooperation and State judicial mechanisms to execute and enforce subpoenas, short of referring the matter to the Security Council under rule 7*bis*(A)."[224]

The Tribunal therefore has the authority to issue subpoenas to witnesses in both their private and public capacities.

D. Special Court for Sierra Leone

Although a hybrid court, the Special Court for Sierra Leone has the full capacity to issue witness subpoenas to State officials. Based on its international character, its Statute, RPE, and case law, the SCSL has the authority to issue witness subpoenas because

1. the State official immunity does not apply to international criminal tribunals;
2. the SCSL statute expressly strips State officials from immunity from prosecution; and
3. the SCSL has the authority to subpoena witnesses.

1. Is the SCSL a national or international tribunal?

[224] *Id.*

The SCSL is a hybrid tribunal that was formed in a different manner than the ICTY and ICTR. It is an international tribunal based on it's a) creation, b) judicial composition, c) funding, d) location, and e) its subject matter jurisdiction.

a. SCSL's Creation

The SCSL was created through a bilateral treaty between the UN and the respective countries. The SCSL signed a treaty with the Security Council forming the tribunal. Therefore, unlike the ICTY and ICTR, the SCSL was not imposed on the countries concerned, but was rather created with the consent of each nation.[225] The Trial Chamber defended the SCSL's international character stating that the agreement to create the tribunal between Sierra Leone and the UN was representative of an agreement between Sierra Leone and all members of the UN.[226] The Trial Chamber also concluded that the agreement was a representation of the overall will of the international community (including Sierra Leone) to try the crimes committed in Sierra Leone at an international level.[227] The Trial Chamber concluded that the SCSL was therefore "a truly international court."[228]

b. SCSL's Judicial Composition

[225] Larry D. Johnson, *Myers S. McDougal Lecture: UN-based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L.& POL'Y 275, 276 (2008) [reproduced in accompanying notebook at Tab 58].

[226] Prosecutor v. Charles Taylor, SCSL-2003-01-I, Decision on the Immunity from Jurisdiction, Judgment (May 31, 2004) [reproduced in accompanying notebook at Tab 64].

[227] *Id.*

[228] *Id.*

The SCSL does not have an entirely international judicial staff and was still considered characteristically international. Rather, a majority of the Judges are international in each of the Chambers, while a minority of the Judges are from Sierra Leone.[229]

c. SCSL's funding

The SCSL receives funding in from voluntary contributions of UN Member States and does not receive contributions from the general UN budget.[230]

d. SCSL's location and headquarters

The SCSL is located in Sierra Leone.[231] The need to hold Charles Taylor's Trial outside of Sierra Leone was at issue at the *Taylor* trial.[232] The Court relocated Taylor's Trial from Sierra Leone to The Hague to ensure that Taylor's supporters would not use violent measures to disrupt or delay the trial.[233]

e. SCSL's Subject matter jurisdiction

The SCSL has jurisdiction over both international and domestic crimes. It has the subject matter jurisdiction to prosecute "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[234] The SCSL has the jurisdiction to prosecute breaches

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[229] Statute for the Special Court for Sierra Leone, S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 1994) [reproduced in accompanying notebook at Tab 18].

[230] Larry D. Johnson, *Myers S. McDougal Lecture: UN-based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L.& POL'Y 275, 279 (2008) [reproduced in accompanying notebook at Tab 58].

[231] *Id.*

[232] Katy Glassborow, *"Turf War" Over Charles Taylor Case*, Institute for War and Peace Reporting, Mar. 23, 2007, at 1, *available at* http://www.iwpr.net/?p=acr&s=f&o=334328&apc_state=henpacr [reproduced in accompanying notebook at tab 65].

[233] *Id.*

[234] Special Court for Sierra Leone, Art.1(1) SCSL Statute [reproduced in accompanying notebook at tab 18].

of the Geneva Conventions of 12 August 1949 and the Additional Protocol II,[235] crimes against humanity,[236] other serious violations of international humanitarian law[237] and domestic crimes under Sierra Leone criminal law including child abuse and destructions of homes and property.[238]

2. Does the SCSL's Statute expressly eliminate State official immunity for prosecution?

The SCSL contains a similar clause to the ICTY and ICTR stripping State officials from immunity in Article 6(2):

> The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.[239]

3. Does the SCSL have the authority to issue witness subpoenas?

The SCSL has the express authority to issue subpoenas to witnesses in RPE 54. It provides:

> At the request of either party or on 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 purpose of an investigation or for the preparation or conduct of the trial.[240]

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[235] *Id.* at Art. 3.

[236] *Id.* at Art. 2.

[237] *Id.* at Art. 4.

[238] *Id.* at Art. 5.

[239] *Id.* at Art. 6(2).

[240] Rules of Procedure and Evidence, Special Court for Sierra Leone, Amended 7 March 2003, Rule 54; Note that the rule is identical to Rule 54 from the ICTY and ICTR, which the *Krstic* and *Bagasora* cases cite [reproduced in accompanying notebook at tab 66].

4. The SCSL case law supports the conclusion that the SCSL may issue witness subpoenas to State officials

Two relevant cases from the SCSL discuss the Special Court's authority to subpoena witnesses who are former Presidents acting in their official capacities but do not mention the question of State immunity: *Prosecutor v. Sesay, Kalla, and Gbao*[241] and *Prosecutor v. Norman, Fofana, and Kondewa.*[242] The Special Court cites the *Krstic* and *Bagasora* decisions in both cases , but does not analyze their holdings on State official immunity. Seemingly, the Special Court takes for granted its authority to subpoena witnesses regardless of their official status. While the court never explicitly mentions that the official Status is not relevant, it could imply such a conclusion by never addressing the issue at all. Instead, the Special Court focuses on the appropriate standard for requesting a subpoena in general.

1. *Prosecutor v. Sesay, Kalla, and Gbao*

In *Sesay,* Sesay's Defense counsel requested the Trial Chamber to issue a subpoena to H.E. Dr. Ahmad Tejan Kabbah, the Former President of the Republic of Sierra Leone compelling him to attend a pre-testimony interview and to appear as a witness at trial.[243] The former president had "actively avoided attempts to obtain his cooperation to become a witness."[244] The Trial Chamber used its Rule 54, allowing the Judge or Trial Chamber to issue "orders, summonses, subpoenas. . ." and precedent from the ICTY's *Krstic* and the ICTR *Bagasora*

[241] Case No. SCSL 04-15-T, Written Recorded Decision on Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, Judgment (June 30, 2008) [reproduced in accompanying notebook at tab 67].

[242] Case No. 2004-14-T, Decision on Interlocutory Appeal Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, Judgment (Sept. 11, 2006) [reproduced in accompanying notebook at tab 71].

[243] Case No. SCSL 04-15-T, Written Recorded Decision on Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, Judgment, page 1 (June 30, 2008) [reproduced in accompanying notebook at tab 67].

[244] *Id.* at ¶ 12.

decisions as justifications for approving the subpoena motion. However, the Trial Chamber only used these decisions to indicate the proper standard for permitting subpoena requests: the subpoena is necessary and it is for the purpose of an investigation.[245]

Perhaps the Trial Chamber did not address the State official immunity issue because the Prosecutor may have not brought forth the State immunity argument to prevent the subpoena. However, the court clearly cites the *Krstic* and *Bagasora* cases that both address State official immunity and confirm the Special Court's authority to subpoena the tribunal. The Trial Chamber may have assumed that State officials were not immune from subpoenas based on its power to subpoena under Rule 54 and its power to prosecute regardless of a person's official status.

2. *Prosecutor v. Norman, Fofana, and Kondewa*[246]

In *Norman,* the Appeals Chamber made two determinations potentially helpful to the SCL. First, it determined that although the SCSL is a hybrid court, it might use the ICTY and ICTR decisions for guidance as it sees fit pursuant to Article 10 of its Statute.[247] Second, it ignored the State immunity question altogether while it analyzed whether to approve the Defense's request for a subpoena to a President.[248] The Court instead suggested that the Defense should request subpoenas from other high-ranking officials who it deemed had the information the Defense needed.[249] Like *Sesay,* the court probably took for granted that State officials are not

[245] *Id.* at ¶ 16.

[246] Case No. 2004-14-T, Decision on Interlocutory Appeal Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, Judgment (Sept. 11, 2006) [reproduced in accompanying notebook at tab 68].

[247] *Id.* at ¶ 12-3.

[248] *Id.* at ¶ 33.

[249] *Id.*

immune from the Special Court's jurisdiction based on their official status.

Norman and Fonfana's Defense counsels appealed the Trial Chamber's denial of their motion to subpoena President Kabbah. The Trial Chamber denied their motion because they did not show that the subpoena was necessary for a legitimate purpose pursuant to the ICTY *Krstic* test.[250] The Appeals Chamber affirmed the lower court decision because the "information sought form the President was 'available through other means.'"[251] The Appeals Chamber first established that the Special Court has the authority to issue subpoenas to witnesses under Rule 54.[252] The Appeals Chamber then showed that the Defense did not prove a necessary and legitimate purpose due to its "own submission" that other relevant State officials may have the same information listing "Vice President Joe Demby, former members of the CDF National Coordinating Committee, former members of the War Council, the First Accused and other CDF commanders."[253] The Appeals Chamber at no point mentioned the issue of State immunity. Citing *Krstic*, which overruled the *Blaskic* State immunity decision, suggests that the court assumed that State officials are not immune from the courts authority to subpoena.

E. The International Criminal Court

The ICC is a permanent international criminal court. The ICC is characteristically an international court, formed by a universal multilateral treaty signed by 193 States.[254] However,

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[250] *Id.* at ¶ 34.

[251] *Id.* at ¶ 32 (citing earlier SCSL precedent Impugned Decision, ¶ 37, citing to Fofana Motion for Judgment of Acquittal, 4 August 2005, SCSL-04-`1-T-457, ¶ 24.).

[252] *Id.* at ¶ 8.

[253] *Id.* at ¶ 32.

[254] Honorable David Hunt, *The International Criminal Court: High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges*, 2 J. INT'L CRIM. J. 56, 58 (2004) [reproduced in accompanying

the ICC may have more difficulty than the previous international tribunals at issuing subpoenas to State officials. While the ICC Rome Statute strips State official immunity from prosecution, the Rome Statute limits its own power to compel witness testimony. In light of the fact that the ICC was set into force by treaty and contains provisions requiring State Party cooperation, the ICC may be able to successfully compel State official witness testimony only for State Parties. The ICC will likely have difficultly exercising authority to subpoena State officials of States not a Party to the Rome Statute.

1. Is the ICC an international or national court?

Analysis of State official immunity from witness subpoenas at the ICC is slightly different than the previous international tribunals. The ICC is the product of a multilateral treaty, whereas the United Nations Security Council created the Tribunals for the former Yugoslavia and Rwanda. The ICC is a permanent criminal court whereas the ICTY and the ICTR were created in response to specific situations and will be in existence for a limited time period. The ICC is a hybrid court, which uses both international and national standards for prosecution. It is a "complementary court" that cannot take cases currently under a national court's jurisdiction but may take cases if the country is unwilling or unable genuinely to investigate or to prosecute.[255]

2. Does the Rome Statute expressly eliminate State official immunity from prosecution?

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notebook at tab 69].

[255] *About the Court*, International Criminal Court, http://www.icc-cpi.int/NetApp/App/MCMSTemplates/Index.aspx?NRMODE=Published&NRNODEGUID={D788E44D-E292-46A1-89CC-D03637A52766}&NRORIGINALURL=/Menus/ICC/About+the+Court/Frequently+asked+Questions/&NRCACHEHINT=Guest#id_1 [reproduced in accompanying notebook at Tab 70].

Like the above tribunals, the ICC contains a provision stripping State immunity defenses for criminal prosecution. Article 27 of the Rome Statute, titled "[i]rrelevance of official capacity" reads:

> 1. This statute shall apply equally to all persons without any distinction on official capacity. In particular, official capacity as a Head of State of Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and or itself constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person. [256]

Importantly, section 2 specifically mentions that the court will have jurisdiction over State officials despite any procedural rules. This may include the Court's authority to subpoena witnesses.

3. Does the ICC have the authority to issue witness subpoenas?

The ICC expressly limits its own power to issue subpoenas for witness testimony. Article 64 outlines the "powers and functions of the Trial Chamber" and indicates that

> 6. In performing its functions prior to trial or during the course of the 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.[257]

The Rome Statute also uses limiting language in Article 93 discussing the "[o]ther forms of cooperation" by State Parties. It reads:

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[256] Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998, Art. 27 [reproduced in accompanying notebook at Tab 71].

[257] *Id.*

> 1.States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with the requests by the Court to provide the following assistance in relation to investigations or prosecutions:
>
> (c)The questioning of any person being investigated or prosecuted;. . .
>
> (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;. . .
>
> 7. (a) The Court may request the temporary transfer of a person in custody for the 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.[258]

In these provisions, the court, while noting that it may "require the attendance and testimony of witnesses" also limits State Party cooperation to only "voluntary" witnesses. Although scholars are concerned that the Court does not have sufficient authority to subpoena witnesses, the language that the court may "require" their testimony and that the State Parties must cooperate with the "questioning of any person" may be sufficient.

The Rome Statute also contains a provision (Article 98(1)) that limits its ability to subject third party State officials to its jurisdiction. That provision reads:

> 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[259]

This provision limits the Courts ability to successfully subpoena State officials for testimony if they are not from Party States.

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[258] *Id.* at Art. 93(1), (7).

[259] *Id.* at Art. 89(1).

Although, like the other international criminal tribunals and hybrid courts, the ICC does not have direct enforcement mechanisms for requiring witness testimony, many of the Rome Statute's articles provide a means for the Court to elicit witness cooperation.[260]

1) Article 93(1)(b) provides a broad duty for States to assist the Court in collection of evidence. It indicates that States are under an obligation to comply with a request of the Court for the "identification and whereabouts of persons or the location of items."[261]

2) Article 93(1)(e) provides that State Parties shall facilitate the voluntary appearance of persons as witnesses or experts before the Court. Although this article expressly uses the term "voluntary," Article 64(6)(b) bolsters the Court's authority by providing that the Trial Chamber may "require the attendance and testimony of witnesses."[262]

3) Article 88 provides that State Parties are under a duty to implement national legislation, which will facilitate cooperation with the Court. It States "State parties shall ensure that there are procedures available under national law for all the forms of cooperation which are specified under this part [9]."[263] Thus far, almost all State Parties have complied.[264]

4) Article 86 provides that States are under the general obligation to assist the ICC fully in its investigations and prosecutions of crimes within its jurisdiction.

5) State Parties are obligated to cooperate with the ICC based on treaty obligations. Upon signing and ratifying the Rome Statute, each State has a duty to cooperate with the ICC in the manner and under the conditions set out by the Statute and the Rules of Procedure and Evidence.[265]

6) The ICC has no power to directly sanction any State for non-cooperation. The ICC may refer the matter to the Assembly of State Parties or to the UN Security Council, which may issue a binding order pursuant to Chapter VII of the U.N Charter.[266]

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[260] Sylvia Ntube Ngane, *Witnesses before the International Criminal Court*, THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 8 (2009) 431-457 [reproduced in accompanying notebook at Tab 72].

[261] Rome Statute, International Criminal Court [reproduced in accompanying notebook at Tab 71].

[262] *Id.*

[263] *Id.*

[264] Ngane, *supra* note 259, at 443-44 [reproduced in accompanying notebook at Tab 72].

[265] *Id.* at 445.

[266] Rome Statute, International Criminal Court, Article 87(7) [reproduced in accompanying notebook at Tab 71].

F. Extraordinary Chambers in the Courts of Cambodia

It is unclear whether the ECCC has the authority to subpoena State officials. The reason for the uncertainty is the issue of whether the ECCC is primarily a Cambodian or an international court. Both the Court's Internal Rules and the ECCC Law grant the court the authority to subpoena witnesses. The ECCC Law also grants the Court the authority to prosecute State officials.[267] However, if the court is mostly a national court, the authority to prosecute and to subpoena State is unwarranted under international law.

1. Is the ECCC a National or International Court?

a. ECCC's creation

The ECCC was established by a domestic Cambodian law pursuant to a 2003 agreement between the United Nations and the Government of Cambodia setting out the legal basis and principles for their cooperation. This was approved by the Cambodian legislature and implemented by the ECCC law in 2004.[268] The ECCC was not created by an international agreement like the ICTY, the ICTR and the SCSL. However, the Cambodian Deputy Prime Minister Sok An considered the court a national court that involves both national and international law, national and international judges, prosecutors, staff, and financing.[269] The pre-trial chamber has said that the court is "a special internationalized tribunal" because it is "an

[267] The Law on the Establishment of the Extraordinary Chambers as amended Oct. 27, 2004, (NS/RKM/1004/006) Article 29 "Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime. The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment." [reproduced in accompanying notebook at Tab 19].

[268] *Id.* at ¶ 22

[269] Anne Heindel "The Scope of the Authority of the Extraordinary Chambers to Obtain the Testimony of High-Level Cambodian Government Officials and King Father Sihanouk," Magazine of the Documentation Center of Cambodia Special English Edition, Second Quarter 2010 [reproduced in accompanying notebook at Tab 73].

independent entity within the Cambodian court structure."[270]

b. ECCC's Judicial Composition, funding, and location

The ECCC does not have an entirely international judicial staff. Rather, the ECCC has a majority of national judges and a minority of international judges in each of the Chambers. The Court has an International Co-Prosecutor, an International Co-Investigative Judge, and a mix of foreign and domestic Trial Chamber and Appeals Chamber Judges. The ECCC receives funding in from voluntary contributions of UN Member States and does not receive contributions from the general UN budget.[271] The ECCC is located in Cambodia.[272] These factors suggest that the ECCC is primarily a national tribunal.

c. Subject matter jurisdiction

The ECCC has a valid claim that it is an "internationalized court" because it prosecutes international crimes. Under the ECCC Law the Court has the jurisdiction to prosecute homicide, torture,[273] Genocide,[274] crimes against humanity,[275] grave breaches of the Geneva Conventions,[276] crimes against internationally protected persons under the Vienna Convention of

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[271] Larry D. Johnson, *Myers S. McDougal Lecture: UN-based International Criminal Tribunals: How They Mix and Match*, 36 DENV. J. INT'L L.& POL'Y 275, 279 (2008) [reproduced in accompanying notebook at Tab 58].

[272] *Id.*

[273] Extraordinary Chambers in the Courts of Cambodia Law, Article 3 (under the Article 500 of the 1956 Penal Code); Art. 5 (listing torture as a crime against humanity under international standards) [reproduced in accompanying notebook at Tab 19].

[274] *Id.* at Art. 4 (using the Geneva Convention definition of Genocide).

[275] *Id.* at Art. 5.

[276] *Id.* at Art. 6.

1961 on Diplomatic Relations.[277] The above crimes are all serious international crimes that have previously been adjudicated at Nuremberg, ICTY, ICTR and SCSL.

Originally, the ECCC was intended to apply Cambodian criminal procedural law and to draw on international procedures when necessary to fill in the gaps between domestic Cambodian law and international standards. This notion is codified in Article 23 of the ECCC law stating:

> If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.[278]

Before the ECCC developed its procedure code in August 2007, the Chambers drafted their own Internal Rules by judicial plenary powers in June 2007. The Judges decided that, when the Procedure Code was finally established in August 2007, that it should "only be applied where a question arises which is not addressed by the Internal Rules." The Court went further to state that where there is "uncertainty regarding the interpretation or application" of these rules, "guidance may also be sought in procedural rules established at the international level."[279]

2. Does the ECCC's Law eliminate State official immunity for prosecution?

[277] *Id.* at Art. 8.

[278] *Id.* at Art. 23.

[279] Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias "Duch," Case No. 001/18=07-2007-ECCC-OCIJ (PTC01), Pre-Trial Chamber decided December 3, 2007, ¶ 19 and 22 [reproduced in accompanying notebook at Tab 74].

The ECCC law contains a provision stripping State official immunity. Article 29 of the ECCC Law State that "any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime. The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment."[280]

3. Does Cambodia grant State officials immunity under its domestic laws?

ECCC cannot subpoena State officials of other nations of the Court if it is considered mostly a national court. The Cambodia Constitution provides that members of the National Assembly and Senate are immune from criminal arrest and detention unless waived in Article 80 which reads: "[t]he accusation, arrest, or detention of [a National Assembly] member shall be made only with the permission of the National Assembly"[281] and Article 104[282] provides the same language for the Senate. The Constitution also recognizes the potential liability for any "crime or misdemeanor that he/she has committed in the course of his/her duty" for members of the Royal Government if the National Assembly votes to file charges against them.[283] The King Father enjoyed "inviolability." However, neither the Constitution not any Cambodian Laws offer immunity from testifying at a domestic Cambodian or international court.

[280] Extraordinary Chambers in the Courts of Cambodia Law, Art. 29 [reproduced in accompanying notebook at tab 19].

[281] The Constitution of Cambodia, adopted 21 September 2003 [reproduced in accompanying notebook at tab 75].

[282] *Id.*

[283] *Id.* at Art. 107.

4. Does the ECCC have the authority to issue witness subpoenas?

The Internal Rules grant the Judges the authority to summon and "take Statements from any person whom they consider conducive to ascertaining the truth."[284] Summonses are defined by the Internal Rules as "an order to any person to appear before the ECCC."[285] Once summoned, witnesses must appear:

> Rule 60. Interview of Witnesses
>
> 3. Any person who has been summoned by the Co-Investigating Judges as a witness must appear. In the case of refusal to appear, the Co-Investigating Judges may issue an order requesting the Judicial Police to compel the witness to appear. Such order must include the identity of the witness and shall be dated and signed by the Co-Investigating Judges. [286]

5. ECCC case law demonstrates the ECCC's difficulty in issuing witness subpoenas to State officials

The ECCC likely has the authority to subpoena witnesses although it has not been met with much success. Whether the courts will attempt to enforce the subpoenas already issued and force State official cooperation may develop and provide guidance for the STL in the future. Most recently, the Pre-Trial Chamber issued a split decision concerning the refusal of six State officials to give testimony when the Court issued them each subpoenas to testify.[287] The Court's international judges were in favor of imposing sanctions on the State officials who instructed those subpoenaed not to testify while the national judges were not. The International Co-

[284] Internal Rules, Extraordinary Chambers of the Cambodian Courts, amended Sept. 17 2010, Rule 55(5) [reproduced in accompanying notebook at Tab 76].

[285] *Id.* at Rule 44(1).

[286] *Id.* at Rule 60.

[287] Case No. 002/19-09-2007-ECCC/OCIJ (PTC 50), Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, Pre-Trial Chamber Decision (Sept. 10, 2010) [reproduced in accompanying notebook at Tab 77].

Investigative Judge summoned 6 State officials to testify on September 25, 2009. The officials never responded but the Phnom Penh Post published an article stating that government spokesman Khieu Kanharth said that the government's position was that "they should not give testimony."[288]

On January 11, 2010, the International Co-Investigative Judge concluded that the "persons concerned have refused to attend for testimony" and have still refused to this day.[289] Judges Catherine Marchi-Uhel and Rowan Downing determined that the evidence shows there was a "reason to believe" the individuals "may" have interfered with the trial.[290] They also note that "preventing testimony from witnesses that have been deemed conductive to ascertaining the truth may infringe upon the fairness of the trial."[291] Cambodian judges Prak Kimsan, Ney Thol and Huot Vuthy said, however, that the court's Co-Investigating Judges had been right to conclude that no investigation was necessary.[292]

The case mainly dealt with whether the government spokesperson's Statements can be considered an interference, and therefore is not conclusive on the issue of State official subpoenas. It does, however, shed light on the disagreement between the international and national judges of the Court and how it may influence whether the STL can impose sanctions on State officials or third parties interfering with the administration of justice. In the absence of a super-majority of judges, the request for an investigation by lawyers for former Khmer Rouge Foreign Minister Ieng Sary and Brother No 2 Nuon Chea was dismissed.

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[288] *Id.* at ¶ 40.

[289] *Id*.

[290] *Id.* at page. 22, ¶ 11.

[291] *Id.* at page. 23 ¶ 12.

[292] *Id.* at page 22- 27.

Although the ECCC applied the ICTY and ICTR precedent granting international tribunals the authority to issue witness subpoenas, the Court has been unsuccessful in enforcing their powers. The issue of the six State officials avoiding the ECCC's witness subpoenas has not yet been resolved despite the court's issuance of 10 separate subpoena requests. The Court will likely be forced to address its capacity to issue witness subpoenas. The ECCC will only be able to successfully exercise full jurisdiction over State officials if it established that it is an international court that has a *vertical* model relationship with national courts.

G. The Special Tribunal for Lebanon

It is unclear whether the STL will be able to successfully subpoena State official testimony although there are many factors that weigh in the Tribunal's favor for such authority: (1) The STL is primarily an international tribunal; (2) the Pre-Trial Judge and a majority of the Chambers are international judges who may favor granting the Tribunal international powers; (3) the Statute and RPE clearly allow the STL to subpoena witnesses; and (4) the Rules of Evidence and Procedure ("RPE") suggest that State officials are included in those who must give testimony upon subpoena.

Factors weighing against the STL's authority to subpoena witnesses are: (1) terrorism is not one of the core international crimes and the Tribunal uses solely Lebanese Criminal Code for its subject matter jurisdiction; (2) the Statute does not contain a provision stripping State immunity for prosecution or process unlike all the other criminal tribunals and courts analyzed above; and (3) the Tribunal has limited authority to compel State party and Third party State cooperation. These factors will be discussed further below.

1. Is the STL an International or National Court?

The STL is a hybrid court that has primarily international characteristics. The Secretary-General has characterized the STL has an international court because its international elements outweigh its national elements.[293] Its international characteristics are (1) the Security Council established the STL under its Chapter VII powers from the United Nations Charter,[294] (2) it operates outside of the Lebanese justice system (similar to the SCSL), (3) the government of Lebanon has a duty to cooperate with the tribunal (unlike the ECCC), and (4) the tribunal has primacy over domestic court proceedings concerning crimes within its jurisdiction.[295] However, the STL remains independent from the UN because (1) only the Registrar of the Tribunal will be a UN staff member (similar to the SCSL), (2) the STL receives no funding from the UN budget and instead receives 49% funding from donations and 51% funding from Lebanon.

Heather Ludwig's memorandum to the STL Prosecutor discusses the STL's international character in depth starting on page 33.

c. Judge Composition

The STL's three Chambers are all composed of a majority of international Judges.[296] The Pre-Trial Chamber consists of one international judge, the Trial Chamber consists of one Lebanese and two international judges and the Appeals Chamber consists of two Lebanese Judges and three international judges. This practice differs from the ECCC, which constitutes a

[293] Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon to the Security Council of U.N. Doc. S/2006-893 (Nov. 15 2006) ¶ 6, 7 [reproduced in accompanying notebook at Tab 52].

[294] Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007) with the annexed Agreement between the United Nations and the Lebanese Republic on the Establishment of a STL, dated 7 February 2007 and the Statute of the STL) [reproduced in accompanying notebook at Tab 5].

[295] *Id.* at Art. 4(1).

[296] *Id.* at Art. 8.

majority of Cambodian national judges who need the support of at least one international judge. The fact that the STL's Pre-Trial judge is an international judge suggests that State official witness subpoena requests will likely be permitted.

d. Jurisdiction and applicable law

The STL has subject matter jurisdiction over the assassination of Rafik Hariri as well as other acts between October 1, 2004 and December 12, 2005 if they are in similar gravity and nature and are connected with the Hariri assassination, and later incidents with the Security Council approval.[297] The applicable subject matter law is Lebanese criminal law only, especially with regard to the crimes of terrorism.[298] Lebanese domestic rules and procedures with principles of international criminal procedure guide the judge's procedural law.[299] The ICTY, ICRT and ICC all only have jurisdiction over international crimes such as genocide, war crimes and crimes against humanity.

The STL will be the first international tribunal without any of the core crimes against international law included in its jurisdiction. The Security Council and the STL agreed the attack on Hariri constituted a local crime committed in violation of Lebanese law. However, it is unclear whether terrorism is an international crime. Although there is currently no international definition of terrorism, it can be considered international as a crime against humanity. The

[297] *Id.* at Art. 1.

[298] *Id.* at Art. 2 ("(a)The provision of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offenses against life and personal integrity, illicit associations and failure to report crimes and offenses, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on 'Increasing the penalties for deition, civil war and interfaith struggle.")

[299] *Id.* at Art. 28.

Security Council specifically agreed to remove crimes against humanity from the Statute[300] although the Secretary General suggested that the attacks could be considered crimes against humanity.[301] Yet, considering the relatively small number of deaths (about 22) and injuries (about 500), and that the intentions behind the attacks were "political destabilization" of the State rather than widespread attacks against the civilian population, the crimes are likely not crimes against humanity.[302] The attacks may still be considered international crimes if "terrorism" is considered as such. Refer to Section

2. Does the STL's statute eliminate State official immunity for prosecution?

The STL differs from the other international and hybrid tribunals in that it does not contain a provision stripping State official immunity for those being tried. Heather Ludwig's memorandum to the Prosecutor provides arguments in support of the notion that adding the provision is unnecessary for the drafters of the STL's Statute because it has become customary in international criminal law for international tribunals to prosecuting criminals regardless of their official capacities.[303]

Additionally, because the STL is predominantly an international tribunal, it may have jurisdiction to prosecute State officials because it enjoys the *vertical* relationship with national courts. However, the STL may face problems arguing that it has a *vertical* relationship with

[300] Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon to the Security Council of U.N. Doc. S/2006-893 (Nov. 15 2006) ¶ 23-25 [reproduced in accompanying notebook at Tab 52].

[301] *Id.* at ¶ 24.

[302] Jan Erik Wetzle and Yvonne Mirti, *The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country*, 7 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 81, 103 (2008) [reproduced in accompanying notebook at Tab 53].

[303] Ludwig, *supra* note 131 page 42 [reproduced in accompanying notebook at Tab 43].

third States because the Tribunal's statute explicitly indicates that the STL only has enforcement authority with third States if they agree to cooperate with the Tribunal.

The *horizontal* model governs the STL relationship with third States. States are only required to comply with the STL's requests if the State is under an agreement to do so with the STL under rules 13, 14, and 15. Under Rule 21(A), non-compliance by third States who have not entered into an agreement is resolved by the dispute settlement mechanism provided for in the relevant agreement. Third States who have not formed an agreement with the STL are not bound to cooperate with the STL. The President of the Tribunal under Rule 21(B) may consult with the competent authorities of the State in order to secure their cooperation. Considering the foreseeable difficulty of obtaining Third Party State compliance, the STL Rules of Procedure and Evidence facilitate the formation of third State agreements allowing the President, (Rule 13), Prosecutor (Rule 14), the Head of Defense Office (Rule 15), and the Registrar acting under the authority of the STL President (Rule 39) to directly seek cooperation from any State.

3. What is the STL's authority to subpoena witnesses and subpoena State officials?

While the Tribunal will have access to evidence collected by Lebanese national authorities and by the International Independent Investigation Commission in accordance with the Security Council resolution 1595, the admissibility of which will be decided by "international standards on the collection of evidence,"[304] the Chambers has its own individual powers to collect evidence. Article 18 of the Statute gives the Pre-Trial Judge authority to, at the request of the Prosecutor, "issue. . . orders . . .for the conduct of the investigation and for the preparation of

[304] Special Tribunal Lebanon Art. 19(2), STL Statute [reproduced in accompanying notebook at Tab 5].

a fair and expeditious trial." The Trial Chamber may also "upon request or *proprio motu*. . . at any stage of the trial decide to call additional witnesses and/or order the production of additional evidence."[305] The "standards of international criminal law" and Lebanese Criminal Procedure will guide the Chamber's authority under the Rules of Procedure and Evidence.[306]

a. Rules of Procedure and Evidence

The Rules of Procedure and Evidence grant the Prosecutor the right to request orders from the Pre-Trial Judge or Chamber to summon and question suspects, victims and witnesses, and may seek assistance from any State authority concerned.[307] Rule 77 grants the Pre-Trial Judge the authority to issue "orders, summonses, subpoenas, warrants and transfer orders or requests as may be necessary for the purposes of an investigation." Rule 78 grants the Pre-Trial judge to "issue a summons to appear to a suspect, an accused or a witness."

The Rules suggest that the Chambers may subpoena State officials. First, Rule 82 requires that "Lebanon or a State which has agreed to provide cooperation with the Tribunal or one of its organs" (which may be interpreted to read a State official or State entity), "or has on any other basis assumed an obligation to provide assistance, the national authorities shall act promptly and with all due diligence to ensure the proper and effective execution thereof." This rule requires State cooperation and does not provide and exception to official immunity. Rather, it suggests that State who have agreed to cooperate must assist in witness subpoenas delivered to State officials.

Second, the Rule 93(A)(ii) envisions the possibility that a witness' testimony may

[305] *Id.* at Art. 20(3).

[306] *Id.* at Art. 28(2).

[307] Special Tribunal for Lebanon, Rules of Procedure and Evidence, STL/BD/2009/01, (March 20, 2009) Rule 61 [reproduced in accompanying notebook at Tab 20].

produce "a serious risk that imperative national security interests might be jeopardized should the witness' identity or affiliation be revealed" and provides the opportunity for the Pre-Trial Judge to question the witness privately. This situation would most frequently arise for State officials who have information related to national security and therefore suggests that the Tribunal assumes its power to subpoena State officials.

b. Lebanese Criminal Code

The Lebanese Criminal Code also gives the Court the authority to subpoena witnesses and State officials. In Section III, Art. 86 the Investigating Judge must "summon the persons whose names appear in the complaint, the report or the submissions as well as anybody else who, in his view, may be able to provide evidence to assist the investigation." Further, the Code goes on to read, "A witness may not be excused form testifying unless it can be demonstrated that he is legally bound to secrecy." This Article suggests that the Court's power to subpoena witnesses extends to State officials unless they are bound to secrecy. More convincing, Article 85 States that the Investigating Judge *shall* take Statements from the "President of the Republic, the Speaker of the Chamber or Deputies or the Prime Minister" by going to the relevant office. Nothing in the Lebanese Criminal Code extends this power to State officials from other Nations. Yet coupled with the RPE and international precedent, the Tribunal may have such authority.

4. What is the STL's Authority to compel State cooperation in obtaining witness testimony?

The STL Statute does not contain a provision granting a Universal obligation to cooperate unlike the ICTY and the ICTR, which impose the obligation to cooperate with the Tribunal on all UN member States in Articles 29 and 28 of their Statutes respectively. Instead,

The STL has three tiers of authority to compel State cooperation. First, the Tribunal's RPE requires a full duty to cooperate from Lebanon. RPE Rule 15 of the Statute States that the Prosecutor or Defense may request Lebanese authorities carry our the questing witnesses searching premises or seizing potential evidence or allow the Defense or Prosecution to conduct the questioning, or a combination of both efforts. RPE Rule 20(a) provides that Lebanon must provide any requested assistance without undue delay. Furthermore, Lebanese authorities who "receive summons to appear, a warrant of arrest, a transfer order, an order for the production of documents or information or any order of cooperation" must provide "assistance without undue delay."[308]

Second, the Tribunal requires that States who have made agreements to cooperate with the Tribunal must do so upon the Prosecutors, Defense's or Chamber's requests. Under Rules 14, 15, 16, and 18, the Prosecutor and the Defense may request that the relevant authorities from this State provide access to witnesses or other relevant sources of evidence. Rule 13(b), RPE and Article 7(d) of agreement requires States and other entities to conclude assistance agreements or negotiate with appropriate measures of assistance to the STL. States bound by these arrangements are obligated to cooperate may be requested to provide assistance by STL.

Third, the Prosecutor, Defense and the Chambers may request cooperation from Third States that do not have any agreement to cooperate with the STL, but have no authority to compel their cooperation. States have no obligation to comply with STL requests unless have an assistance agreement or arrangement under Rule 21(a). The President of the Tribunal may consult with the State authorities in order to obtain the cooperation, but it is not required under Rule 21(b). The Tribunal has no independent authority to compel witness testimony, like the

[308] *Id.* at Rule 20(b).

other tribunals and courts discussed above, but may request that the Security Council issue a binding order.[309]

VI. Conclusion

The STL will likely be able to subpoena high-ranking State officials only if the Tribunal is considered primarily international. The STL is primarily an international court based on its formation, its location and its judicial composition. It is arguable whether "terrorism" as its subject-matter jurisdiction gives it international or national character. While the STL uses Lebanese Penal Code, the Code mirrors international criminal law standards. Terrorism may be considered an international crime under Security Counsel resolution 1373, which requires all Member States to criminalize all forms of terrorism.

If the STL is considered an international court, it may successfully subpoena State officials from States that have agreed to cooperate with the tribunal. Otherwise, the Tribunal may only request cooperation from third Party States but will have difficulty enforcing such requests. The Prosecutor could argue that, like the SCSL *Taylor Case*, that the agreement between the STL and the United Nations is representative of an agreement between Lebanon and all members of the UN. However, for the STL, Chapter VII enforcement powers apply to only the first paragraph of the Tribunal's Resolution 1757, which does not address the issues of requiring compliance by third party States with the court's decisions and requests. Lebanon is the only nation bound by the Security Council Resolution to co-operate fully with the requests of the STL. Supporting the Tribunal's international character therefore is of utmost importance.

[309] See Keith White's Memorandum to the STL Prosecutor Issue 12 for more information on the STL's capacity to request Security Council binding orders. [reproduced in accompanying notebook at Tab 1].