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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before:	Hon. Justice Pierre Boutet, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Benjamin Mutanga Itoe
Registrar:	Mr. Lovemore G. Munlo, SC
Date:	13th of June, 2006

PROSECUTOR Against SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

Public Document

DECISION ON MOTIONS BY MOININA FOFANA AND SAM HINGA NORMAN FOR THE ISSUANCE OF A SUBPOENA *AD TESTIFICANDUM* TO H.E. ALHAJI DR. AHMAD TEJAN KABBAH, PRESIDENT OF THE REPUBLIC OF SIERRA LEONE

Office of the Prosecutor:
Desmond de Silva QC
James Johnson
Joseph Kamara

Attorney-General and Minister of Justice of the Republic of Sierra Leone for President Kabbah:
Frederick M. Carew

Court Appointed Counsel for Sam Hinga Norman:
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Alusine Sani Sesay

Court Appointed Counsel for Moinina Fofana:
Victor Koppe
Arrow Bockarie
Michiel Pestman

Court Appointed Counsel for Allieu Kondewa:
Charles Margai
Yada Williams
Ansu Lansana

TRIAL CHAMBER I ("The Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson and Hon. Justice Benjamin Mutanga Itoe;

SEIZED OF the "Fofana Motion for Issuance of a Subpoena *Ad Testificandum* to President Ahmed Tejan Kabbah", filed by Court Appointed Counsel for the Second Accused, Moinina Fofana, ("Counsel for Fofana") on the 15th of December, 2005 ("Fofana Motion");

SEIZED OF the "Norman Motion for Issuance of a Subpoena *Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", filed by Court Appointed Counsel for the First Accused, Sam Hinga Norman, ("Counsel for Norman") on the 16th of December, 2005 ("Norman Motion");

NOTING the "Affirmation of Service with Respect to Fofana and Norman Motions for Issuance of a Subpoena *Ad Testificandum* to President Ahmed Tejan Kabbah", filed by Counsel for Fofana on the 16th of January, 2006, wherein they stated that, on the 13th of January, 2006, copies of the Fofana Motion and the Norman Motion (collectively, "Motions") were served on Mr. Soulay Daramy, Chief of Protocol of H.E. Alhaji Dr. Ahmad Tejan Kabbah, the President of the Republic of Sierra Leone ("President Kabbah");

NOTING the "Prosecution Response to Fofana Motion for Issuance of a Subpoena *Ad Testificandum* to President Ahmed Tejan Kabbah", and the "Prosecution Response to Norman Motion for Issuance of A Subpoena *Ad Testificandum* to President Ahmed Tejan Kabbah", filed on the 13th of January, 2006 ("Prosecution Response to Fofana Motion" and "Prosecution Response to Norman Motion", respectively);

NOTING the "First Accused Reply to the Prosecution Response to Norman Motion for Issuance of a Subpoena *Ad Testificandum* to President Ahmad Tejan Kabbah", filed by Counsel for Norman on the 16th of January, 2006 ("Norman Reply to Prosecution");

NOTING the "Reply to Prosecution Response to Fofana Motion for Issuance of a Subpoena *Ad Testificandum* to President Ahmed Tejan Kabbah", filed by Counsel for Fofana on the 18th of January, 2006 ("Fofana Reply to Prosecution");

NOTING that, on the 17th of January, 2006, Mr. Frederick M. Carew, Attorney-General and Minister of Justice of the Republic of Sierra Leone ("Attorney-General"), acknowledged the service of the Motions on President Kabbah, requested copies of the Consolidated Indictment and of the Rules of Procedure and Evidence of the Special Court ("Rules") and expressed his intention "to apply for such a subpoena, if and when issued, to be set aside on constitutional and other legal basis";[1]

NOTING that, on the 18th of January, 2006, the Attorney-General acknowledged receipt of the documents he had requested,[2] recalled his intention "to apply to the Trial Chamber if and when a

[1] SCSL-04-14-T-535, p. 2.
[2] They were supplied to him by the Registrar of the Special Court: *see* SCSL-04-14-T-537.

subpoena is issued" and asked to be informed "of the date of the hearing for the determination by the Trial Chamber of this matter";[3]

NOTING The Chamber's "Order on Motion for Issuance of a Subpoena *Ad Testificandum* to H.E. Dr. Ahmad Tejan Kabbah, the President of the Republic of Sierra Leone and Leave to Intervene", issued on the 19th of January, 2006, whereby The Chamber, in the interests of justice, granted the Attorney-General leave to intervene in the proceedings by filing with the Court a written response to the Motions and by presenting arguments, if any, at a hearing to be held by The Chamber;

NOTING "The Response of the Attorney-General and Minister of Justice to the Application Made by Moinina Fofana for the Issuance of Subpoena *Ad Testificandum* to President Alhaji Dr. Ahmad Tejan Kabbah Pursuant to Rule 54, Rules of Procedure and Evidence of the Special Court for Sierra Leone Pursuant to the Order of the Special Court Dated 19 January 2006" and the "The Response of the Attorney-General and Minister of Justice to the Application Made by Samuel Hinga Norman for the Issuance of Subpoena *Ad Testificandum* to President Alhaji Dr. Ahmad Tejan Kabbah Pursuant to Rule 54, Rules of Procedure and Evidence of the Special Court for Sierra Leone Pursuant to the Order of the Special Court of Dated 19 January 2006", filed on the 23rd of January, 2006 ("Attorney-General Response to Fofana Motion" and "Attorney-General Response to Norman Motion", respectively);[4]

NOTING the "Fofana Reply to the Response of the Attorney General to the Fofana Motion for Issuance of a Subpoena *Ad Testificandum* to President Ahmad Tejan Kabbah", filed on the 26th of January, 2006 ("Fofana Reply to Attorney-General");

NOTING the "Norman Reply to the Response of the Attorney General to the Norman Motion for Issuance of a Subpoena *Ad Testificandum* to President Ahmad Tejan Kabbah", filed on the 30th of January, 2006 ("Norman Reply to Attorney-General");

NOTING the oral submissions presented at the hearing of the 14th of February, 2006;[5]

PURSUANT TO Rule 54;

ISSUES THE FOLLOWING DECISION:

I. SUBMISSIONS

A. Introduction

1. Two preliminary matters need to be disposed of before considering the merit of these submissions. The first one is whether the Prosecution has standing to object to a request by the Defence for the issuance of a subpoena to a witness. It is The Chamber's understanding that this issue has now been rendered moot by the fact that, in the course of the oral hearing, Counsel for Fofana did not

[3] SCSL-04-14-T-537.
[4] SCSL-04-14-T-541.
[5] Transcript of the 14th of February, 2006, pp. 1-98.

reiterate their objection to the Prosecution's intervention in these proceedings, whilst Counsel for Norman explicitly withdrew theirs.[6]

2. As to the other matter, a considerable number of written submissions have been filed concerning the issue currently before The Chamber. Parties to the current proceedings have opted to associate themselves with the written submissions filed by others.[7] In the result there is a degree of repetition and overlap in the parties' submissions and in some instances some confusion as to the applicability of such adopted submissions. The Chamber has sought to avoid that repetition when setting out the parties' submissions and has attempted to show the existence of overlap where it has considered it relevant.

B. Relief requested

3. In their Motions, Counsel for Norman and Counsel for Fofana (collectively, "Applicants") requested a Judge of The Chamber or The Chamber to issue, pursuant to Rule 54, a subpoena to President Kabbah to compel him to appear as a witness in the CDF trial on behalf of the First and Second Accused, respectively, and to meet with the Applicants in advance of his proposed testimony ("Application").[8]

4. The Prosecution and the Attorney-General submitted that the Application should be denied and the Motions dismissed.[9]

C. Standard for the issuance of a subpoena pursuant to Rule 54

5. According to Counsel for Fofana, the general test for relief under Rule 54 is twofold:

> First, the proposed injunction must be *necessary* in order for the requesting party to obtain the material sought. Further, the requested material must be *relevant* to the proceedings.[10] Accordingly,

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[6] *Ibid.*, p. 47. Counsel for Norman had argued in their written submission that the Prosecution had no standing to object to the issuance of a subpoena to a third party because it has no control over which witnesses the Defence intends to call, so that while the prospective witness to whom a subpoena is directed can move to have it quashed, the Prosecution cannot: Norman Reply to Prosecution, paras 3, 10-14. According to Counsel for Norman, the Prosecution's objection violated the right of the accused, *inter alia*, to summon the witnesses on his behalf in "full equality": *ibid.*, paras 5-9, citing Article 17(4) of the Statute of the Special Court. Counsel for Fofana expressly associated themselves with the argument made by Counsel for Norman that the Prosecution had no standing to object: Fofana Reply to Prosecution, paras 2, 4-6. This matter was also the subject of oral submissions. Whereas, in the course of the hearing, Counsel for Fofana did not reiterate their objection to the Prosecution's intervention in the proceedings, Counsel for Norman did. The Prosecution responded that it was not the Prosecution's duty to seek to control who the Defence wished to call as their witness by way of a subpoena so long as the evidence that was being sought was relevant: Transcript of the 14th of February, 2006, p. 43. In the course of the oral hearing, Counsel for Norman eventually withdrew their objection: *ibid.*, p. 47.

[7] Thus, in their Motion, Counsel for Norman associated themselves with the submissions made by Counsel for Fofana in theirs. When replying to the Prosecution, Counsel for Fofana associated themselves with the submissions in the Norman Reply to Prosecution. For his part, in paragraph 12 of his Responses to the Motions, the Attorney-General adopted by reference the submissions in the Prosecution Responses to the Motions. In paragraph 5 of their reply to the Attorney-General, Counsel for Norman associated themselves with the submissions made in the Fofana Reply to Attorney-General.

[8] Fofana Motion, paras 1, 28; Norman Motion, paras 1, 2.

[9] Prosecution Response to Fofana Motion, para. 2; Prosecution Response to Norman Motion, para. 2; Attorney-General Response to Fofana Motion, paras 11, 16; Attorney-General Response to Norman Motion, paras 11, 16.

[10] Fofana Motion, para. 10, citing *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged between Zejnil Delalic and Zdravcko Mucic, 11 November 1996, para. 39.

> with respect to subpoenas directed at individuals, the Defence must demonstrate that it has made "reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful", and the Defence "must have a reasonable belief that the prospective witness can materially assist in the preparation of its case."[11]

6. Counsel for Norman submitted that the criteria of relevance and materiality of the evidence to be given by the prospective witness in relation to the indictment and of "necessity for the conduct of the trial" envisaged in Rule 54, were sufficient guidelines for The Chamber to adopt its own standard for issuing a subpoena.[12] This notwithstanding, Counsel for Norman submitted that any additional conditions, such as the "legitimate forensic purpose" and "last resort" requirements, were not inconsistent with these criteria.[13]

7. The Prosecution relied on the standard which in its submission was to be found in the jurisprudence of the ICTY and maintained that, in assessing an application for a subpoena, The Chamber should consider:

> (1) whether the information in the possession of the prospective witness is necessary for the resolution of specific issues in the trial (the '*legitimate forensic purpose*' requirement),[14] *i.e.* that this evidence must be of *substantial or considerable assistance* to the Accused in relation to a *clearly identified issue* that is relevant to the trial;[15] and
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> (2) whether the information in the possession of the prospective witness is obtainable by other means (the '*last resort*' requirement),[16] *i.e.* whether the information sought is obtainable through other means and whether it is necessary to ensure that the trial is informed and fair.[17]

8. The Attorney-General did not explicitly set out what he considered to be the applicable legal standard. Instead he adopted the Prosecution's submissions.[18]

9. Counsel for Fofana replied that the standard advanced by the Prosecution and based on ICTY jurisprudence should be adapted in order to reflect the "practical reality of the present situation and the unique features of [the Statute of the Special Court] and developed practice", specifically, "to account for the fact that the Defence has been unable to interview the proposed witness, in a substantive manner, with respect to the particular issues on which evidence is sought to be elicited; and further to

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[11] Fofana Motion, para. 10, citing *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004, Trial Chamber ("*Bagosora* Decision"), para. 4.

[12] Transcript of the 14th of February, 2006, pp. 27, 33.

[13] *Ibid.*, pp. 91-92.

[14] Prosecution Response to Fofana Motion, para. 5, citing, *inter alia*, *Prosecutor v. Krstic*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, Appeals Chamber ("*Krstic* Appeal Decision"), para. 10.

[15] Prosecution Response to Fofana Motion, para. 6, citing *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder, 9 December 2005, Trial Chamber ("*Milosevic* Decision"), para. 39.

[16] Prosecution Response to Fofana Motion, para. 5, citing, *inter alia*, *Milosevic* Decision, para. 36.

[17] Prosecution Response to Fofana Motion, para. 15, citing, *inter alia*, *Prosecutor v. Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, Appeals Chamber ("*Halilovic* Appeal Decision"), para. 7.

[18] Attorney-General Response to Fofana Motion, para. 12; Attorney-General Response to Norman Motion, para. 12.

accommodate both the concept of 'greatest responsibility' codified in Article 1(1) of the Statute and this Chamber's liberal approach to admissibility as developed over the course of these proceedings".[19]

D. Whether this standard is met in the instant case

(i) The "purpose" requirement

10. Counsel for Fofana submitted that President Kabbah is in possession of information specifically relevant to the Second Accused's alleged liability pursuant to Articles 1(1), 6(1) and 6(3) of the Statute of the Special Court.[20] According to them, "at times relevant to the [Consolidated Indictment], [President] Kabbah was commanding, materially supporting, and communicating with various members of the alleged CDF leadership, both from his exile in Conakry and later from his presidential offices in Freetown", and thus is in a position to provide evidence on the activities of the CDF.[21] In their submission he can provide evidence on the existence and extent of the Second Accused's participation in a common plan, design or purpose for the determination of his responsibility pursuant to participation in a joint criminal enterprise.[22] Counsel for Fofana also submitted that President Kabbah "is in a position to give evidence regarding the relative culpability of the three accused persons" for the purposes of determining who bears the "greatest responsibility".[23] Further, they claimed that he can provide evidence concerning command responsibility,[24] such as evidence on the CDF command structure, the duties associated with the position of the "Director of War", how orders passed through the chain of command and how certain members of the alleged CDF leadership interacted with one another.[25] Finally, Counsel for Fofana submitted that President Kabbah "was specifically mentioned by at least seven Prosecution witnesses, some indicating that he may have played a role within the alleged CDF command structure", and thus that the relevance of what President Kabbah may have to say in this respect is self-evident,[26] and that the current state of the evidence "is that the CDF personnel travelled to Guinea and periodically held consultation meeting with [President Kabbah]".[27]

11. The Prosecution responded that the Fofana Motion provides no evidence that the information sought from President Kabbah affects any issue relevant to the determination of the guilt or innocence of the Second Accused in relation to any of the charges in the Consolidated Indictment, or that it affects any evidence given in relation to such charges. According to the Prosecution, "in the absence of any such evidence, the mere expression of desire in the Fofana Motion to question President Kabbah does not constitute a legitimate forensic purpose for the purpose of subpoenas".[28] Referring to the testimony of the seven witnesses invoked by Counsel for Fofana, the Prosecution submitted that the mere fact that President Kabbah's name was mentioned cannot itself be a basis for the issuance of a subpoena, particularly since this evidence is not really the subject of dispute by the Prosecution.[29] The

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[19] Fofana Reply to Prosecution, paras 10-13, citing, *inter alia*, Rule 89(C).
[20] Fofana Reply to Attorney-General, para. 6.
[21] Fofana Motion, paras 13-14.
[22] Fofana Reply to Prosecution, para. 21.
[23] Fofana Motion, para. 14, citing Article 1(1) of the Statute of the Special Court.
[24] Fofana Motion, para. 14.
[25] Transcript of the 14th February, 2006, pp. 19-20.
[26] Fofana Motion, para. 15. The seven Prosecution witnesses mentioned are TF2-140, TF2-096, TF2-190, TF2-001, TF2-005, TF2-014 and TF2-EW1.
[27] Transcript of the 14th February, 2006, p. 20.
[28] Prosecution Response to Fofana Motion, para. 14.
[29] Transcript of the 14th February, 2006, pp. 63-64.

Prosecution also submitted that, even if it were assumed for the sake of argument that the Fofana Motion did satisfy the requirements for issuing a subpoena, this would still not mean that the Norman Motion satisfied these requirements, for the latter fails to identify how any evidence that President Kabbah could give could materially assist the First Accused, as opposed to the Second Accused.[30]

12. Counsel for Norman replied to the Prosecution that the Applicants have made a proper showing to satisfy the requirements for the issuance of a subpoena.[31] Counsel for Norman submitted that "the relevance of the information in question, is not to the evidence or the defence of the accused, but to the case against him."[32] According to Counsel for Norman, the evidence of President Kabbah would materially assist the First Accused in rebutting paragraphs 13, 14, 15, 18, 20 and 21 of the Consolidated Indictment, specifically:[33]

> (i) President Kabbah, as Minister of Defence, appointed the First Accused as Coordinator of the CDF; the latter was answerable to him and they were in constant contact for input on how the war should be conducted, while President Kabbah helped raised money to pay for it;[34]
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> (ii) President Kabbah knows what happened to the people of his country and at the hands of whom, and it was not at the hands of the CDF.[35]

13. To the Motions, the Attorney-General responded that, at the material time, "because of the activities of the RUF, CDF/AFRC [President Kabbah was] outside of the jurisdiction in a neighbouring country" and, therefore, whatever evidence President Kabbah may give if a subpoena were to be issued to him, "it is unlikely that such evidence would have a direct and important place in the determination of the issues before the Trial Chamber".[36] The Attorney-General further submitted that the issues outlined in the Motions "have no material effect and relevance in proving the [A]ccused's innocence or guilt in respect of the charges contained in the indictment against him".[37]

14. To this, Counsel for Fofana replied that the Attorney-General is in error to contend that President Kabbah's exile in Guinea is relevant to the question of whether or not he is in possession of information that would materially assist the defence of the Second Accused.[38] Counsel for Norman for their part replied that the Attorney-General's submissions on the absence of relevance and materiality of President Kabbah's evidence contradict the latter's own previous assertions as well as the prior testimony of witnesses in this case.[39]

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[30] Prosecution Response to Norman Motion, para. 8.
[31] Norman Reply to Prosecution, paras 15-17, citing *Krstic* Appeal Decision, para. 17.
[32] Transcript of the 14th February, 2006, p. 86.
[33] Norman Reply to Prosecution, para. 20; Norman Reply to Attorney-General, para. 7.
[34] Norman Reply to Prosecution, para. 21. *See* also Transcript of the 14th February, 2006, pp. 28-29.
[35] Norman Reply to Prosecution, para. 24. In paragraphs 19, 20 and 24 of the Norman Reply to Prosecution, Counsel for Norman referred to a number of paragraphs from the TRC report in support of the contention that President Kabbah is in a position to give evidence on the issues outlined by Counsel for Norman.
[36] Attorney-General Response to Fofana Motion, para. 14.
[37] *Ibid.*, para. 14.
[38] Fofana Reply to Attorney-General, paras 7-8.
[39] Norman Reply to Attorney-General, paras 8-13.

(ii) The "necessity" requirement

15. Counsel for Fofana submitted that they have made reasonable attempts to obtain President Kabbah's voluntary cooperation but have been unsuccessful.[40] According to them, they met with President Kabbah on the 15th of November, 2005. On that date, President Kabbah refused their request for him to testify.[41] Subsequently, on the 18th of November, 2005, Counsel for Fofana wrote to President Kabbah urging him to reconsider his previous decision and to appear as a witness on behalf of the Second Accused. Counsel for Fofana allege that, to date, they have received no response to this correspondence.[42] For this reason, they argue, a subpoena *ad testificandum* is necessary to secure President Kabbah's participation in the proceedings.[43] Since he has "already declined to cooperate with Counsel for Fofana on a voluntary basis after numerous attempts", they submit that the issuance of a subpoena to him is the last resort.[44] Appended to the Fofana Motion is a letter from Counsel for Norman dated the 23rd of November, 2005 addressed to President Kabbah requesting him to give oral evidence on behalf of the First Accused. According to the Fofana Motion, Counsel for Norman have received no response to it.[45]

16. The Prosecution responded that the onus is on the Applicants to establish that the last resort requirement is met, and that in the absence of any clear indication in the Motions as to the specific issues on which the testimony of President Kabbah is sought, it is impossible for The Chamber: (a) to assess whether or not evidence of those issues would be obtainable from another source; (b) to assess whether or not his testimony is necessary to ensure that the trial is informed and fair; and (c) to balance the interests of the litigants against the overarching interests of justice and other public considerations.[46]

17. On the "necessity" requirement, Counsel for Fofana replied to the Prosecution that President Kabbah is in the best, perhaps only, position to comment on the aforementioned issues: "[n]o other means of obtaining the information would be as convenient as a practical matter, as credible from an evidentiary standpoint, or as transparent from a public policy point of view".[47] Furthermore, Counsel for Fofana stated that they are interested in President Kabbah's personal observations, so that the information he may provide cannot be obtained by other means.[48] Counsel for Norman submitted that valuable material evidence in respect of the issues already outlined "is in the bosom and breast" of President Kabbah.[49]

18. The Attorney-General responded that the requested subpoena is "irrelevant, fishing, speculative and oppressive" and "is not *bona fide* but meant to embarrass [President Kabbah] and cause mischief and [that it is] therefore an abuse of the process of the Trial Chamber [...]".[50]

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[40] Fofana Motion, para. 12.
[41] *Ibid.*, para. 4. *See* also Transcript of the 14th of February, 2006, p. 5.
[42] Fofana Motion, para. 5. *See* also *ibid.*, Annex A.
[43] *Ibid.*, para. 12.
[44] Fofana Reply to Prosecution, para. 23.
[45] Fofana Motion, para. 6. *See* also *ibid.*, Annex B.
[46] Prosecution Response to Fofana Motion, paras 18-19; Prosecution Response to Norman Motion, paras 18-19.
[47] Fofana Reply to Prosecution, para. 22.
[48] Fofana Motion, para. 12.
[49] Transcript of the 14th February, 2006, p. 30.
[50] Attorney-General Response to Fofana Motion, para. 14; Attorney-General Response to Norman Motion, para. 14.

19. To this, Counsel for Fofana replied that the Application is based on available information and diligent investigation so that it is in no way a speculative request, even if, as with any witness who has refused to submit to questioning, there is some degree of uncertainty as to what, exactly, the object of such request will be able to address.[51] Furthermore, in the Applicants' submission, the Attorney-General has failed to make a specific showing as to how the issuance of the requested subpoena would oppress President Kabbah in any discernible manner, and he has also failed to substantiate the allegation that the Application is an abuse of process.[52]

E. Whether President Kabbah can be the object of a subpoena by The Chamber

20. Counsel for Fofana submitted that President Kabbah is compelled to abide by the terms of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court and thus to cooperate with the Special Court at all stages of its proceedings.[53] They submitted that President Kabbah is compellable to appear as a witness before The Chamber because the latter is empowered, by virtue of section 20 of the Ratification Act and of Rule 8, to enforce its orders through the same mechanism available to its municipal counterparts, namely by directing the Inspector General of the Sierra Leone Police to issue a warrant for the arrest of an individual who fails to comply with The Chamber's order pursuant to Rule 54.[54] According to Counsel for Fofana, if President Kabbah ignored an order from The Chamber, he would be in contempt of an order of the Special Court. The remedy would then lie in Rule 8(B), whereby The Chamber may refer the matter to the President of the Special Court to take appropriate action.[55] Counsel for Norman submitted that it should not be presumed that President Kabbah would not come if a subpoena were issued to him, but if he finally did not, then another available option would be to employ the mechanism envisaged by Rule 77(A)(iii) and (C).[56]

21. The Prosecution responded that, since the Application should be denied for the reasons previously set out, it is unnecessary for The Chamber to address the question of whether or not the President of Sierra Leone can claim any privilege in relation to a subpoena.[57] It further submitted that, similarly to the position at the ICTY, this issue must be regarded as an open question before the Special Court.[58]

22. The Attorney-General cited section 48(4) of the Constitution of Sierra Leone as well as the *Blaskic* Appeal Decision before the ICTY in support of the proposition that "[President Kabbah] is not compellable as President and Head of State by reason of the fact that a subpoena requires a judicial penalty to enforce it were it to be disobeyed."[59] As President Kabbah is "the embodiment of the State of

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[51] Fofana Reply to Attorney-General, para. 14.

[52] *Ibid.*, paras 10-16; Norman Reply to Attorney-General, paras 14-17.

[53] Fofana Motion, paras 16-19, citing Article 17 of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone ("Agreement"), section 21(2) of the Special Court Agreement, 2002 (Ratification) Act, 2002 ("Ratification Act") and Rule 8.

[54] Fofana Reply to Attorney-General, paras 17-20; Fofana Motion, paras 20-24, citing section 20 of the Ratification Act and Rule 8.

[55] Transcript of the 14th of February, 2006, pp. 14-15.

[56] *Ibid.*, pp. 25-26.

[57] Prosecution Response to Fofana Motion, para. 18.

[58] *Ibid.*, para. 19, citing *Krstic* Appeal Decision, para. 27 and *Milosevic* Decision, para. 67.

[59] Attorney-General Response to Fofana Motion, para. 15, citing National Constitution of Sierra Leone, Act No. 6 of 1991 ("Constitution of Sierra Leone"), section 48(4) and *Prosecutor v. Blaskic*, Case No. IT-95-14-AR108*bis*, Judgement on the

Sierra Leone", it is the Attorney-General's submission that a subpoena cannot be issued to him, and a penalty cannot be enforced against him, were he, as Head of State, to disobey it.[60] According to the Attorney-General, this phenomenon cannot be implied from the provisions of Rule 8 and sections 17 and 20 of the Ratification Act.[61] Furthermore, the Attorney-General argued that, assuming that The Chamber were to grant the subpoena, it "should not act in vain", stressing that "[n]o court in any part of the world has ever made orders [...] that will diminish their authority because [they're] difficult to enforce".[62] He argued that he was not suggesting that The Chamber does not have the power to issue such an order, but that it is instead a "question of the practical enforcement of that order", since "[section] 48(4) of the [Constitution of Sierra Leone] provides that [the President] within Sierra Leone, other than being committed for any offence, cannot be brought before our courts of law". As a result, the Attorney-General would be placed in a very awkward situation because he may be unable to effect that order.[63] The Attorney-General conceded, however, that if The Chamber were to have President Kabbah as a Chamber witness, he would advise him to attend.[64]

23. Counsel for Fofana replied that the President enjoys no immunity from process under either the laws of the Republic of Sierra Leone or international law. As regards the latter, the controlling precedent is not the *Blaskic* Appeal Decision,[65] which the Attorney-General relied upon, as that decision addressed the functional immunity of a state official called upon to produce state documents pursuant to a subpoena *duces tecum*, but the more recent *Krstic* Appeal Decision, which according to Counsel for Fofana supports their proposition that a sitting Head of State enjoys no immunity under international law against being compelled to give evidence before an international criminal tribunal of what he saw or heard in the course of exercising his official functions.[66] Counsel for Norman also maintained that it is specifically contemplated in Article 1 of the Statute of the Special Court that "leaders" do not enjoy immunity from prosecution; surely, then, a "leader" cannot have immunity from being subpoenaed.[67] Counsel for Fofana further submitted that this proposition is supported by the Decision of the Appeals Chamber of the Special Court in the *Taylor* case,[68] and by the Judgement of the Supreme Court of Sierra Leone in the case of *Issa Hassan Sessay, Allieu Kondewa, Moinina Fofana against the President of the Special Court, the Registrar of the Special Court, the Prosecutor of the Special Court and the Attorney-General.*[69]

Request of the Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, 29 October 1997, Appeals Chamber ("*Blaskic* Appeal Decision"), paras 25, 38.

[60] Attorney-General Response to Fofana Motion, para. 15.

[61] *Ibid.*, para. 15.

[62] Transcript of the 14th February, 2006, p. 74.

[63] *Ibid.*, pp. 79-81.

[64] *Ibid.*, p. 83.

[65] Counsel for Fofana had earlier argued, on the basis of the *Blaskic* Appeal Decision, that President Kabbah cannot claim functional immunity from subpoena: Fofana Motion, para. 27. "While so much of the *Blaskic* [Appeal Decision] was concerned with the rights and powers of sovereign States, it must be noted here that the sovereign Republic of Sierra Leone specifically abdicated by treaty a measure of its sovereignty to the Special Court": Fofana Motion, fn. 26.

[66] Fofana Reply to Attorney-General, paras 23-25. *See* also Norman Reply to Attorney-General, paras 24-28.

[67] Norman Reply to Attorney-General, para. 29.

[68] Transcript of the 14th of February, 2006, pp. 9-12, citing *Prosecutor v. Taylor*, Case No. SCSL-03-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, Appeals Chamber.

[69] Transcript of the 14th of February, 2006, pp. 9-12, citing Judgment in the Supreme Court of Sierra Leone, Case No. S.C No. 1/2003, "In the Matter of Application Pursuant to Sections 122, 124, and 127 of the Constitution of Sierra Leone Act No. 6 of 1991 and Part XVI, Rules 89-98 of the Supreme Court Rules Statutory Instrument, No 1 of 1982 and In the Matter of the Constitution of Sierra Leone, Act No. 6 of 1991, Sections 122, 124, 127, 171(15), 120, 108, 40(4), 125 and 30(1) and In the Matter of the Special Court Agreement 2002 (Ratification) Act 2002 (Ratification) (Amendment) Act, 2002 -

The Attorney-General responded that the latter case is distinguishable because it deals with a Head of State who has committed a crime under the Statute of the Special Court or under international law. He also sought to distinguish section 29 of the Ratification Act, which Counsel for Fofana had relied on, because, in the submission of the Attorney-General, it refers to an accused person.[70]

24. As regards the law of Sierra Leone, it is the submission of Counsel for Fofana that, even assuming, *arguendo*, that the rules of international criminal law should somehow give way to the specific provisions of the Constitution of Sierra Leone, the President still enjoys no immunity from appearing as a factual witness before the Special Court in this case for the simple reason that no such immunity is prescribed by the Constitution of Sierra Leone.[71] In the course of the oral hearing, however, Counsel for Fofana stated that "[the application of section 48(4) of the Constitution of Sierra Leone] is only limited [to] the national court[s] where the President can avail himself of the provisions of section 48(4) of [the Constitution of Sierra Leone]".[72] Counsel for Norman added that section 29 of the Ratification Act "revers[ed] the import, implication, relevance and significance" or waived section 48(4) of the Constitution of Sierra Leone for the purposes "of proceedings and processes of the Special Court".[73] According to Counsel for Norman, "[t]he substance of [section 29] seems to be directed also to a denial of immunity for substantive charges" and could become applicable at a future stage if Rule 77 were to be invoked.[74]

II. DELIBERATIONS

A. Introduction

25. In deciding whether or not to grant the Application, The Chamber must first determine the legal standard that it considers applicable to the issuance of a subpoena and then whether or not that standard has been met in the instant case.

B. Standard for issuing a subpoena pursuant to Rule 54

26. Rule 54, entitled "General Provision", provides that: "[a]t the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial".

27. It should be observed that this provision is essentially identical to the provisions found in the Rules of the ICTY and ICTR.[75] Therefore, decisions rendered by these Tribunals and particularly by

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Article 1(1) of the Schedule and the Preamble Thereto, Part III Sections 10, 11(2) 29 and Article 8(1) & (2) of the Statute of the Said Act", 14 October, 2005 ("Supreme Court Judgment"). Counsel for Norman also relied on the Supreme Court Judgement for the proposition that section 48(4) of the Constitution of Sierra Leone is not applicable before an international criminal tribunal: Transcript of 14th of February, 2006, pp. 36-40.

[70] Transcript of the 14th February, 2006, pp. 75-76.

[71] Fofana Reply to Attorney-General, paras 26-27; Fofana Motion, para. 26, citing Constitution of Sierra Leone, Chapter V (the Executive), Part I (The President), section 48(4). *See* also Norman Reply to Attorney-General, para. 23.

[72] Transcript of the 14th of February, 2006, p. 9.

[73] *Ibid.*, pp. 35-36: "[m]aking it absolutely irrelevant and non-applicable is in effect nullifying its force".

[74] *Ibid.*, pp. 39-41.

[75] Rule 54 of the ICTY Rules of Procedure and Evidence provides: "[a]t 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

their Appeals Chamber under this Rule are to be considered of great assistance and do provide proper guidance for the disposition of this Application, [76] more particularly the decisions by the ICTY Appeals Chamber in the cases of *Krstic* and *Halilovic*.

28. The applicant for the issuance of a subpoena pursuant to Rule 54 must, in accordance with that Rule, show that the measure requested is necessary (the "necessity" requirement) and that it is for the purposes of an investigation or for the preparation or conduct of the trial (the "purpose" requirement).[77]

29. The Chamber considers that the "purpose" requirement under Rule 54 imposes on the applicant the obligation to show that the subpoena serves a legitimate forensic purpose for an investigation or the preparation or conduct of the trial against the accused. The applicant must therefore demonstrate a reasonable basis for the belief that the information to be provided by a prospective witness is likely to be of material assistance to the applicant's case, or that there is at least a good chance that it would be of material assistance to the applicant's case, in relation to clearly identified issues relevant to the forthcoming trial.[78] Whether the information will be of material assistance to the applicant's case will depend largely upon the position held by the prospective witness in relation to the events in question, any relationship he may have or have had with the accused which is relevant to the charges, the opportunity which he may reasonably be thought to have had to observe those events or to learn of those events and any statements made by him to the applicant or to others in relation to those events.[79] If the applicant has been unable to interview the prospective witness, the test will have to be applied in a reasonably liberal way, but the applicant will not be permitted to undertake a "fishing expedition" - where the applicant is unaware whether the particular person has any relevant information, and seeks to interview that person merely in order to discover whether he has any information which may assist the applicant's case.[80]

30. The "necessity" requirement under Rule 54 is designed to limit the use of coercive measures to a minimum. Since a subpoena is an instrument of judicial compulsion backed by the threat and the power of criminal sanctions for non-compliance, it is to be used sparingly.[81] The fact that a subpoena is considered to be convenient for an applicant is not a sufficient justification for the possible application of criminal sanctions against individuals to ensure compliance with it. Although we consider that a

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purposes of an investigation or for the preparation or conduct of the trial." Rule 54 of the ICTR Rules of Procedure and Evidence provides: "[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

[76] *See* Articles 14(1) and 20(3) of the Statute of the Special Court. *See* also *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, Trial Chamber, paras 22-25.

[77] *See Halilovic* Appeal Decision, para. 7. *See* also *Milosevic* Decision, fn. 51.

[78] *See Halilovic* Appeal Decision, para. 6. *See* also *Krstic* Appeal Decision, para. 10. The Chamber notes that, contrary to the practice at the ICTY, the ICTR does not require an applicant to clearly identify the issues in the forthcoming trial in relation to which the proposed testimony would be of material assistance; *see, e.g., Bagosora* Decision, para. 4: "[...] the Defence must have a reasonable belief that the prospective witness can materially assist in the preparation of its case". The Chamber is of the view that to require an applicant to clearly identify the issues in the forthcoming trial in relation to which the proposed testimony would be of material assistance is more in keeping with the criteria found in Rule 54 that a subpoena must be "necessary for the purposes of an investigation or for the preparation or conduct of the trial".

[79] *See Krstic* Appeal Decision, para. 11. *See* also *Halilovic* Appeal Decision, para. 6.

[80] *See Krstic* Appeal Decision, para. 11.

[81] *See Halilovic* Appeal Decision, para. 10.

Chamber should not hesitate to use this instrument when it is necessary to elicit information material to the case and to the presentation of one of the parties' cases, it must guard against the subpoena becoming a mechanism which is used routinely as part of trial tactics.[82] Furthermore, in deciding whether to grant such a subpoena, the Chamber must also consider, in addition to the usefulness of the information for the applicant, the overall necessity of the information in ensuring the trial is informed and fair.[83] We consider that it would be inappropriate to issue a subpoena if the information sought to be obtained is obtainable through other means.[84]

31. The Chamber subscribes to the determination made by the ICTY Appeals Chamber in the *Krstic* case that, before granting a subpoena to an applicant, a Chamber must ensure that the applicant has demonstrated a reasonable basis for the belief that the prospective witness is likely to give information that will materially assist the applicant's case with regards to clearly identified issues in the forthcoming trial.[85] Furthermore, as stated by the ICTY Appeals Chamber in the *Halilovic* case, in determining whether or not to issue a subpoena, a Chamber may consider both whether the information the applicant seeks to elicit through the use of the subpoena is necessary for an investigation or for the preparation or conduct of the applicant's case and whether this information is obtainable through other means.[86]

C. Whether this standard is met in the instant case

32. After a careful review of the submissions presented, The Chamber finds that the Applicants' arguments either fail to demonstrate that the proposed testimony would materially assist the cases of the First or Second Accused (the "purpose" requirement) or alternatively fail to show that the proposed testimony is necessary for the preparation or conduct of the trial (the "necessity" requirement). Although The Chamber has addressed the arguments of Counsel for Fofana pertaining to the case of the Second Accused separately from the arguments of Counsel for Norman pertaining to the case of the First Accused, it is cognisant of the fact that, in seeking to show that a subpoena is necessary for the conduct or preparation of the trial, the Applicants have adopted each others' submissions. The Chamber finds that, in the case before it, the mere adoption by an Applicant of arguments made by the other Applicant with respect to the latter's case is not sufficient to demonstrate that the proposed testimony would materially assist the case of the Applicant adopting the arguments.

33. As stated earlier, whether the information is likely to be of material assistance to the applicant will, *inter alia*, depend largely upon the position held by the prospective witness in relation to the events in question. Because both Applicants lay great store by this position when they submit that evidence of material assistance to the cases of the First and Second Accused can be anticipated from President Kabbah's position as President, as Commander-in-Chief and as Minister of Defence,[87] it is necessary as a preliminary issue to determine at least the contours of the position of the prospective witness based upon the various submissions made. President Kabbah was elected President of the

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[82] *See Halilovic* Appeal Decision, para. 10.

[83] *See Halilovic* Appeal Decision, para. 7. *See* also *Prosecutor v. Brdanin and Talic*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, Appeals Chamber, para. 46.

[84] *See Halilovic* Appeal Decision, para. 7. *See* also *Milosevic* Decision, para. 41.

[85] *See Krstic* Appeal Decision, para. 10. *See* also *Halilovic* Appeal Decision, para. 6.

[86] *See Halilovic* Appeal Decision, para. 7. *See* also *Krstic* Appeal Decision, paras 10-12.

[87] *See* Counsel for Norman at Transcript of the 14th of February, 2006, pp. 29, 89.

Republic of Sierra Leone in 1996 and re-elected in 2002.[88] The Attorney-General maintained that "[a]s a result of the rebel incursion and the activities of the CDF, AFRC/RUF, [President Kabbah] was obliged for security reasons to remove himself from the seat of Government in Freetown to a neighbouring State, that is, the Republic of Guinea".[89] Counsel for Fofana responded that "it is a matter of public record that [President Kabbah] was in exile in the Republic of Guinea from May 1997 through March 1998 -a period of eleven months", while "the charges contained in the [Consolidated] Indictment with respect to the alleged culpability of [the Second Accused] span a much broader space of time, namely October 1997 through December 1999, a period of over two years."[90] Thus, in the submission of Counsel for Norman, President Kabbah was President of the Republic of Sierra Leone at all times relevant to the Consolidated Indictment, from 30th November 1996 to December 1999, "during which [period] he served as President in office and also as temporarily ousted President in exile".[91]

(i) With respect to the Second Accused

34. Counsel for Fofana maintained that President Kabbah is in possession of information relevant to the charges in the Consolidated Indictment pertaining to the Second Accused's alleged liability pursuant to Articles 1(1), 6(1) and 6(3) of the Statute. These arguments will be analysed in turn.

(a) "Persons who bear the greatest responsibility" pursuant to Article 1(1) of the Statute of the Special Court

35. Article 1(1) of the Statute provides in relevant parts that "[t]he Special Court shall [...] have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."

36. Counsel for Fofana referred to The Chamber's Decision of 3 March 2004, wherein The Chamber concluded that "in the ultimate analysis, whether or not in actuality the [Second] Accused is one of the persons who bears the greatest responsibility for the alleged violations of international humanitarian law and Sierra Leonean law is an evidentiary matter to be determined at the trial stage."[92] Counsel for Fofana argued that President Kabbah is in a position to give evidence regarding the relative culpability of the three Accused in this case in order to determine who bears the "greatest responsibility" pursuant to Article 1(1) of the Statute. In their submission, such assessments of comparative responsibility are absolutely crucial for the purposes of Article 1(1) of the Statute.[93] According to Counsel for Fofana, they "must be given the opportunity to address the potential culpability of every other actor to the conflict -individuals and organizations alike", and it is with this aim that they seek to subpoena President Kabbah.[94]

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[88] Attorney-General Response to Fofana Motion, para. 4.
[89] *Ibid.*, para. 6.
[90] Fofana Reply to Attorney-General, para. 8.
[91] Transcript of the 14th of February, 2006, p. 28.
[92] *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, 3 March 2004, Trial Chamber ("Decision on 'Greatest Responsibility' Requirement"), para. 44.
[93] Fofana Motion, para. 13, citing, *inter alia*, Decision on 'Greatest Responsibility' Requirement, para. 44.
[94] Fofana Reply to Prosecution, para. 15.

37. In the first place, in light of the submission by Counsel for Fofana that the "greatest responsibility" lies, apart from with President Kabbah, with "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"[95], The Chamber is not satisfied that issuing a subpoena to President Kabbah on the basis that he could testify on the relative culpability of the Second Accused, where the information is obtainable through other means, would, in the existing circumstances, be a "necessary" measure. Therefore, The Chamber finds that this would not constitute a sufficient basis for issuing a subpoena.

38. Furthermore, even if it were to be demonstrated that President Kabbah is or could be said to be one of the persons who bear the greatest responsibility, this would not affect the allegation that the Second Accused could also be one of the persons who bears the greatest responsibility. In addition, it would not mean that the Second Accused would be absolved of any criminal responsibility that he would otherwise have. This evidence is not relevant for the purposes for which it is being sought at this stage. Thus, in The Chamber's opinion, Counsel for Fofana have failed to show that the proposed testimony would materially assist the case of the Second Accused.

(b) Individual criminal responsibility pursuant to Article 6(1) of the Statute of the Special Court

39. Article 6(1) of the Statute provides that "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime."

40. In so far as the responsibility of the Second Accused pursuant to Article 6(1) of the Statute is concerned, Counsel for Fofana submitted that, at the relevant time, President Kabbah "was commanding, materially supporting, and communicating with various members of the alleged CDF leadership", both from Conakry and from Freetown, and that President Kabbah is in a position to provide evidence "on the activities of the CDF".[96]

41. As for the submission that President Kabbah was commanding, materially supporting, and communicating with various members of the alleged CDF leadership, The Chamber fails to understand the materiality of this submission to the case of the Second Accused. In addition, The Chamber finds that the submission on "the activities of the CDF" fails to identify with sufficient specificity either the particular indictment-related issue to which the proposed testimony goes to or, indeed, how this testimony would materially assist the case of the Second Accused. Furthermore, despite the allegation by Counsel for Fofana that "personnel from the CDF travelled to Guinea and periodically held consultation meeting[s] with [President Kabbah]",[97] there is, however, no suggestion that President Kabbah has personal knowledge about what happened "on the ground" so that he could be asked to verify the facts alleged in the Consolidated Indictment. Therefore, there is no legitimate forensic purpose in calling *him* to verify these facts.

42. Counsel for Fofana also maintained that President Kabbah can provide evidence on the existence and extent of the participation of the Second Accused in a common plan, design or purpose for

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[95] *Prosecutor v. Norman et al.*, Fofana Motion for Judgement of Acquittal, 4 August 2005, SCSL-04-14-T-457, para. 24 ("Fofana Rule 98 Motion").
[96] Fofana Motion, paras 13-14.
[97] Transcript of the 14 of February, 2006, p. 20.

the determination of his responsibility pursuant to participation in a joint criminal enterprise.[98] They do not, however, provide any additional explanation as to why they believe this would be the case. This, coupled with the fact that the Consolidated Indictment does not allege that President Kabbah was a party to the common purpose, leads The Chamber to conclude that Counsel for Fofana have failed to show a reasonable basis for their belief that the prospective witness is likely to give information that would materially assist the case of the Second Accused.

43. This said, in their submissions on the relevance of the proposed testimony to the existence of a common plan, Counsel for Fofana referred to the argument that the CDF was fighting to restore President Kabbah's own government.[99] The Chamber is not satisfied that, even if proven, the existence of a common purpose to restore President Kabbah to power would exclude the concurrence of the common purpose charged in the Consolidated Indictment and which, it is alleged, amounted to using "any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone."[100] Therefore, The Chamber fails to see how the proposed testimony would materially assist the case of the Second Accused. Moreover since Counsel for Fofana provides no explanation as to how demonstrating that the CDF was fighting to restore President Kabbah to power might impact upon The Chamber's findings on any element of any crime or mode of liability with which the Second Accused is charged in the Consolidated Indictment. Furthermore, that the CDF was fighting for the restoration of democracy and the restoration of President Kabbah to power is not a matter disputed by the Prosecution.[101]

(c) Superior criminal responsibility pursuant to Article 6(3) of the Statute of the Special Court

44. Article 6(3) provides that "[t]he fact that any of the acts referred to in [A]rticles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

45. Counsel for Fofana submitted that, because President Kabbah is alleged to have been the top figure of the CDF, he could provide evidence relevant to the Article 6(3) charges against the Second Accused, such as evidence on the CDF command structure, including: (i) the duties associated with the position of Director of War; (ii) how orders passed through the chain of command; and (iii) how members of the CDF leadership interacted with one another.[102] While The Chamber recognises that Counsel for Fofana have identified indictment-related issues which, in their submission, the proposed testimony would go to, The Chamber is not satisfied that a subpoena to President Kabbah on the basis that he could testify on the CDF command structure, where the information is obtainable through other

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[98] Fofana Reply to Prosecution, para. 21.

[99] *Ibid.*, paras 19-21: "[...] [f]or the same reasons discussed above, [President Kabbah] will likely be able to shed light on [the Second Accused's] alleged participation in any common plan, design, or purpose, to the extent such existed". *See* also Fofana Motion, para. 13.

[100] Consolidated Indictment, para. 19.

[101] *See* the submission of the Prosecution at Transcript of Status Conference of the 2nd of May, 2006, p. 15: "[t]hat is not in dispute and it has never been challenged that the CDF came to the assistance of the government and the government were extremely grateful". *See* also *ibid.*, pp. 6-7.

[102] Fofana Reply to Prosecution, para. 18; Transcript of the 14th of February, 2006, pp. 19-20.

means, would be a "necessary" measure. Therefore, The Chamber declines to issue the subpoena on this basis.

46. Furthermore, Counsel for Fofana maintained that "[t]he fact that the CDF was fighting to restore [President Kabbah's] own government, in conjunction with the evidence already adduced that CDF personnel travelled to Guinea to attend meetings with the President and further that he was in constant contact with [the First Accused] via satellite phone, implies that [President Kabbah] may have been coordinating the entire CDF effort from Conakry".[103] Again, despite the claim by Counsel for Fofana that this proposed testimony is highly relevant to the Article 6(3) case against the Second Accused and, in particular, to the Prosecution's allegations regarding the existence of a superior-subordinate relationship,[104] it is not sufficient to show how the proposed testimony would materially assist the case of the Second Accused or might impact upon The Chamber's findings on any element of any crime or mode of liability with which the Second Accused is charged in the Consolidated Indictment. The Article 6(3) allegation against the Second Accused is that he bears responsibility for the acts of his subordinates.[105] It is not immediately apparent to The Chamber how the mere contention that President Kabbah is alleged to have been the top official coordinating the efforts of the CDF would constitute a reasonable basis for the belief that he is likely to give information that would materially assist the case of the Second Accused with regards to whether or not those committing the crimes alleged in the Consolidated Indictment were indeed the Second Accused's subordinates, including whether or not he had effective control over them.[106] The Chamber is not satisfied that Counsel for Fofana have made a showing to this effect and consequently they have failed to show a legitimate forensic purpose for the issuance of a subpoena pursuant to Rule 54.

47. Finally, Counsel for Fofana maintained that President Kabbah was specifically mentioned by at least seven Prosecution witnesses, some indicating that he may have played a role within the alleged CDF command structure, and, therefore, the relevance of what President Kabbah may have to say about such testimony is self-evident.[107] While mindful of the fact that the test for a subpoena has to be applied in a reasonably liberal way when an applicant has not been able to obtain a pre-testimony interview from the prospective witness, The Chamber wishes to emphasise that, as we have already stated, an applicant is not allowed for that purpose to embark on a "fishing expedition". In The Chamber's view, the submission by Counsel for Fofana that the relevance of the proposed testimony is "self-evident" amounts to a vague and general assertion which as a result fails to sufficiently substantiate how the proposed testimony would materially assist the case of the Second Accused with respect to any particular indictment-related issue or how it might impact upon the Chamber's findings on any element of any crime or mode of liability with which the Second Accused is charged in the Consolidated Indictment.

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[103] Fofana Reply to Prosecution, para. 19.

[104] *Ibid.*, paras 18-20. The Chamber notes that, in their submission, Counsel for Fofana stated that "[a]ll of this information [...] is highly relevant to the first element of the Prosecution's putative command responsibility case". While Counsel for Fofana do not specify what this element is, The Chamber has taken the reference to the "first element" to mean the existence of a superior-subordinate relationship: *see* Fofana Rule 98 Motion, para. 48.

[105] Consolidated Indictment, para. 21.

[106] *See* Fofana Rule 98 Motion, para. 68: "[i]n sum, because the Prosecution has failed to establish that [the Second Accused] was indeed a superior with effective control over his alleged subordinates [...], the charges against him with respect to Article 6(3) must be dismissed."

[107] Fofana Motion, para. 15.

48. In the course of oral submissions, Counsel for Fofana mentioned, in passing, that only President Kabbah would be privy to the conversation, if any, that took place between himself and the CDF leadership, and that only he can provide information as to whether he gave direct orders and whether he knew of the perpetration of the alleged acts in the places specified in the Consolidated Indictment.[108] Now, whether the Second Accused was in fact put on notice that his subordinates either were about to commit such crimes as are specified in the Consolidated Indictment or had done so is not likely to be affected by any evidence that President Kabbah can give of his own personal knowledge, if any, since there is no suggestion that President Kabbah ever put the Second Accused on notice of such crimes, or knew of such crimes and failed to put the Second Accused on notice of them.[109] As for the passing reference to "direct orders", if it is the case of the Second Accused that the crimes charged in the Consolidated Indictment came about as a result of the Second Accused following orders from President Kabbah, then it should be expressly stated. A mere allusion to such possibility is not sufficient justification in our opinion for The Chamber to exercise its powers of compulsion. Furthermore, even if it were the case of the Second Accused that he was following orders from President Kabbah, this would not relieve him of criminal responsibility. Should he be convicted, it may then be considered in mitigation of punishment if The Chamber determines that justice so requires.[110] Therefore, while it may become relevant in the determination of an appropriate sentence, it would not be relevant for the purposes for which this substantive evidence is being sought at this stage.[111] Thus, in The Chamber's view, Counsel for Fofana have failed to show a legitimate forensic purpose for the issuance of a subpoena.

(ii) With respect to the First Accused

49. Counsel for Norman submitted that President Kabbah's testimony would materially assist the First Accused in rebutting paragraphs 13, 14, 15, 18, 20 and 21 of the Consolidated Indictment, since: (i) in his position as Minister of Defence he appointed the First Accused to the role of Coordinator of the CDF; (ii) the First Accused was directly answerable to him, and the two were in constant contact as to the conduct of the war; and (iii) President Kabbah helped to raise money to pay for the war.[112] The Chamber finds that these submissions fail to identify with sufficient specificity how the proposed testimony would materially assist the case of the First Accused in rebutting paragraphs 13, 14, 15, 18, 20 of the Consolidated Indictment, and further, how it might impact upon The Chamber's findings on any element of any crime or mode of liability with which the First Accused is charged.

50. In addition, Counsel for the First Accused Norman maintained that "[President] Kabbah knew what [the First Accused] was doing at all times because [he] was in contact with [President] Kabbah by satellite phone".[113] However, Counsel for Norman have failed to show that the prospective witness' awareness of the acts of the First Accused at all times relevant to the Consolidated Indictment is something which, if established, would affect the First Accused's case in relation to any particular charge

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[108] Transcript of the 14th February, 2006, p. 24.

[109] *See* Fofana Rule 98 Motion, para. 68: "[i]n the alternative, the Prosecution has failed to demonstrate that [the Second Accused] knew or should have known of any alleged violations of that he failed to take the reasonable and necessary measures to prevent them."

[110] *See* Article 6(4) of the Statute of the Special Court.

[111] *See* Rule 100(A).

[112] Norman Reply to Prosecution, para. 21.

[113] *Ibid.*, para. 21.

or mode of liability in the Consolidated Indictment. Thus, Counsel for Norman have failed to show a legitimate forensic purpose for the issuance of a subpoena pursuant to Rule 54.

51. Furthermore, Counsel for Norman referred to Article 1(1) of the Statute and stated that "[i]f, for one reason or the other, the Prosecution failed to indict [President Kabbah], then it is not their business for them to question the First Accused why [President Kabbah's] evidence is necessary for the proper execution of his defence".[114] The Chamber fails to see the relevance of this submission. If, by this submission, Counsel for Norman was seeking to argue that the prospective witness' testimony would become relevant in determining whether or not President Kabbah is one of those individuals who bear the greatest responsibility, The Chamber has already dismissed this submission in the case of the Second Accused, and its reasons for doing so are equally applicable to this submission.

52. Counsel for Norman also stated that President Kabbah can certainly testify as to what he knows happened to the people of his country and who caused it, which, in their submission, was not the CDF.[115] Again, The Chamber fails to see either the particular indictment-related issue to which the proposed testimony is relevant or, indeed, how this testimony would materially assist the case of the First Accused. In addition, since there is no suggestion that President Kabbah has personal knowledge about what happened "on the ground" (Counsel for Norman maintained that "[the First Accused] was in the field, but President Kabbah was either at the State House or in Conakry"[116]) so that he could be asked to verify the facts alleged in the Consolidated Indictment, there is no legitimate forensic purpose in calling *him* to verify these facts. Somewhat quizzically, Counsel for Norman stated that "this particular knowledge that the President has of events that occurred while he was in exile in Guinea [...] is one of the areas of material importance to the Defence".[117] Again, The Chamber fails to see the relevance of this submission: whether or not the First Accused was in fact put on notice that his subordinates were either about to commit such crimes as are specified in the Consolidated Indictment or had done so is not likely to be affected by any evidence that President Kabbah can give of his own personal knowledge of those crimes, if any, since there is no suggestion that President Kabbah ever put the First Accused on notice of them, or knew of such crimes and failed to put the First Accused on notice of them.

53. Counsel for Norman further submitted that President Kabbah possesses knowledge of the structures of the CDF and could testify about his involvement in that organisation.[118] As for the former, The Chamber is not satisfied that a subpoena to President Kabbah on the basis that he could testify on the CDF command structure, where the information is obtainable through other means, would be a "necessary" measure, and therefore The Chamber declines to issue the subpoena on this basis. As for the submission that President Kabbah could testify on his own alleged involvement in the CDF, it is not sufficient to show how the proposed testimony would materially assist the case of First Accused or how it might impact upon The Chamber's findings on any element of any crime or mode of liability with which the First Accused is charged in the Consolidated Indictment. In the course of the oral hearing, Counsel for Norman supplemented these submissions by stating that President Kabbah's evidence would clarify "most indispensably, those allegations of exercise of authority, command and control over all subordinate members of the CDF".[119] Counsel for Norman do not, however, provide any additional

[114] *Ibid.*, para. 22.
[115] *Ibid.*, para. 24.
[116] *Ibid.*, para. 21.
[117] Norman Reply to Attorney-General, para. 7.
[118] *Ibid.*, para. 7.
[119] Transcript of the 14th of February, 2006, p. 31.

explanation as to why they believe this would be the case. This, coupled with the fact that the Norman Defence Pre-Trial Brief alleges that the CDF "was under the control of a coalition of organisations, including, but not limited to, Economic Community of West African States Monitoring Group ("ECOMOG"), Sierra Leone Army, and various local chiefs and war councils"[120] leads The Chamber to conclude that the issuance of a subpoena to President Kabbah on that basis, *i.e.* that he could give information as to who exercised effective control over the CDF for the purposes of Article 6(3) of the Statute, where the information is obtainable through other means, would not be a "necessary" measure, and therefore declines to issue the subpoena on this basis.

54. Finally, Counsel for Norman, relying, *inter alia*, on statements purportedly made by President Kabbah himself stated that, at the very minimum, the inconsistencies found in those statements (whether it was the crimes of, *inter alia*, the CDF that forced President Kabbah into exile, when it is the submission of Counsel for Norman that the role of the CDF in restoring President Kabbah's government is undisputed[121]) "go to core issues in the Consolidated Indictment, reveal the materiality of the President's anticipated testimony".[122] Again, The Chamber fails to see how the proposed testimony would materially assist the case of the First Accused, and further, how it might impact upon the Chamber's findings on any element of any crime or mode of liability with which the First Accused is charged in the Consolidated Indictment.

D. Conclusion

55. The Applicants are seeking to secure a pre-testimony interview and the testimony of President Kabbah as a prospective witness by way of a subpoena pursuant to Rule 54. According to the provisions of this rule, a subpoena must be "necessary" for "the preparation or conduct of trial". The Chamber, having proceeded to a detailed examination of the Applicants' submissions, finds, for the reasons set forth in the previous part, more specifically part C, paragraphs 32 to 54 inclusive, that the issuance of a subpoena is not warranted in relation to President Kabbah as concerns either the First or the Second Accused. This finding constitutes a sufficient basis to dispose of this Application.

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[120] *Prosecutor v. Norman et al.*, Defence Pre-Trial Brief Pursuant to Revised Order for the Filing of Defence Pre-Trial Briefs (under Rules 54 and 73 *bis*) of 22nd March 2004, 31 May 2004, SCSL-04-14-PT-111, para. 63.
[121] Norman Reply to Attorney-General, para. 11.
[122] *Ibid.*, para. 13.

IV. DISPOSITION

56. For these reasons, and pursuant to the provisions of Rule 54, The Chamber hereby **DENIES** the Motions by Court Appointed Counsel for the Second Accused and Court Appointed Counsel for the First Accused, for the issuance of a subpoena to H.E. Alhaji Dr. Ahmad Tejan Kabbah, the President of the Republic of Sierra Leone, for a pre-testimony interview and for testimony at this trial.

ACCORDINGLY, the Motions are **DISMISSED**.

Hon. Justice Benjamin Mutanga Itoe appends a Separate Concurring Opinion to this Majority Decision.

Hon. Justice Bankole Thompson appends a Dissenting Opinion to this Majority Decision.

Done in Freetown, Sierra Leone, this 13th day of June, 2006.

Hon. Justice Pierre Boutet
Presiding Judge
Trial Chamber I

Hon. Justice Benjamin Mutanga Itoe

[Seal of the Special Court for Sierra Leone]

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TRIAL CHAMBER I

Before: Hon. Justice Pierre Boutet, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Benjamin Mutanga Itoe

Registrar: Mr. Lovemore G. Munlo SC

Date: 13th of June, 2006

PROSECUTOR **Against** SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

SEPARATE CONCURRING OPINION OF HON. JUSTICE BENJAMIN MUTANGA ITOE ON THE CHAMBER MAJORITY DECISION ON MOTIONS BY MOININA FOFANA AND SAM HINGA NORMAN FOR THE ISSUANCE OF A SUBPOENA *AD TESTIFICANDUM* TO H.E. ALHAJI DR. AHMAD TEJAN KABBAH, PRESIDENT OF THE REPUBLIC OF SIERRA LEONE

Office of the Prosecutor:
Desmond de Silva QC
James C. Johnson
Joseph Kamara

Attorney-General and Minister of Justice of Republic of Sierra Leone for Prsident Kabbah:
Frederick M. Carew

Court Appointed Counsel for Sam Hinga Norman:
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Alusine Sani Sesay

Court Appointed Counsel for Moinina Fofana:
Victor Koppe
Arrow J. Bockarie
Michiel Pestman

Court Appointed Counsel for Allieu Kondewa
Charles Margai
Yada Williams
Ansu Lansana

I, HON. JUSTICE BENJAMIN MUTANGA ITOE, Judge in Trial Chamber I of the Special Court for Sierra Leone;

SEIZED of Two Motions filed by the 2nd and 1st Accused respectively, urging The Chamber to issue a Subpoena *Ad Testificandum* against H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone and Head of State;

MINDFUL of the Majority Chamber Decision dated this day, the 13th of June, 2006, denying the said Motions;

Having subscribed to and being in full agreement with the Conclusions of the said Chamber Majority Decision on the said Motions;

MINDFUL of the fact that these Motions are filed in order to compel President Kabbah to appear as a witness on their behalf in the criminal proceedings now on-going against them in Trial Chamber 1;

MINDFUL of the written submissions of The Applicants, of The Prosecution and of the Hon. Learned Attorney General Minister of Justice;

MINDFUL of the oral submissions in Court of The Applicants, of The Prosecution, and of the Hon. Learned Attorney General Minister of Justice on the 14th of February, 2006;

MINDFUL of the provisions of Article 17 of the Agreement between the United Nations and the Government of Sierra Leone, dated the 16th of January, 2002, setting up the Special Court for Sierra Leone;

NOTING of the provisions of Article 6(2) of the Statute of the Special Court;

MINDFUL of the provisions of Article 17 of the said Statute and in particular, its Article 17(4)(e) on the right of the accused to examine, or have examined, the witnesses against him or her and to

obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

MINDFUL of the provisions of the Special Court Agreement, 2002, (Ratification) Act, 2002, and in particular, those of Sections 21(1), 21(2), of Part VI of the said Act and noting in particular, the provisions its Section 29;

MINDFUL as well of the provisions of the Rules 8(A) and 8(B) of the Rules of Procedure and Evidence of the Special Court;

MINDFUL of the written and oral submissions of the Parties as are highlighted and reproduced in **The Chamber Majority Decision;**

TAKING COGNIZANCE of the provisions of the Sections 40, 48(4), 157(1) and 165 of the 1991 Constitution of the Republic of Sierra Leone and in particular, those of Section 48(4);

MINDFUL of the provisions of Rule 54 of the Rules of Procedure and Evidence of the Special Court;

DO HEREBY ISSUE THE FOLLOWING SEPARATE CONCURRING OPINION TO THE CHAMBER MAJORITY DECISION.

I. FACTS BRIEFLY STATED

1. The 2 Applicants to this Motion, Moinina Fofana and Samuel Hinga Norman, are 2 of the 3 Persons charged by The Prosecutor of the Special Court on an 8 Count Indictment for having allegedly committed crimes against humanity and other offences relating to International Humanitarian Law and in violation of Articles 2, 3, and 4 of the Statute of the Special Court for Sierra Leone.

2. On the 14th of July 2005, The Prosecution closed its case. Thereafter, The Defence Counsel for the 3 Accused Persons filed Motions for Judgements of Acquittal in

accordance with Rule 98 of the Rules of Procedure and Evidence. Even though these Motions were partly upheld, The Chamber, in its Judgement on the Motions for Judgements of Acquittal, delivered on the 21st of October, 2005, found, and came to the conclusion, that the evidence so far adduced by The Prosecution was, within the context of Rule 98 of the Rules of Procedure and Evidence, capable of supporting a conviction on what was left of all the 8 Counts of the Indictment. Accordingly, the 3 Accused Persons were put to their Defence. The Chamber, amongst other things, ordered the Accused Persons to file a list of their witnesses they intended to call to testify on their behalf.

3. Amongst the names of witnesses featuring in both the witness lists of the 2nd and 1st Accused, The Applicants in this Motion, is that of H.E. Alhaji Dr Ahmad Tejan Kabbah who is the subject matter of the Motions for the issuance of the Subpoena in question.

4. The Applicants and The Prosecution have made written submissions. In view of the persistent reference in these submissions to the alleged implication and participation of H.E. President Kabbah in the execution of the war, The Chamber, by an Order made on the 19th of January, 2006, directed that the said submissions, including those of The Prosecution, be served on the Hon. Learned Attorney General Minister of Justice of the Republic of Sierra Leone who normally, in litigation, would represent the interests of Government or of The President whenever its or his acts or activities are called to question or are legally challenged before a Court of Law.

5. In view of the undeniable importance and intricacy of the issues raised in the motions and in the submissions of the Parties, The Chamber decided to grant to all the Parties, a right to make oral submissions on issues which they may not have addressed in their written submissions and further, to make some clarifications on certain issues raised in the written submissions.

6. On the 14th of February, 2006, The Chamber heard the oral submissions of Counsel on behalf of the 2 Applicants, of The Prosecution, and of the Learned Attorney General Minister of Justice who was given the option to appear or to be represented in Court for purposes of providing a legal representation for H.E. The President in particular, and the

Government of Sierra Leone in general, particularly in relation to the issues raised against The President as well as the contextual application of the Agreement, the Statute, and the Special Court Agreement, 2002 (Ratification) Act, 2002, are concerned.

7. These Motions are premised, inter alia, on the provisions of Article 54 of the Rules of Procedure and Evidence of the Special Court.

APPLICABLE LAW

8. Section 54 of the Rules of Procedure and Evidence which provides as follows:

'At the request of either party or of its own Motion, a Judge or a Trial Chamber **may** issue such Orders, Summonses, Subpoenas, Warrants and Transfer Orders ***as may be necessary for purposes of an investigation or for the preparation or conduct of a trial.***'

9. Article 17 of the Agreement between the Untied Nations and the Government of Sierra Leone ('The Agreement') which provides, inter alia:

Section 17 (1) The Government shall cooperate with the Organs of the Special Court at all stages of the Proceedings;

Section 17 (2) The Government shall comply without undue delay with any request for assistance by the Special Court or an Order issued by The Chambers;

10. Section 6(2) of the Statute of the Special Court provides as follows:

'The official position of any Accused Persons, whether as Head of State or Government or as a responsible Government Official shall not relieve such persons of criminal responsibility nor mitigate punishment.'

11. Section 48(4) of the 1991 Constitution of Sierra Leone provides as follows:

'While any person holds or performs the functions of the Office of President, no civil or criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his office or private capacity.'

12. The provisions of the Special Court Agreement, 2002 (Ratification) Act, 2002, particularly the following:

PART V - ORDERS OF SPECIAL COURT

Section 20 For the purposes of execution, an order of the Special Court shall have the same force or effect as if it had been issued by a Judge, Magistrate or Justice of the Peace of Sierra Leone Court.

Section 21(1) Any person executing an order of the Special Court shall comply with any direction specified in that order.

Section 21(2) Notwithstanding any other law, every natural person, corporation or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court.

PART VI - ARREST AND DELIVERY OF PERSONS

Section 23 For the purposes of execution, a warrant of arrest issued by the Special Court shall have the same force or effect as if it had been issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone Court.

Section 25 Where a warrant of arrest is executed, the person arrested shall be delivered forthwith into the custody of the Special Court.

Section 29 The existence of an immunity or special procedural rule attaching to the official capacity of any person shall not be a bar to the arrest and delivery of that person into the custody of the Special Court.

13. In addition, Rule 8(A) of the Rules of Procedure and Evidence provides as follows:

> 'The Government of Sierra Leone shall cooperate with all Organs of the Special Court at all stages of the proceedings. Requests by any Organ of the Special Court shall be complied with in accordance with Article 17 of the Agreement. An Order issued by a Chamber or by a Judge shall have the same force or effect as if issued by a Judge, Magistrate, or Justice of the Peace of a Sierra Leone Court.'

14. Rule 8(B) of these same Rules provides as follows:

> 'Except in cases to which Rule 11, 13, 56 or 60 applies, where a Chamber or a Judge is satisfied that the Government of Sierra Leone has failed to comply with a request made in relation to any proceedings before that Chamber or Judge, The Chamber or Judge may refer the matter to The President to take appropriate action.'

II. SUBMISSIONS OF THE PARTIES

The submissions and arguments for the Parties are as follows:

FOR THE FOFANA MOTION

Written Submissions

15. The Fofana Defence Team has this to say in support of their Motion.

- This Motion is brought under the provisions of Rule 54 of the Rules of Procedure and Evidence.

- President Kabbah has refused to testify voluntarily hence, the resort to the Subpoena procedure to compel him to appear before the Court. That President Kabbah made

mention of an informal agreement between himself and the United Nations not to involve himself in Special Court affairs and ended up by expressing his sympathy for the CDF defendants and wished them well, hoping 'that they would be acquitted'.

- The Fofana Defence submits that President Kabbah is in possession of information highly relevant to the charges contained in The Prosecutions Indictment against Fofana.

- That The President's failure to testify in these proceedings would deprive The Chamber of evidence necessary to arrive at a comprehensive and considered Decision in the instant case.

That The President Has Been Mentioned by Several Prosecution Witnesses

16. At least seven Prosecution witnesses have mentioned The President in their *viva voce* testimony at the CDF trial:

i. Witness TF2-140 testified that he travelled to Guinea with Mr Norman where he met Mr Kabbah, then Vice-President Albert Joe Demby, and then British High Commissioner Peter Penfold. According to the Witness, Mr Demby indicated that it was Mr Norman's responsibility to handle security in Sierra Leone during the President's absence, and Mr Kabbah gave Mr Norman a sum of money to support the war effort[1].

ii. Witness TF2-096 testified that Mr Norman arrived at Talia in 1997 along with Maxwell Khobe. According to the Witness, Mr Norman said that "Papa Kabbah" had told him and General Khobe to fight the war together[2].

iii. Witness TF2-190 testified that he travelled to Freetown to receive Mr Kabbah from exile at the invitation of Mr Norman[3].

[1] *Prosecutor v. Norman et al.*, SCSL-2004-14-T, Trial Transcript, 14 September 2004 at 92-96.
[2] *Ibid.*, 8 November 2004 at 17-18.

iv. Witness TF2-001 testified that the Kamajors entered Bo as a group after the coup to restore Mr Kabbah's government[4].

v. Witness TF2-005 testified that he went to Conakry in September, 1997, to inform Mr Kabbah that the Kamajors lacked proper logistics to support their operations. Further, according to the Witness, (i) Mr Kabbah instructed him to contact Mr Norman in Monrovia[5]; (ii) Mr Kabbah sent an envoy to investigate activity of the Death Squad at Sierra Rutile[6]; (iii) Mr Norman had a direct link to Mr Kabbah in Guinea[7]; (iv) Mr Kabbah was the Minister of Defence when Mr Norman was serving as the Deputy Minister of Defence[8]; (v) the CDF , the Sierra Leone Army, and the Sierra Leone Police were under the unified command of Mr Kabbah[9]; and (vi) even though The President had been overthrown, the CDF still regarded him as their commander-in-chief[10].

vi. Witness TF2-014 testified that the aim of the CDF was to restore Mr Kabbah's presidency[11].

vii. Finally, The Prosecution's military expert, Witness TF2-EW1, testified that he believed the SLPP government in exile played a role, at the strategic level, in CDF activities in Sierra Leone, based on reports that Mr Norman communicated with Mr Kabbah by satellite telephone[12].

17. Both Mr Fofana and, upon information and belief, Mr Norman have instructed their respective Counsel that they wish to have questions put to Mr Kabbah concerning the allegations contained in The Prosecution's indictment and the *viva voce* testimony given thus far in the case, as is expressly their right under the Statute[13].

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[3] *Ibid.*, 10 February 2005 at 60.
[4] *Ibid.*, 15 February 2005 at 16-17.
[5] *Ibid.*, 15 February 2005 at 85-86.
[6] *Ibid.* at 96-97.
[7] *Ibid.*, 16 February 2005 at 10.
[8] *Ibid.* at 21.
[9] *Ibid.*, 17 February 2005 at 31.
[10] *Ibid.* at 34.
[11] *Ibid.*, 14 March 2005 at 60.
[12] *Ibid.*, 14 June 2005 at 70.
[13] *See* Statue of the Special Court for Sierra Leone (the "Statute"), Article 17(4)(e), which states that \n accused person shall have the right to, *inter alia*, "examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her".

Rule 54

18. As regards the provisions of Rule 54, the Fofana Defence submits that, 'the proposed injunction must be necessary in order for the requesting party to obtain the material sought' and further, that 'the requested material must be relevant to the proceedings'.

19. That with respect to Subpoenas directed at individuals, The Defence must demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the Parties involved and has been unsuccessful and that The Defence must have a reasonable belief that the prospective witness can materially assist in ***the preparation of its case***.

The President Possesses Relevant Information

20. The Fofana Defence submits that Mr Kabbah is in a position to provide evidence relevant to the charges contained in The Prosecution's indictment against Mr Fofana and his co-defendants. It is submitted that, at times relevant to the indictment, Mr Kabbah was commanding, materially supporting, and communicating with various members of the alleged CDF leadership, both from his exile in Conakry and later from presidential offices in Freetown. As further indicated by The Prosecution's evidence, the Kamajors claimed to be fighting, in part, on behalf of Mr Kabbah with a view to effecting his restoration as the democratically-elected President of the Nation. With respect to the question of who bears the greatest responsibility[14] for the alleged violations of the CDF during the conflict, The Defence submits that Mr Kabbah may himself be among such a group or, at the very least, that he is in a position to give evidence regarding the relative culpability of the three Accused Persons.

The President Enjoys no Immunity from Process Under Sierra Leone Law

21. The National Constitution of Sierra Leone (the "Constitution") provides:

[14] *See* Statute, Article 1(1).

'While any person holds or performs the functions of the Office of President, ***no civil or criminal proceedings*** shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official or private capacity[15].'

22. Learned Counsel states that the Constitution is however, silent as to immunity from process. The Fofana Defence Team in its Submissions, continues.

'For the reasons discussed above, Mr Kabbah is not subject to the so-called "functional immunity" discussed by the ICTY Appeals Chamber[16], nor does he enjoy any statutory immunity under the laws of Sierra Leone or the constitutive instruments of the Special Court. Indeed, it would be inconsistent to acknowledge that a Head of State enjoys no immunity from prosecution – as set forth in Article 6(2) of the Statute and upheld by the Appeals Chamber[17] – but that as to the far lesser assertion of Subpoena power, he is somehow beyond the reach of the law. What is more, to allow Mr Kabbah to hide behind a veil of immunity would be patently at odds with the right of Mr Fofana to call him as a witness in his case[18].'

23. It is not necessary for me to dwell here any longer, either on the written response to The Prosecutions' reply to this Motion or on the oral Submissions of The Fofana Defence, since there are no significant shifts or changes from what is contained in the written Submissions which have been reproduced here. This is an unedited version of the Fofana Submissions.

WRITTEN SUBMISSIONS BY THE HINGA NORMAN DEFENCE TEAM

24. It is legitimate to consider the written Submissions of the Fofana Team as constituting the Submissions in support of the Hinga Norman Motion which was filed after Fofana's.

[15] *See* (Act No. 6 of 1991), Chapter V (The Executive), Part I (The President), Section 48(4) (emphasis added).
[16] *See Blaskic* Judgement, 25, 38.
[17] *See Taylor* Decision, 53; *see also Blaskic* Judgement, 40 ("... in modern democracies ... nobody, not even the Head of State, is above the law".)
[18] *See* n. 16, supra.

25. I say this because in their very brief written Submissions of the 15th of December, 2005, the Norman Defence Team had this to say:

i. Considering the request by Fofana Defence Team, "FOFANA MOTION FOR ISSUANCE OF A SUBPOENA *AD TESTIFICANDUM* TO PRESIDENT AHMED TEJAN KABBAH", filed on the 15th of December, 2005, Counsel for Norman hereby associates with The Fofana Motion for the Issuance of a Subpoena *Ad Testificandum* against H.E. Alhaji Dr. Ahmad Tejan Kabbah, as a witness for Sam Hinga Norman.

ii. The Norman Defence respectfully requests The Trial Chamber to invoke the powers provided for under Rule 54 which provides that: "At the request of either party or its own motion, a Judge or Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for preparation or conduct of the trial", and to compel President Kabbah to appear before the Honourable Court to give evidence on behalf of Sam Hinga Norman, and to further order that he should meet with the Norman Defence Team in advance before his proposed testimony.

26. However, in their reply to The Prosecution's response to the Norman Motion for issuance of the Subpoena, The Norman Defence Team, inter alia, objected to the intervention of The Prosecutor in the matter because according to them, The Prosecutor had no legal stands to object to a Subpoena to a third party over which it has no control. The second reason for their objection to this intervention is that if it were upheld, it will violate the rights of The Accused as provided for in Article 17(4) of the Statute.

27. Surprisingly however, Counsel for Fofana did not reiterate or follow up the objection to The Prosecution's intervention in these proceedings and equally surprisingly, Counsel for Norman expressly withdrew this objection.

28. In their replies to The Prosecution's Response to their Motions as well as to the Learned Attorney General's written and oral Submission, The Fofana and Norman Defence Teams,

besides reinforcing their common grounds outlined in the Fofana Motion and touching on some other issues, did not substantially depart from the general focus and thrust of their fundamental arguments and submissions.

SUBMISSIONS BY THE PROSECUTION

29. I would like to observe here that the contents and focus of the submission made by The Prosecution and dated the 13th of January, 2006, in response to the Fofana Motion are the same as that filed by The Prosecution, still on the 13th of January, 2006, in response to the Norman Motion for the issuance of the Subpoena.

30. It is The Prosecution's submission that the 2 Motions, which are premised on the same grounds, should be dismissed for, as it contends, 'There is no evidence provided in the Fofana Motion that the information sought from President Kabbah affects any issue relevant to the determination of the guilt or the innocence of the Accused Persons in relation to any of the charges in the indictment.'. The Prosecution cites the ICTY case of the PROSECUTION VS. KRISTIĆ, DECISION ON APPLICATION FOR SUBPOENAS, where the following were laid:

i. Whether the information in the possession of the prospective witness is necessary for the resolution of specific issues in the trail (the legitimate forensic purpose requirement) and;

ii. Whether the information in the possession of the prospective witness is obtainable by other means, which is the 'last resort' requirement.

The Legitimate Forensic Purpose Requirement

31. The Fofana Motion argues that President Kabbah possesses "certain information highly relevant to the charges contained in the Prosecution's indictment against Mr Fofana."[19] However, in order to satisfy the "legitimate forensic purpose" requirement, it is not

[19] *Fofana Motion*, para. 3. *See also Fofana Motion*, para. 13, arguing the "Mr Kabbah is in a position to provide evidence relevant to the charges".

sufficient for an applicant for a Subpoena to show merely that the addressee of the Subpoena has information or knowledge that is ***relevant*** to the case. Rather, the applicant for the Subpoena must make an evidentiary showing of "a reasonable basis for his 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".[20] It is not enough that the information requested may be "helpful or convenient" for one of the parties: it must be of ***substantial or considerable assistance*** to the Accused in relation to a ***clearly identified issue*** that is relevant to the trial.[21] It is only where these requirements have been demonstrated that it can be said that the Subpoena is "necessary" within the meaning of Rule 54 of the rules of Procedure and Evidence ("Rules").[22]

32. The Prosecution submits that the Motions do not in any way seek to identify how the guilt or innocence of the Accused could be affected by whether or not the testimony of President Kabbah, on the lines it is solicited by the Accused, is true, and further that even if it were established that the CDF may have come to the assistance of the Lawful Government, the issue remains whether the crimes charged in the indictment were committed by the Accused or not.

The Last Resort Requirement

33. In determining whether an applicant for a Subpoena has satisfied the 'Last Resort' requirement, The Trial Chamber must consider whether the information the applicant seeks to elicit through the use of Subpoena is obtainable through other means.[23] Furthermore, The Trial Chamber must consider not only the usefulness of the information to the applicant but on its overall necessity in ensuring that the trial is informed and fair.[24] The Trial Chamber must take into account not only the interests of the litigants but the overarching interest of justice and other public considerations.[25]

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[20] *Halilović* Appeal Decision, para. 6 (emphasis added). See also *Krstić* Appeal Decision, para. 10; *Milošević* Trial Decision, para. 39; *Prosecutor v. Simba, Decision on the Defence Request for a Subpoena for Witness SHB*, Case No. ICTR-01-76-T, Trial Chamber 7 February 2005, para. 3 (an applicant for a Subpoena "must have a reasonable belief that the prospective witness can materially assist its case").
[21] *Milošević* Trial Decision, para. 39 (emphasis added).
[22] *Ibid.*
[23] *Halilović* Appeal Decision, para. 7; *Krstić* Appeal Decision, paras 10-12; *Prosecutor v. Brđanin and Talić*, "Decision on Interlocutory Appeal", Case No. IT-99-36-AR73.9, Appeals Chamber, 11 December 2002, paras 48-50.
[24] *Halilović* Appeal Decision, para. 7.
[25] *Brđanin and Talić* Appeal Decision, para. 46.

34. In the absence of any clear indication in the Fofana Motion of the specific issues on which the testimony of President Kabbah is sought, it is impossible for The Trial Chamber to assess whether or not evidence of those issues would be obtainable from another source. As the onus is on the applicant to establish that the 'last resort' requirement is met, the Fofana Motion should be refused on the ground that the Defence has not established this.

SUBMISSIONS BY THE HON. LEARNED ATTORNEY GENERAL MINISTER OF JUSTICE

35. The Learned Attorney General, who says he has had the opportunity of reading the Prosecution's Response to the Motion, indicates that he respectfully adopts the arguments, submissions and authorities contained therein. The Learned Attorney General submits as follows:

- That the Subpoena requested in this case is irrelevant, fishing, speculative and oppressive and should be refused by this Honourable Trial Chamber.

- That whatever evidence The President may give if the requested Subpoena is issued, it is unlikely that such evidence would have a direct and important place in the determination of the issues before the Trial Chamber.

36. Citing R.V. Agwuna 12 WACA, 456, the Learned Attorney General submits:

- That a person served with a Subpoena has a right to apply to the Court to set it aside on the ground that such a Subpoena is not bona fide required for the purpose of any evidence that can be relevant and the Court upon such an application, will interfere when it is satisfied the process is being used for indirect or improper objects.

- That the application for the issuance of a Subpoena to The President is not bona fide but meant to embarrass the President and cause mischief and therefore an abuse of process of The Trial Chamber.

- That The President is not compellable, as President and Head of State, by reason of the fact that a Subpoena requires a Judicial penalty to enforce it if it were to be disobeyed.

37. The Learned Attorney General cites Section 48(4) of the 1991 Constitution of Sierra Leone which grants to President Kabbah, immunity from any prosecution for offences committed whilst in office. The Learned Attorney General contends and submits that The President is the embodiment of the State of Sierra Leone and that a Subpoena cannot issue against him in that a penalty cannot be ordered or enforced against him were he, as Head of State, to disobey it.

38. In the light of these arguments, the Learned Attorney General, Minister of Justice submits and urges The Chamber to deny the Motion.

39. Let me say here, that for purposes of this Separate Concurring Opinion, I adopt the submissions of the Parties as reproduced in The Chamber Majority Decision with which I concur in its conclusions.

40. In order to place these two Motions in their proper context and perspective for an informed judicial appraisal, it is necessary to examine the historical background, the reasons and the motivations that led to the creation of the Special Court for Sierra Leone after the gruesome civil war that preceded it. This creation was achieved by virtue of a Security Council Resolution Number 1315 (2000) of the 14th of August, 2000. The reasons and motivations, I would recall here, are stipulated in the Preamble and in Article 1 of the Agreement between the United Nations and the Government of Sierra Leone creating the Special Court. It reads as follows:

Article 1

Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone ***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.

41. These same reasons and motivations are reiterated and reproduced in the Preamble and in Article 1 of the Statute of the Special Court that is annexed to the said Agreement which provide as follows:

Article 1

Competence of the Special Court

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

42. From these provisions, it is not in any doubt at all, that the category of Persons who compulsorily fall within the jurisdiction of the Special Court for prosecution are those '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 the 30th of November, 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone'. The offences for which those who are considered to bear the greatest responsibility for their commission are defined in Articles 2, 3, 4, and 5 of the Statute.

43. Article 6(2) of the Statute stipulates as follows:

> '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.'

44. This provision, in my opinion, is intended to be applicable, and should only be applicable to the category of persons envisaged respectively in Articles 1 of the Agreement and of the Statute, that is, those who bear the greatest responsibility and are to be indicted, or are already indicted, for committing the crimes defined in Articles 2, 3, 4 and 5 of the Statute, and to no one else.

45. In this regard, The Defence, in their submissions, has alleged amongst other things, that The President enjoys no immunity at all from prosecution having regard, not only to the provisions of Article 6(2) of the Statute referred to above, but also, to the provisions of Section 29 of the Special Court Agreement, 2002 (Ratification) Act, 2002, which provides as follows:

> 'The existence of an immunity or special procedural rule attaching to the official capacity of any person shall not be a bar to the arrest and delivery of that person in the custody of the Special Court.'

46. This stand and submission, in my opinion, is erroneous, misleading and unfounded because, as I have already indicated, Article 6(2) of the Statute and all the provisions of the Special Court Agreement, 2002 (Ratification) Act, 2002, particularly those of Section 29, apply only, and should only apply, to those who have been indicted under Articles 2, 3, 4 and 5 of the Statute and also to those witnesses or individuals who are called up in the conduct of the investigations and the trials of this category of indictees who, like the 2 Accused Persons in this Motion, are charged and are being prosecuted for offences under the International Criminal Law regime as defined in the Statute. It is therefore clear, that the provisions of Article 6(2) of the Statute do not concern nor do they relate to or affect the status of President Kabbah who, unlike Milosević and Charles Taylor, is, so far, not an indictee charged with any offence at all, and least still, of any that is defined in Articles 2, 3, 4 and 5 of the Statute of the Special Court.

47. In fact, I would like to say, that the offence of Contempt under Rule 77(A)(iii) of the Rules of Procedure and Evidence to which President Kabbah may be liable for a prosecution in the event of his refusal to respond to the Subpoena if any were to be issued by The

Chamber, is not one of those that is prosecutable either under the provisions of the Agreement or of the Statute because it was not, nor could it, by any stretch of the imagination, have been contemplated by the Security Council, the United Nations and the Government of Sierra Leone when drawing up the Agreement and the Statute. It indeed was not, nor could it have been contemplated either, or even envisioned by the Legislature of the Republic of Sierra Leone in enacting the Special Court Agreement, 2002 (Ratification) Act, 2002, and particularly, in relation to the provisions which the Applicants to this Motion are relying on to seek the issuance, and of course, the enforcement of a Subpoena by This Chamber, if at all it were ever issued against President Kabbah.

48. It should be emphasised here that the Special Court of Sierra Leone, very much unlike other International Criminal Tribunals which are not, in any way, twinned to the Municipal jurisdictions or the laws in the Countries where they operate, is a hybrid Tribunal. It has jurisdiction, not only to draw up its indictments based, not only on International Criminal Law offences and those which are recognised by International Instruments, but also, on those that relate to Sierra Leonean Law or practice should this become necessary in the overall interests of ensuring a fair determination of an issue before a Chamber of the Special Court for Sierra Leone.

49. Certainly, a resort to the purposeful interpretational approach of the provisions in this regard, favours the thesis that the provisions of the Agreement, of the Statute, and of the Special Court Agreement, 2002 (Ratification) Act, 2002, in their ordinary meaning, intend to include and to target only those who, in the judgement of The Prosecutor, were to be or are now indicted and are being tried for bearing the greatest responsibility for offences defined in Articles 2, 3, 4 and 5 of the Statute. It is also clear and should be understood, that the provisions for compelling any witnesses in relation thereto in accordance with the relevant provisions of the Ratification Act 2002, and charging them for Contempt under Rule 77 (A)(iii) of the Rules of Procedure and Evidence if it became necessary, only concerns the normal, routine, and ordinary witnesses, who are called upon to testify in cases concerning the Accused Persons who are International Criminal Law Indictees. It is

important to say here, that Mr. Kabbah, President and Head of State of the Republic of Sierra Leone, does not fall under this category.

50. It is therefore pertinent and important, in order to dissipate all expressed misunderstandings and misinterpretations of the provisions of the Agreement, of Article 6(2) of the Statute and of Section 29 of the Special Court Agreement, 2002 (Ratification) Act, 2002, and finally, of Section 48(4) of the Constitution of Sierra Leone, particularly on the hotly contested subject of President Kabbah's immunity, to note here that the offence of contempt under Rule 77(A)(iii) of the Rules is not classified as a serious violation of international humanitarian law, nor is it a crime against humanity as defined by the Agreement and by the Statute of this Court.

51. I, however, for reasons which I have provided in this Separate Concurring Opinion, would like to emphasise the legal impossibility and impermissibility for this Chamber to issue the Subpoena solicited by the Accused Persons against H.E. The President of the Republic of Sierra.

DELIBERATION

52. For these motions to succeed, the Applicants must of course fulfil the criteria defined in Rule 54 of the Rules of Procedure and Evidence for the issuance of a Subpoena. It is my considered opinion, that in addition, particularly in view of the Presidential status of the person sought to be summoned by virtue of this Subpoena, to also address some other issues with a view to satisfying some concerns which, for purposes of this Separate Concurring Opinion and for a proper determination of these Motions, I consider crucial, challenging, and strategic. These include:

i. Whether the Subpoena can be issued against the Head of State, President Kabbah, notwithstanding notwithstanding the immunity he enjoys by virtue of Section 48(4) of the Constitution, and this, vis-a-vis the legal definition, implications and consequences of issuing this judicial process.

ii. Whether the application for the issuance of the Subpoena, far and beyond the Rule 54 considerations advanced by the Applicants to support their Motions, is not, in the light of the written and oral submissions they have advanced, remotely intended to ridicule or to embarrass The President and Head of State as well as his exalted office, and, whether in this regard,

iii. These motions, again, given the written and oral submissions of The Defence Teams, do not, as the Learned Attorney General Minister of Justice contends, amount to **an abuse of process.**

A) Can These Motions be Granted Under the Provisions of Rule 54 of The Rules of Procedure and Evidence?

53. It is necessary in this regard, to first of all examine and determine whether the legal criteria for the issuance of a Rule 54 Subpoena are satisfied.

Rule 54 provides as follows:

> 'At the request of either Party or of its own motion, a Judge or Trial Chamber ***may issue*** such Orders, Summonses, Subpoenas, Warrants and Transfer Orders ***as may be necessary for purposes of*** an investigation or ***for the preparation or conduct of a trial.***'

54. From the submissions of the Parties, it is clear that these applications are made, not only to secure the appearance of President Kabbah in Court to testify on their behalf, but also for The President preliminarily, and before his proposed testimony, to submit himself to a prior interview with The Defence Teams. The records in this regard, show that even though President Kabbah granted an audience to the Fofana Defence Team, he turned down the invitation to come and appear in Court because, as alleged in the submissions of the 2nd Accused, he, The President, had an informal agreement with the United Nations not to involve himself in the Special Court matters.

55. As far as the 1st Accused, Samuel Hinga Norman is concerned, the records reveal that the President has not responded favourably to receiving The Norman Defence Team in audience notwithstanding persistent requests. If, up to this moment, President Kabbah has not received the Norman Defence Team in audience, and the purport of these Motions is to secure his attendance in Court to testify for the 2 Accused Persons, it is difficult to imagine the posturing of The President in this situation that has been rendered as complex as in now appears, and where it is alleged by the 2 Accused Persons, that The President may also bear the greatest responsibility for the offences that feature in the indictment on which they are charged and on which he, President Kabbah, should also have been indicted.

56. Besides the reason which he has so far revealed in relation to the informal agreement with the United Nations not to meddle in Special Court affairs, President Kabbah has given no other reason as to why he has turned down the requests made to him by Moinina Fofana and Samuel Hinga Norman, to come to This Chamber and testify on their behalf.

Should or Can The Chamber Therefore Proceed to Issue The Subpoena Under Rule 54 and Compel Him to Appear Before it to Testify?

57. It is my opinion in this regard, that for the application to be granted, the Applicants must demonstrate that they have fulfilled the legal criteria and standard set up in Rule 54. It is only after examining these criteria that I will proceed to determine whether or not they have been met before proceeding finally to exercising the discretionary powers conferred under that Rule, to grant or to refuse the application for the issuance of the Subpoena that is solicited by the 2 Accused Persons.

58. It is necessary, for a logical follow up of and an understanding of this Separate Concurring Opinion and the intricacies that accompany the determination of these Motions, to indicate a known fact, which is, that H.E. Alhaji Dr. Ahmad Tejan Kabbah is not just an ordinary Sierra Leonean but also, by a rare coincidence of destiny and history, the current, sitting in, and incumbent President and Sovereign Head of State of the Republic of Sierra Leone who, I would like to add, for this same purpose, was in office at the time, not only

when these Motions for the issue of the Subpoena Ad Testificandum against him were filed and argued, but also continues to be The President and Sovereign Head of State of this Country today, and indeed, at this time that the Decision on these Motions is being rendered.

59. Since this Judicial instrument is sought to be issued and used against him, the President, who occupies a special Constitutional and Legal status, it is necessary, as a preliminary step, and for purposes of this Opinion, to provide the definition of a Subpoena and to examine the consequences that accompany it once it is issued.

60. A Subpoena is defined as:

> 'Latin - UNDER PENALTY - A writ commanding a person to appear before a Court or other Tribunal subject to a penalty for failing to comply' - BLACK'S LAW DICTIONARY, 7TH EDITION, PAGE 1440.

61. In the light of this definition, a Subpoena is, in fact and in law, an instrument of judicial compulsion which is backed by the threat of sanctions for non-compliance. In assessing the stand to be taken in a matter of this nature, I would like to refer to the Decision of The Appeals Chamber of the ICTY in the case of THE PROSECUTOR VS. HALILOVIĆ where that Chamber had this to say about the issuance of Subpoenas, and I quote:

> 'Subpoenas should not be issued lightly, for they involve the use of coercive powers. The Subpoena is a weapon which must be used sparingly. While The Trial Chamber should not hesitate to resort to this instrument where it is necessary to elicit information of importance to the case and to ensure that the defendant has sufficient means to collect information necessary for the preservation of an effective defence, it should guard against the Subpoena becoming a mechanism used routinely as part of trial tactics.
>
> A Subpoena involves the use of judicial power to compel, and as such , it must be used where it would serve the overall interests of the criminal process.'

62. I would like to add here, that it should not be issued at all where its issuance will put the interests of peace, law and order and the stability of the Country and of its Institutions at peril or in jeopardy, and threats which are disruptive of this process which may be created by the issuance of this Subpoena against The President of the Country. In fact, in granting it, the context of the Country such as Sierra Leone, where there is a general will and mobilisation to consolidate the peace after the war, should be recognised and considered.

63. In fact, as Hon. Judge Weinberg de Roca of the ICTY stated in her Opinion, particular caution is needed where the party is seeking to interview a witness who has declined to be interviewed. This is what is so far known from the records, to be President Kabbah's posturing in this matter.

The Legal Standard For The Issuance Of A Subpoena Under Rule 54

64. According to The Defence, the test for relief under Rule 54 is twofold. First, the proposed injunction must be necessary in order for the requesting party to obtain the material sought. Further, the requested material must be relevant to the proceedings and when Subpoenas are directed to individuals, The Defence must demonstrate that it has made reasonable attempts to obtain voluntary cooperation of the Parties involved and has been unsuccessful. Furthermore, The Defence must have a reasonable belief that the prospective witness **can materially assist in the preparation of its case**. The question to be put here is whether President Kabbah, given the facts before me at this point in time, is prepared to or can materially assist the 2 Accused Persons in the preparation of their case.

65. For the Prosecution, the standard is that defined by the ICTY in the case of *THE PROSECUTOR V. KRISTIĆ*, which consists in The Trial Chamber considering the following:

i. Whether the information in possession of the prospective witness is necessary for the resolution of specific issues in the trial (the 'legitimate forensic purpose' requirement) and;

ii. whether the information in possession of the prospective witness is obtainable by other means (the 'Last Resort') requirement.

66. These 2 tests were applied by The Trial Chamber of the ICTY in the case of THE PROSECUTION VS. SLOBODAN MILOŠEVIĆ, where a Motion by the Accused to issue a Subpoena to Mr Tony Blair, the British Prime Minister, and Mr Gerhard Schroeder, the former German Chancellor, to appear and testify on issues that had no direct reference to specific issues that could materially assist the Accused in relation to the indictment preferred against him, was denied.

'The Legitimate Forensic Purpose' Requirement

67. This is intended to limit the issue of the Subpoena for the witness to give evidence that will materially assist the applicant with respect to a clearly identified issue or issues.

The 'Last Resort' Requirement

68. This entails considering whether the information solicited by the Applicant could be or is obtainable through other means.

69. In Our Trial Chamber I Decision dated the 2nd of May, 2006, on SESSAY - MOTION SEEKING DISCLOSURE OF THE RELATIONSHIP BETWEEN GOVERNMENTAL AGENCIES OF THE UNITED STATES OF AMERICA AND THE OFFICE OF THE PROSECUTOR, the doctrine and requirement of specificity was applied. In this case, Counsel for the applicant sought the disclosure to him of exculpatory material under Rule 68 of the Rules of Procedure and Evidence. Counsel particularly wanted to have disclosed to The Defence, the assistance that was offered and given to a witness, General Tarnue, by Dr White, the Special Court Investigator, and or any other investigator. The Chamber

held that the request made by The Defence was too broad, too vague, and indeed unspecific. In dismissing the Motion, we had this to say:

> 'Furthermore in resolving this important question, The Chamber must be satisfied that the quest by The Defence has been specific as to the targeted material alleged to be in The Prosecutor's possession, control or custody.'

70. In the case of *THE PROSECUTOR VS. ALLIEU KONDEWA*, which came up before Trial Chamber I, we took the same view. In this case, The Defence, under Rule 68 of the Rules, sought an order to compel The Prosecutor to disclose such exculpatory material in its possession. In that decision dated the 8th of July, 2004, we had this to say:

> 'The Chamber adopts this reasoning and takes the view that any request by The Defence for exculpatory material alleged to be in The Prosecution's possession, custody or control must be specific as to such material.....The Chamber must be satisfied that the request by The Defence has been specific as to the targeted material alleged to be in The Prosecutor's possession, control or custody.'

71. I have no cause today to renege on Our Chamber's stand on the principle we have enunciated and adopted it on issues of this nature that feature in the instant case and where the criterion of specificity of a request is in issue in this Rule 54 Subpoena application has surfaced in another form, this time, on specific facts which a Party must provide and demonstrate, are important to justify the issuance of a Subpoena under Rule 54.

72. The reasons why the Applicants are seeking that a Subpoena be issued against President Kabbah have been amply stated in their submissions. However, for the Motions to be granted, The Defence admits and pertinently submits that it must be shown not only that the requested material is relevant to the proceedings, but also that the prospective witness can materially assist in the preparation of the case.

73. If the crux of the success of the applications is that the requested material should not only be relevant to the proceedings but also, that the prospective witness should be such as can materially assist in the preparation of the case against the Accused Persons, it stands to reason that such requested material should be specifically identified and canvassed with a showing that if made available, it would indeed contribute to determining the innocence or the guilt of the Accused in relation to the offences for which they stand indicted.

74. The specific issues canvassed by The Defence are that The President has been mentioned by 7 witnesses who have testified on how President Kabbah was involved in the war effort. The other issue which The Defence has raised concerns the question of who bears the greatest responsibility for the alleged violations of the CDF during the conflict. In this regard The Defence , to justify why President Kabbah should be called, submits that:

> 'With respect to the question of who bears the greatest responsibility for the alleged violations of the CDF during the conflict, The Defence submits that Mr Kabbah may himself be among such a group or at the very least, that he is in a position 'to give evidence regarding the relative culpability of the 3 Accused Persons'.'

75. I would like to observe here that even if some of the issues that The Defence has canvassed were true, in the light of the Admissions that were made by the Learned Prosecutor of the Special Court during the proceedings on the 8th of May, 2006, those now advanced, to my mind, are irrelevant in making a determination on either the innocence or the guilt of the Accused Persons. For this reason, the arguments by the 2 Accused Persons do not warrant my exercising the discretion conferred under Rule 54 of the Rules, in their favour.

76. The element that is lacking in the submissions of the Accused Person, is one of specificity and furthermore, how it is material to the case against them, and how this material, including the testimony of President Kabbah, will be material in contributing to establishing the case for the Accused Persons.

77. In the absence of such specificity, as was the case in the ICTY case of THE PROSECUTOR VS. SLOBODAN MILOŠEVIĆ, the application for the issuance of the Subpoena must fail.

78. In the double faceted legal standard for the issuance of a Subpoena under Rule 54 that was adopted by the Trial Chamber of the ICTR in the SIMBA CASE, it was held that the requesting party must first demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful and that additionally, the party must have a reasonable belief that the witness can materially assist its case.

79. In this regard as well, I do recall that Trial Chamber II of the Special Court, in its Decision in the case of THE PROSECUTION VS. ALEX TAMBA BRIMA had this to say:

> 'The rule is a general rule in unambiguous language. Clearly, the test for whether the Trial Chamber ought to issue orders sought by The Defence, is whether to do so is necessary (not simply useful or helpful) for purposes of an investigation or, for the preparation or conduct of the Trial.'

80. It is required that the Applicant for the issuance of a Subpoena must fulfil these requirements before a Subpoena can be issued under Rule 54. Here again, I am constrained by the factual realities of this Motion, that the Accused Persons have not demonstrated a showing that the threshold of the 2nd arm of the legal standard so set, has been attained, because it is not clearly and positively established by the Accused, that the 'so-far' unwilling President Kabbah, even as their witness and called at their behest, can or is willing to materially assist their case. The contrary at this stage, from the facts available on the records, indeed appears to be the case.

Application of the Provisions of Article 17 of the Statute in Relation to The Application of Rule 54

81. One of the arguments advanced by The Defence for the success of their Motions is that issuing of the Subpoena is consistent with the rights of the Accused as enshrined in Article 17 of the Statute.

82. Even though The Defence has not expressly submitted this thesis this way, they inferentially are submitting that refusing the application to issue the Subpoena would amount to a violation of the Rights of the Accused under Article 17 and particularly, those of Articles 17(4)(b) and 17(4)(c), and that it is not the business of The Prosecution to raise any objections to their calling their Defence witnesses, like President Kabbah, who they have so decided to call as their witness. They buttress this stand by stating that they never objected to The Prosecution calling any of their Prosecution witnesses who appeared to testify with a view to proving their case against the Accused Persons.

83. I neither share this view nor do I share the insinuation to this effect. It is my understanding of the provisions of Article 17(4)(e) of the Statute that they only apply to those witnesses who are at the beckon and call of the Accused and can voluntarily and at any time, without any constraints, turn up to be interviewed by him or his Counsel or to testify for him depending of course on his availability. It does not, in my understanding, apply to those unwilling, reluctant, or reticent witnesses like President Kabbah, who are not prepared to voluntarily testify and could therefore, depending on the circumstances, become the subject matter of the issuance of a Subpoena.

84. It is my considered opinion, and I do so hold, that once there is a recourse to the Rule 54 Subpoena process against an unwilling, recalcitrant, reluctant or reticent witness, it ceases to be the exclusive legal right of the Accused to have this witness to be obligatorily called on his behalf under Rule 17(4)(e) of the Statute. The attendance and appearance of such witnesses, from the moment Subpoena proceedings are engaged under Rule 54, becomes a matter solely for the determination of The Judge or The Trial Chamber as to whether or not they should, under the discretionary powers conferred on it by Rule 54 of the Rules,

appear to testify. Should The Chamber, in the exercise of that discretion, reject the application for the issuance of the Subpoena, this to my mind, does not amount to a violation of the rights of the Accused defined under Article 17(4)(e) of the Statute.

'Bearing the Greatest Responsibility'

85. One of the reasons canvassed by the Accused for the issuance of a Subpoena to The President is related to the phrase, those 'who bear the greatest responsibility' for the atrocities. They want President Kabbah, as their CDF Commander, to come and testify to the degree of their responsibility in the crimes alleged.

86. I would like to state here, that the phrase, 'who bear the greatest responsibility', as appears in the Agreement and the Statute, is in no way an ingredient of any of the offences that features in the indictment and which is required to be proved by The Prosecution to secure a guilty verdict. More importantly, and in this regard, it does not have the potential, whether established or not, to contribute in determining the guilt or the innocence of the Accused Persons. In fact, the expression 'bearing the greatest responsibility' is just an expression of art relating to the standard to be applied in the choice of the category of those to be indicted, albeit only some, but certainly, not all of them.

87. In this regard, it is necessary to indicate, and this a very well known principle, that there is prosecutorial discretion which determines who to prosecute and who not to, and that in the process, The Prosecutor, in the exercise of this discretion which is vested in him, may decide not to prosecute a culprit even if it is alleged or popularly known that he bears the greatest responsibility for the atrocities committed in this Country.

88. The legal position and message is clear in this regard. The fact that some other people who may also be said to bear the 'greatest responsibility' for the offences that were committed during the civil conflict are not indicted, does not in the least, exonerate or exculpate the 2 Applicants from the crimes for which they stand indicted, nor does it constitute a legal defence in their favour in relation thereto.

89. It stands to reason therefore that this ground fails to meet up with the Rule 54, standards for not being in consonance with the requirements of the 'Legitimate Forensic Purpose' or the 'Last Resort' principles even though it has been The Defence position that such assessments by President Kabbah of their comparative responsibility are absolutely crucial.

90. On this analysis, it is clear that the notion of the unwilling President Kabbah appearing to explain their degree of responsibility as a test to fulfil under Rule 54, does not assist their Motions which accordingly, should fail.

91. These 2 applications however fail on the grounds of lack of the element of specificity and further, that even if the allegations were true or correct, it would have no bearing on the questions of the Accuseds' guilt or innocence of the charges for which they are indicted.

92. Further beyond, and in addition to the 'Legitimate Forensic Purpose' and the 'Last Resort' requirements that have been enunciated in the ICTY KRISTIĆ DECISION and adopted in the MILOŠEVIĆ CASE and in the ICTR Case of THE PROSECUTION VS. SIMBA, I consider that other relevant issues should be addressed in the course of considering Rule 54 Subpoena Motions. I have taken them into consideration in writing this opinion and they have, including the ICTY Judicial precedents, influenced my reasoning in this Separate Concurring Opinion. They include:

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

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

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

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

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

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

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

93. In the light of the above analysis and considering all the facts and the law that have been canvassed by the Accused Persons to obtain the issuance of the Subpoena against President Kabbah under Rule 54 of the Rules, I am of the opinion that the standard and threshold set by the Rule, for such Applications to succeed, have not been reached and that the said Motions must therefore fail.

B) Does President Kabbah Enjoy Any Immunity At All?

94. In my opinion, a consideration and an analysis of the questions raised and relating to President Kabbah's immunity is very crucial and capital in the determination as to whether these Motions should be granted or not. This issue is on the table for examination because of the submissions by The Defence Teams which contend that he enjoys no immunity from the service of processes and also because of the very nature and legal definition and the consequences of a Court issue a Subpoena.

95. To answer this question, I have taken cognizance of what the situation would be on a strict construction of the provisions of the Constitution of Sierra Leone and the necessity, as part of the duties of The President of the Republic, to ensure respect for international

treaties. However, giving a strict interpretation in this regard, as The Defence seems to suggest, of the provisions of Section 48(4) of the Constitution which makes no mention of immunity from the issuance or the service of processes like a Subpoena and The President's appearance as a witness of fact, would not only be unrealistic but would also be counter productive and indeed not in harmony with the principles of statutory interpretation in that it would produce absurd results.

96. In this regard it is argued that Section 29 of the Ratification Act, which virtually re-enacts the provisions of Article 6(2) of the Statute of the Special Court, strips the President of any immunity. This view, to my mind, is totally erroneous and misconceived in that both Section 29 and Article 6(2) were enacted to be applicable, as I have mentioned in paragraphs 44, 45, and 46 of this Opinion, only to persons or indictees charged, or yet to be charged, and tried under the offences defined only and exclusively in Articles 2, 3, 4 and also 5 of the Statute, and not for Persons like President Kabbah, who is not an indictee of this category or any at all.

97. The second contention is that President Kabbah enjoys immunity from prosecution and civil actions but enjoys no immunity from service of processes like a Subpoena even though those lower in his hierarchy, namely, the Speaker, Members of Parliament and the Clerk of Parliament, under Section 101(1) of the Sierra Leone Constitution, are explicitly granted an immunity from appearing as witnesses. But this immunity, it should be understood, is only valid when they are in Parliamentary Sessions.

98. It should be said here that The President belongs to a different category and regime of immunities. The submission by The Defence that he is not immune from the issuance and the service of processes is superficial, ill conceived, and misdirected, because if Members of Parliament can be said to enjoy temporal immunity from appearing as witnesses whilst they are in Parliament, there is no reason, nor is there an logic for excluding The President from enjoying immunities enjoyed by his inferiors. This interpretation gives rise to an absurdity. In fact, his immunity under Section 48(4) of the Constitution should ordinarily include, not only immunity against criminal and civil actions, but also against Subpoenas, other Court processes, or even being compelled to appear in Court as a factual witness.

A Recourse to The Rules and Principles of Statutory Interpretation in Order to Resolve this Issue

99. One of the cardinal principles of statutory interpretation is that a statute should not be construed in a manner that would give rise to an absurdity.

100. The President, is as well the Head of State and finds himself at the top of the State machinery. Article 48(4) gives The President immunity from criminal and civil action but not for service of processes such as a Subpoena, nor does it grant him immunity to appear as a witness of fact.

101. In that same Constitution, Section 102(1) grants to the Speaker, the Parliamentarians and the Clerk of the House, immunity against the services of processes and their appearing as witnesses, 'but only when they are in session'.

102. The Defence Teams, in their submissions, contended that President Kabbah is:

1. Not above the Law;
2. That Section 48(4) of the Constitution does not grant him immunity against the issuance and service of processes like the Subpoena;
3. That Section 48(4) of the Constitution does not grant him immunity from appearing in Court as a factual witness of fact.

103. The absurdity in these constitutional provisions is that The President enjoys immunity from prosecution for a more grave and serious situation like the commission of an offence, even if he committed murder, but enjoys no such immunity for the issuance and service of processes on him, for which his inferiors in hierarchy enjoy under Section 101(1) of the Constitution and even though the Speaker, the Parliamentarians and the Clerk, do not enjoy the more important, and broadly based and more encompassing immunity guaranteed to The President under Section 48(4) of the Constitution.

104. In order to avoid an absurd result in the interpretation of Sections 48(4) and 101(1) of the Constitution, it is my view, that it is perfectly legal and permissible, under the Absurdity Rule principle, to integrate by analogy and read the provisions of Section 101(1) into those of Section 48(4) so as to avail The President of an immunity from the issuance and service of processes and compelling him to give evidence as a factual witness.

105. Furthermore, it has been contended that The President enjoys no immunity in so far as the International Instrument, the Statute, in its Article 6(2) and Article 29 of the Special Court Agreement, 2002 (Ratification) Act, 2002, prohibits him, as a Head of State, to lay a claim to immunity.

106. Here again, The Defence appears to have opted for the application of the 'Golden Rule' in the interpretation of those Statutes which, even given their ordinary meaning in the context in which they were adopted, do not support the position of The Defence. In fact, I would say here that it is when you interpret the Statute and the Ratification Act, 2002, the way The Defence conceives it, that one runs into an absurdity, which law, and particularly in matters of statutory interpretation, must be avoided in all circumstances and at all costs, because it has the potential of creating a dangerous mischief that could produce a disaster which was not intended by the legislator.

107. In this regard, it is pertinent to reiterate here, the 'Golden Rule' in matters of statutory interpretation. It is that the Courts must adhere to the ordinary sense or 'plain meaning' of words in a Statute unless it leads to an absurdity, repugnance or inconsistency. In this domain, a Court which is placed in such a dilemma, has to seek recourse to an established technique in statutory interpretation that seeks to avoid absurd and unjust consequences that result from the application of legislation to particular facts and circumstances. This approach is governed by the ***'Consequential Analysis Rule'*** or the ***'Absurdity Rule'***. This allows a Court or Tribunal to take into consideration the consequences of applying legislation in a particular case and to seek to avoid the consequences that may be deemed to be absurd.

108. The justification for this, as was enunciated by R. SULLIVAN in his Treatise, STATUTORY INTERPRETATION (Ottawa: Irwin Law 1997), is that an interpretation of a particular Statute that leads to consequences that are absurd or otherwise unacceptable, is presumed not to have been intended by the author of the Statute.

109. In fact in the case of GREY V. PEARSON (1857), 29 L.T.O.S. 67, it was said that where absurd consequences result according to the Rule, Courts are permitted to modify the ordinary sense of the words in the Statute to resolve or avoid the absurdity.

110. Indeed, where there is ambiguity in a Statutes' text, and where one interpretation is more plausible, it is appropriate for the Court to avoid the interpretation leading to absurdity in favour of one that both avoids absurdity and is more plausible.

111. In their submissions to back up these Motions, The Defence Teams have only proposed the application of the 'Golden Rule' in the interpretation of Statutes which I have had to examine in order enable me to arrive at certain findings. They include for instance.

i. That since Article 48(4) of the 1991 Sierra Leonean Constitution only grants immunity to President Kabbah for criminal and civil suits, The President cannot claim immunity from service of ordinary process like the Subpoena.

ii. That Article 6(2) of the Statute of the Special Court, a product of an international legislation or agreement, and Section 29 of the Special Court Agreement, 2002 (Ratification) Act, 2002, a Sierra Leonean legislation which gives effect to that international legislation, must be interpreted strictly.

112. If this were accepted, it would mean that The President cannot enjoy the immunity which he otherwise enjoys, and should in fact enjoy, under the provisions of Section 48(4) of the Constitution, and further, that an interpretation in this sense would, as I have pointed our in Para 95, give rise to an absurdity, given the real intentions of the authors of those 2 statutory instruments.

113. Indeed, the main basis for justifying the claim for Presidential immunity even in respect of processes, particularly from the issuance of a Subpoena, is that the State is the source of any immunity attaching to its Head of State and that the State has an interest in avoiding the disclosure of information that would be detrimental to the national security or some domestic or foreign policy interests of the State.

114. The creation of the Special Court for Sierra Leone, I would imagine, certainly involved delicate and protracted diplomatic and political negotiations in which President Kabbah, as the Head of this Country's diplomacy, must certainly have been involved. I imagine that his replies to some of the questions which would be put to him in this regard, and which might require a revelation of some classified foreign policy issues, particularly those relating to the creation of the Special Court, would be met with a plea of privilege if at all he ever were to appear to testify.

115. If it could be conceded, as The Defence contends, that the President is not above the law and that he enjoys no immunity from processes, it is my opinion that this submission, even though it finds grace in the universally accepted doctrine of equality of all before the Law, has its limitations in terms of its practical application. The reality is that not all Sierra Leoneans enjoy the immunity that is conferred on The President under Section 48(4) of the Constitution which provides as follows:

> 'While a person holds or performs the functions of the Office of the President, no civil or criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official or private capacity.'

116. The Norman Defence, I note, in his reply dated 30th January, 2006, to the Learned Attorney General's written Submissions, contends in this regard and submits that a Subpoena is not a civil or criminal proceeding instituted or continued against him and that Section 48(4) of the Constitution has no application because The President does not have any immunity under the Constitution of Sierra Leone from appearing as a factual witness before the Special Court.

117. In making these submissions, the Norman Defence Team has not addressed the issue of the nature and the consequences that are contingent to the issue of a Subpoena. In the light however, of the definition of a Subpoena, which I have already provided in an earlier analysis, it is my opinion, and I do so hold, that the Presidential immunity from a Prosecution that is guaranteed by Article 48(4) of the Constitution, clearly forbids and precludes the issuance of a Subpoena against The President since it is an order that is backed up with a criminal sanction.

118. In this connection, I do say that the issuance of the Subpoena solicited against President Kabbah becomes illegal and irrelevant and cannot, for reasons of its illegality, be enforceable in view of the fact that the President, under Section 48(4) of the Constitution, enjoys immunity from any criminal prosecution or sanction. In fact, a decision by This Chamber that grants the issuance of a Subpoena, a penal judicial instrument, against President Kabbah, immediately activates the immunity protection mechanism that is defined under Section 48(4) of the Constitution, to shield him from any criminal action.

What Is the Position In International Customary Law?

119. This issue was raised in the Kristić case where The Appeals Chamber of the ICTY held that:

> 'there is, in principle, no functional immunity enjoyed by State Officials against being compelled by the ICTY to give evidence of what the Official saw or heard in the course of exercising his or her official functions, but added that no issue arises for determination in this case as to whether there are different categories of State Officials to whom such immunity may apply.'

120. The Prosecution in this regard, in its submissions dated the 13th of January, 2006, in reply to the Norman Motion, had this to say:

'....in other words, The Appeals Chamber of the ICTY has left open, the possibility that there may be some categories of Government Officials (such as The Head of State) who do enjoy such an immunity.'

121. I agree entirely with this submission and would, for a clear understanding of the conclusions I will be making on this subject, like to refer to the Rules of Procedure and Evidence which govern the principles of law that are applicable in the Special Court.

122. Under Rule 72bis the applicable laws of the Special Court include:

i. the Statute, the Agreement and the Rules;

ii. where appropriate, other applicable treaties and the principles and rules of International Customary Law;

iii. general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those principles are not inconsistent with the Statue, the Agreement and with International Customary Law and internationally recognised norms and standards.

123. Furthermore, Rule 89(B) of the same Rules provides as follows, but only in relation to the admissibility of evidence:

'In cases not otherwise provided for in this Section the Chamber shall apply rules of evidence which best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.'

124. This important subject that concerns an unsettled but very important legal issue , has not received the attention of Our Appeals Chamber because it has not had the opportunity addressing it as yet. The International Court of Justice has not as yet, either. The Appeals Chamber of the ICTY, has not, even though it came close to it in the KRISTIC CASE, but

could not, understandably, go further into the theme because there was no Kabbah Head of State, scenario before them for adjudication.

125. In the light of the above, I would, as I indeed can, under the provisions of Rule 72bis(ii) and 72bis(iii) of the Rules, resort to adopting the best practices that are obtainable on this subject in other legal systems and Countries in the world, with a view to arriving at a fair determination of the issues raised by the Applicants in this case, that is, that President Kabbah, Head of State, is not, under Section 48(4) of the Constitution, entitled to immunity for service of processes like Subpoenas and from appearing as a factual witness before the Special Court.

126. As far as the application of Rule 72bis(iii) is concerned the position is not clear here in Sierra Leone because it has never arisen for a determination before now. Furthermore, on a plain strict interpretation of Section 48(4) of the Constitution, or on its ordinary reading, The President does not, ex facie, appear to enjoy or to have been granted any immunity from the Subpoena process although this immunity has been granted, albeit on a temporary basis, to the Speaker, the Parliamentarians and the Clerk of the House under Section 101(1) of the Constitution. These Motions therefore, offer us the first opportunity for a legal stand to be taken on this matter of extreme legal, domestic, and international importance.

127. On the stand of International Customary Law on this issue, it is pertinent to say that even though the International Court of Justice, in its Judgement dated the 14th of February, 2002, in the case of WARRANT OF ARREST OF 11 APRIL 2000 (DEMOCRATIC REPUBLIC OF CONGO VS. BELGIUM), sustained that this immunity protects any Head of State from prosecution, it is still not resolved if the immunity also extends to the impossibility of compelling Heads of State to appear as witnesses.

128. I would like however, to observe here, that in France, and precisely in the case of REPUBLIC OF CONGO VS. FRANCE the International Court of Justice is considering the possibility that a French request to Congo's President to testify violates Customary International Law on the grounds of Head of State immunity. The situation remains quite

preoccupying because the solution, in view of our case in hand, is still not clear as we wait for a decision of the International Court of Justice in the case of REPUBLIC OF CONGO V. FRANCE.

129. What is known is that in the domestic laws of some Latin American States such as Argentina, Bolivia, Chile, Panama and Uruguay, the Head of State cannot be compelled to testify but could testify if he or she voluntarily decides to do so.

130. I would like, in these circumstances, to refer to a case in France where President Jacques Chirac was summoned as a witness at the pre-trial stage. The 'Cour de Cassation', which is the equivalent of the Supreme Court of Sierra Leone, on the 10th of October, 2001, held that The President is not under any obligation to appear as a witness since such an obligation is subject to a constraint and where failure to appear attracts a criminal penalty. The text of this Decision of 'La Cour de Cassation' reads as follows in French:

> 'Le President de la Republique n'est pas soumis a L'obligation de comparaitre en qualité de temoin, dès lors que cette obligation est assortie d'une mesure de contrainte par l'article 109 du CPP et qu'elle est penalement sanctionee.'

I would like to suppose that the abbreviation 'CPP' stands for, 'Code de Procedure Penale'.

Translated into English, and to give it the meaning and effect it portrays in the French version, it would read as follows:

> 'The President of the Republic is not subjected to the obligation of appearing as a witness granted that this obligation is accompanied by a measure of constraint defined in Article 109 of the Criminal Procedure Code and is punished by a criminal penalty.'

131. The immunity of The President occupies, in varied degrees and provisions, depending on the Sovereign option of its People, a prominent place in the Constitutions of all independent and Sovereign Nations of the World. The justification for this is that those who rise up to and occupy these privileged positions which are the highest in the rungs of

the ladder of State hierarchy, have been democratically elected after the organisation of a universal suffrage. In view of the fact that these Presidents are the offsprings of those elections, they are looked upon and regarded as the symbols and an embodiment of their States. They ensure the continuity of life in their States and ensure its perenity and that of peace, order and good government.

132. Commonly referred to as 'The Princes' who govern us, Heads of States are granted these immunities, not for their personal aggrandisement, comfort, needs, or aspirations, but because of the seat and position they occupy as the highest ranking Officials and Citizens their Countries. This emphasises the necessity for the dignity, respect and honour that go with it to be conserved and to remain inviolable in order to preserve the integrity and honour that, in this regard, is due primarily and firstly to the Sovereign Nations concerned and subsidiarily, to their Heads of State who are their sovereign representatives. In this process and within this context, Heads of States need to be guaranteed an environment, an atmosphere, and an institutional framework for them to perform their duties in all tranquillity and without any unnecessary interferences which could result from the issuance of a Subpoena.

133. In fact, the issuance of a Subpoenas against President Kabbah, a Head of State, is not of a nature to guarantee this tranquillity and continuity in the exercise of his State functions because it, albeit temporarily, like in a Coup d'Etat scenario, involves unseating the Head of State, arresting him and constraining him, not only to be brought to This Chamber virtually forcibly, but also putting an end to his mandate or suspending him, although on a temporary basis, from the high office which he occupies by virtue of his election and under the Constitution.

134. The temporary arrest or sequestration of the Commander-In-chief of the Armed Forces, not only has the potential of occasioning a disconnect in governance and a breakdown of law and order, but also, a Constitutional crisis and the upsetting of the long-standing Constitutional doctrine of Separation of Powers with the Judiciary interfering with and violating executive powers and privileges. In fact, I would like to observe here that the reasons which may have influenced and motivated 'La Cour de Cassation' in its very

practical and wisdom-driven solution in its Decision, which I consider a landmark, finds their justification and expression here. This is particularly so because the constitutional powers under which Senior Government Officials, including of course, those of the Law Enforcement Agencies like the Inspector-General of Police of the Republic of Sierra Leone who is charged with enforcing criminal and other sanctions that accompany the issuance of processes like the Subpoena are appointed, are vested on the Head of State by virtue of Articles 155(1) and 157(1) of the 1991 Constitution of the Republic of Sierra Leone which provides as follows:

Section 155(1)

> 'There shall be a Police Force of Sierra Leone, the Head of which shall be Inspector-General of Police.'

Section 157(1) of this same Constitution stipulates:

> 'The Inspector-General shall be appointed by the President acting on the advice of the Police Council subject to the approval of parliament.'

135. Although Section 157(1) of the Constitution provides some safeguards, in practice it is indeed The President who fishes around and chooses his nominee for this post before presenting it to the Police Council, whose role is merely advisory, and thereafter to Parliament for vetting.

136. The everyday reality however, is that the Head of the Law Enforcement Agency of Sierra Leone, the Inspector-General of Police, as is the case elsewhere in Nations around the world, is in fact, an appointee of The President, and in this case, and the situation as it is now, of President Kabbah. This is why it would be very interesting to watch this Inspector General, if at all he would ever, and particularly where he knows and sees himself violating the provisions of Section 48(4) of the Constitution, proceed, on the Orders of This Chamber, to arrest President Kabbah who, in addition to his very high status and profile as President of the Republic, appointed him to that office as the Principal Law Enforcement

Agent of the Country, dislodge him from his Constitutional Presidential Offices, and escort him to This Trial Chamber stand a charge of contempt under Rule 77(A)(iii) of the Rules of Procedure and Evidence, for failing to respond to the Subpoena so issued.

137. It is indeed my understanding, conviction and finding that Heads of States are, and should in fact enjoy immunity, not only for criminal and civil suits, but also against the issuance and service of processes like a Subpoena because of the penal component that goes with it and that Courts should refrain from issuing such processes against Heads of States who in fact enjoy quite an extensive regime of immunity including that involving the issuance of a Subpoena and appearing to testify as a factual witness, unless he does so voluntarily.

138. In the light of the foregoing analysis, I am of the opinion, and I do so hold, relying on the historic Judicial Decision and precedent of, 'La Cour de Cassation' of France of the 10th of October, 2001, which confirmed President Jacques Chirac's immunity in this regard, and which I approve of, adopt, and rely on, for me to convincingly hold, that H.E. President Kabbah, President of the Republic of Sierra Leone and Head of State, should also enjoy immunity, not only against criminal or civil action as enshrined in Section 48(4) of the Constitution, which I interpret charitably in the sense of the 'Absurdity Rule', but also against the issuance or the service on him, of any processes like Subpoenas and any other which may have criminal and penal consequences if not complied with.

139. It is also my opinion in the light of the above analysis, that The Chamber cannot, and should not, issue any Subpoena to President Kabbah at all because it is not only unconstitutional and illegal to do so, but would be an ***exercise in futility***, since the said Subpoena, even if issued, can neither be served on him nor executed against him in terms of imposing or meting out a penal sanction against him since, as I have found, he enjoys the protection and immunity granted him by Section 48(4) of the Constitution.

140. If these national practices and decisions like that of 'La Cour de Cassation' could gain the deserved notoriety and jurisprudential consistency in most legal systems of the world, as they should and are indeed already, and it happens that they some day crystallise into a rule of International Customary Law, and eventually, into the Treaty, a major long-

standing municipal and internationally based problem would have received a welcome and laudable solution from France. In the meantime, it is my opinion and I so do hold, that the solution to be adopted at this point in time, and pending the decision of the International Court of Justice in the case of CONGO V. FRANCE, is that provided by 'La Cour de Cassation' of the Republic of France.

141. Accordingly, and in the light of the above, I rule that no Subpoena can be issued against President Kabbah, and that none can be served on him either, even if issued, because of the immunity he enjoys under Section 48(4) of the Constitution of the Republic of Sierra Leone. Accordingly, the Motions of the 2 Accused Persons on this ground also fail.

142. This said however, I still hold that Heads of States who wish to voluntarily testify, should be encouraged to do so as this will certainly contribute to disentangling certain complex issues and problems, and situations which they master better, and which plague social order and the judicial process, where their testimony is more convincing, authentic and reassuring.

ALTERNATIVE MECHANISM

143. The enforcement mechanism of the Subpoena having failed because of the immunity status of The President, a recourse to the alternative approach to that of imposing a penalty for a refusal to comply with the Subpoena so issued by the Court could be necessary so as to bring President Kabbah to accept to voluntarily testify.

144. This consists in the disarmed Chamber referring the matter to The President of the Special Court in accordance with the provisions of Rule 8(B) of the Rules of Procedure and Evidence, for him to take 'appropriate action' which I note, is not defined in the Rules. Is The President of the Special Court then required, thereafter, to raise the matter with H.E. President Kabbah or to negotiate his appearance before The Chamber with him? This would be unacceptable and indeed, a violation of the Constitutional Principle of Separation of Powers.

145. The second option will be for The President of the Special Court to refer the matter to the United Nations and to the Management Committee and to draw their attention to the breach of Article 17 of the Agreement and of Articles 20, 21, 23 and 25 of the Special Court Agreement, 2002 (Ratification) Act, 2002, and a possible application of Article 20 of the said Agreement between the United Nations and the Government of Sierra Leone.

146. Thirdly, The President of the Special Court could just do nothing and wait for the matter to be referred to it on appeal in accordance with the provisions of Rule 73 of the Rules of Procedure and Evidence.

147. The only comment I have to make here is that time is not on our side given the limited life-span of this Court and the completion strategy that is on our desks.

148. Consequently, I consider that the 3rd solution, which is more expeditious, and more in conformity with the judicial process, should be preferred to the second which entails the application of Article 20 of the Agreement which could be protracted by diplomatic exchanges and lengthy negotiations.

Should The Court Act in Vain?

149. I am of the opinion that granting these Motions and issuing a Subpoena against President Kabbah, President of the Republic, who is not only the Commander-In-Chief of the Armed Forces but also the Constitutional Authority that appoints the Head of the Law Enforcement Agency, the Inspector-General of Police, who is supposed, if it came to that level at all, to be charged with executing the instructions of The Chamber including the constraints and coercive procedures and measures that go with issuing the said Subpoena, would be, and is indeed, an exercise in futility.

150. I say this because it is indeed difficult to imagine a scenario, and it is dangerous and imprudent for this Court to create such a precedent, where the Inspector-General of Police, an Appointee of President Kabbah, will, and knowing that he is compromising or breaching the public peace which he is employed and appointed to keep, ensure, and

protect at all times, and knowing that he is violating the provisions of Section 48(4) of the Constitution of his Country, to proceed to arrest President Kabbah, on authority of a warrant issued by This Chamber.

151. Indeed, if an order were made by This Chamber to issue the Subpoena which implies and is coupled with an order for his arrest should he not comply with the Subpoena, it is my opinion, and I so do hold, that the Inspector-General of Police will not, and should not execute such an order which, because it flagrantly violates the provisions of Section 48(4) of the Constitution, is manifestly illegal.

152. The Presidency of the Republic is a sacred national Institution created by the Constitution in all Countries that have opted for the Presidential Regime of Government. In this Country, it is the creation of Section 40 of the 1991 Constitution of the Republic of Sierra Leone.

153. The President of the Republic, as the first citizen of the Land, is the most protected person in this or any other Country. He is bestowed and endowed with entrenched and inviolable Constitutional powers, protections and privileges which Judges, as custodians of the Law, are bound to and must respect and protect at all times as we do in our professional application of other principles of law, in the execution of our duties. In doing this, we are contributing, as we should, to the process of fully re-establishing and consolidating the peace, security, and the Rule of Law in this Country into which so much has been invested to achieve after a long, bitter, and brutal struggle. It would be unfortunate if the contrary were to be our contribution as this would indeed amount to a dereliction of our duty as a Trial Chamber.

154. In fact, ordering the Inspector-General of Police to proceed to arrest President Kabbah for the offence of Contempt and to displace him from his Presidential Office, prevents and prohibits him from performing the functions and duties of the Office of the President under Section 40 of the Constitution for which he took the Constitutional oath to assume and to perform. To say the least, this would create a destabilising situation that could

generate anarchy and disorder which the law is supposed to combat in order to ensure the prevalence of peace.

155. The next issue I would like to address is the legal basis and the necessity in the circumstances, to issue a Subpoena at all against President Kabbah.

156. In my considered opinion, it stands to reason and is indeed logical to so hold, that in Law, and given the very nature and legal definition of a Subpoena, it should not be issued unless the Court issuing it is capable of having the person in question arrested and delivered to it with a view to trying him lawfully, and equally lawfully imposing on him, a penalty for defying the Subpoena.

157. In this regard, I would like to say, that where a Court, as in this case, cannot, for reasons of Sovereign or Constitutional immunity, enjoyed by a person like President Kabbah, against whom the issuance is sought, assume jurisdiction either to order the arrest or the trial of that person, The Court so seized of the application for its issuance should not issue it at all because adopting such a cause of action would amount, not only to an exercise in futility, but also a flagrant violation of the Constitution of this Country, the principles of the law on immunities, and the Constitutional Doctrine of Separation of Powers.

EXERCISE IN FUTILITY

158. In fact, since President Kabbah, as I have held, is protected by the immunity granted to him under Section 48(4) of the Constitution, Why in law, should a Subpoena be issued by The Chamber against him at all if the inseparable penal component of the Subpoena cannot be enforced in the event of its being disregarded or flouted by him? The following analysis will indeed demonstrate the futility of such an exercise.

159. In the case of the PROSECUTION VS. DELALIĆ, The Defence sought the issuance of Subpoenas Ad Testificandum to certain proposed witnesses in circumstances where there were supervening logistical obstacles. The Chamber, in rejecting the application, concluded that this effort of compelling the witness by means of Subpoena was not one

intended to succeed and added that 'it does not, and should not, do anything in vain'. This to my mind, certainly suggests that the Courts should refrain from making any orders or decisions unless they are capable of being enforced, particularly in a situation where the Special Court, like all other International Criminal Tribunals, does not have its own Police Force to enforce its Orders and in fact has, in this regard, to count on the goodwill of the Inspector General of Police, appointed by President Kabbah, to do this for it.

160. This Decision echoes the application of the Common Law doctrine of 'Equity does not act in vain' which has been developed in various aspects of English case law.

161. The House of Lords in the Case of MALLOCH VS. ABERDEEN CORPORATION [1971] All E.R. 1278 enunciated a principle requiring that Courts should not act where the outcome of such action would be 'futile' or 'fruitless'. In fact, the English Court of Appeal elaborated on this principle in WOOKEY V. WOOKEY, [1991] 3 All E.R. 365 and *RE S. (A MINOR)*, [1991] FAM 121. In WOOKEY, a non-molestation order was granted against a mentally incapacitated man who had illustrated violent tendencies towards his wife. On appeal, the court held that the injunction issued would not serve the purpose for which it was intended, namely to deter the husband or regulate his conduct, because he was mentally incapable of understanding the nature of the injunction and would be unfit to plead if charged with a violation of the order. The court held that therefore "any breach of the order could not be the subject of any effective enforcement proceedings," and it would be inappropriate to grant the injunction.

162. In RE S., civil proceedings for assault and battery were instituted against a 15 year old boy by his sister, who sought an injunction to restrain him. A lower court judge refused to grant the injunction on the ground that it could not be enforced by any of the available penalties, namely committal to prison, sequestration of property or fine. The court had no power to commit a minor to prison, and it was unrealistic to order sequestration or a fine, because S had neither property nor money. The injunction was therefore practically unenforceable making recourse to the civil courts an "inappropriate procedure." Both cases cited the principle that "equity does not act in vain," and that ***the courts should refrain***

from granting an injunction unless it is capable of being enforced i.e. unless there is a reasonable chance that the order, if made, will be enforceable. Unenforceable orders, the court indicated, would only add to costs and yet serve no useful purpose.[26] ***In determining whether to grant an injunction the courts must consider whether in practical terms such an order is going to be enforceable, and whether, if it is granted and then becomes unenforceable, this will not merely expose the law to ridicule and contempt.***

163. In *Attorney General v. Guardian Newspapers Ltd. And Others*, [1990] 1 A.C. 109, the English Court of Appeal again referred to the "old maxim that equity does not act in vain," ***meaning that the court should not make orders which would be ineffective in achieving their purpose. The court indicated that if courts were to make orders "manifestly incapable of achieving their avowed purpose," the law would be making itself "an ass."*** In this case, injunctions were issued against the Observer and Guardian newspapers to restrain their editors from disclosing or publishing any information obtained by a particular member of the British Security Service. The papers sought discharge of the injunctions because the information had already been made public by other publications and television programs. The court granted the appeal of the injunctions, ***agreeing with the argument that they were, given the circumstances, futile and irrelevant.***

164. In the light of the futility in issuing this Subpoena against H.E. Kabbah, The President and Head of State, it is my view, because I am of the opinion that it should not be issued at all because, by virtue of Section 48(4) of the Constitution, he is immune, and as I have held, not only from criminal and civil action but also to service of the Subpoena process for him to appear as a witness. In these circumstances, I hold, that the Subpoena, cannot and should not be issued for him to testify for Moinina Fofana and for Samuel Hinga Norman and that the Motions are denied and accordingly dismissed.

[26] See also *Pride of Derby and Derbyshire Angling Association Ltd. And Earl of Harrington v. British Celanese Ltd.* [1953] 1 All E.R. 179 and *Cammell v. Cammell* [1969] 3 All E.R. 929.

Are These Motions Calculated To Embarrass Or To Ridicule The President? Should They Also Be Dismissed On Thes Grounds In That They Amount To An Abuse Of Process?

165. In his response to the submissions of the Fofana Defence Team, urging The Chamber to dismiss the Motions, the Learned Attorney General Minister of Justice argues that the requested Subpoena is irrelevant, fishing, speculative and oppressive, and 'is not bona fide but meant to embarrass President Kabbah and cause mischief and that it is an abuse of the process of Trial Chamber I'.

166. The Fofana Defence Team, in reply to this specific allegation which it denies, submits that the Attorney General has failed to make a specific showing as to how the issuance of the requested Subpoena would oppress President Kabbah and that the Learned Attorney General has failed to substantiate the allegation that the Application is an abuse of process.

167. In this regard, I would like to make reference to some specific submissions made by the 2 Applicants which would appear to lend some support to the allegations of alleged ulterior extra judicial motives that appear to accompany these Motions, which, it is not denied, are ostensibly and primarily based on the legal grounds provided that are defined by Rule 54 of the Rules of Procedure and Evidence:

i. It is the submission of the Fofana Defence Team, which has been endorsed and adopted by the Defence Team of the First Accused, and I quote:

> "that at all times relevant to the indictment, Mr Kabbah was commanding, materially supporting, and communicating with various members of the alleged CDF Leadership both from his exile in Conakry and later from his Presidential Offices in Freetown in."

ii. In page 8 of the, FIRST ACCUSED Reply to The Prosecutions Response to Norman Motion for the Issuance of a Subpoena to The President, filed on the 16th of January, 2006, The Defence Team had this to say and I quote:

'The Prosecution tendered the CDF Calendar which was admitted as an Exhibit which shows the President occupying the topmost position in the hierarchical structure of the CDF where the 1st Accused occupies the 5th position.'

The submission continues:

'If for one reason or the other, The Prosecution failed to indict The President, then it is not their business for them to question the First Accused why The President's evidence is necessary for the proper execution of his defence.'

iii. It is also the submission of the 2nd Accused adopted by the 1st Accused, and I quote:

'With respect to the question of who bears the greatest responsibility for the alleged violations of the CDF during the conflict, The Defence submits that Mr. Kabbah may himself be among such a group.'

iv. Furthermore, it is the submission of the first Accused in his response to the prosecutions reply to the Motion and I quote:

'...that President Kabbah was in constant contact with Norman for input on how the war should be conducted and that Kabbah helped raise money to pay for it. Kabbah knew what Norman was doing at all times because Norman was in contact with Kabbah by satellite phone. Norman was in the field, but Kabbah was either at State House or in Conakry....'

168. In addition to this, Mr Arrow Bockarie, Learned Counsel for Moinina Fofana, submits that President Kabbah could be arrested, forcibly brought before The Trial Chamber, and prosecuted for the offence of contempt if he decides to ignore the Subpoena issued by This Chamber. Learned Counsel, Mr Bockarie, after citing Section 20 of the Special Court Agreement, 2002 (Ratification) Act, 2002, stoutly stood his grounds on this issue during

his oral arguments and submissions on the 14th of February, 2006 when he had this to say and I quote him:

> 'Accordingly Your Honours, as a general matter, This Chamber is empowered to enforce its orders through the very mechanism available to officials of our National Courts namely by directing the Inspector General of Police to issue a warrant for the arrest of any individual who fails to comply with The Chambers, order pursuant to Rule 54.'

169. If this submission were to be upheld, Learned Counsel is saying that, in the event of H.E. President Kabbah ignoring the Subpoena, This Chamber could order the Inspector-General of Police, the Head of the Law Enforcement Agency in this Country, a Kabbah Appointee, armed with a warrant, to proceed to arrest The President and bring him before The Chamber, to stand charged and prosecuted for the offence of Contempt as defined in Rule 77(A)(iii) of the Rules of Procedure and Evidence.

170. This is exactly the situation that relates to the Dictum of the WEST AFRICA COURT OF APPEAL before Their Lordships, The Learned Justices P. Wilson (CJ), Blackall and Abott J. in the case of

R v. 1. Osita Chukwigbo Agwuna
2. Habib Raji Abdallah
3. Fred Anyiam
and 4. Oged Macaulay,

to which the attention of The Chamber was drawn by the Learned Attorney General Minister of Justice in his written submissions

171. Their Lordships in their Decision in this case, very pertinently, had this to say on this subject, and I quote:

'A person served with a Subpoena has the right to apply to the Court to set it aside on the ground that the Subpoena is not bona fide required for the purpose of obtaining any evidence that can be relevant and the Court upon such an application will interfere where it is satisfied that its process is being used for indirect or improper objects.'

172. In this regard, ABUSE OF PROCESS is defined as:

'The improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope.' BLACK'S LAW DICTIONARY 7TH EDITION, PAGE 10.

173. I acknowledge with deference and satisfaction, the AGWUNA CASE that was decided by the Monumental, Revered and Respected West African Court of Appeal, and the definition of Abuse of Process by the Learned Author, BLACK, but note that although these Submissions are very emotional and cautiously belligerent, it is not unusual to expect such exchanges in matters of such grave importance and concern to the Accused Persons, as it is in this case, and which in litigation, I consider to be a normal human phenomenon and sentiment.

174. In fact, these expressions emanate from Accused Persons who are facing, and understandably so, with a lot of apprehensions, anxiety, uneasiness, uncertainty, and to some extent, personal frustrations, the outcome of the trial on the 8 Count indictment that has been preferred against them by The Prosecution. In addition to this, it cannot be said that in the circumstances, their Motions for the issuance of a Subpoena Ad Testificandum against The President, given the background of this matter, is unfounded, even though the grounds exploited by The Defence, as I have found in this Opinion, and as Our Chamber Majority Decision has also found, do not meet the standards set in Rule 54 of the Rules of Procedure and Evidence for the issuance of this Subpoena.

175. In any event, I cannot, at this stage, make a finding of fact on this submission by the Learned Attorney General, to the effect that this Motion is intended to embarrass and

ridicule President Kabbah, because it is, at this point in time, speculative, since I so far, have no clear, convincing, and conclusive proof, that this would indeed happen.

176. However, if President Kabbah were to appear before us at all and questions intended to ridicule or to embarrass him were put to him, the Learned Prosecutor, who no doubt, will be flanked by the Learned Attorney General Minister of Justice, will give H.E. The President, the protection he deserves by objecting to those objectionable questions and leaving the rest to The Chamber to fulfil its role as The Arbiter.

177. Consequently, considering the foregoing analysis on this issue and mindful of the definition of Abuse of Process, it is my finding that these Motions, notwithstanding some expression of passion that can be perceived in the submissions, do not, in my opinion, neither constitute nor do they amount to an Abuse of Process as contended by the Learned Attorney General Minister of Justice.

SUMMARY OF FINDINGS

178. Having examined and analysed so far, the issues and the arguments that have been raised and articulated by Counsel for the 2 Applicants in these Motions, by The Prosecution, and by the Learned Attorney General Minister of Justice on behalf of H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic and Head of State, I now make the following findings.

1. That the submissions and arguments presented to sustain these Motions fail to satisfy the standards stipulated in Article 54 of the Rules of Procedure and Evidence.

2. That a Subpoena is a judicial process that has a penal component and consequences, in that non-compliance with it after its issuance, has the potential of triggering a prosecution under Rule 77(A)(iii) of the Rules of Procedure and Evidence that could possibly give rise to a conviction or to an acquittal.

3. That President Kabbah, by virtue of the provisions of Section 48(4) of the Constitution of Sierra Leone, enjoys an immunity, not only against criminal or civil action, but also against the issuance against him or service on him, of legal processes such as a Subpoena whose issuance, in the context, amounts to a violation of Section 48(4) of the Constitution since a Subpoena, from its definition, has the potential of having the President prosecuted and convicted under the provisions of Rule 77(A)(iii) of the Rules of Procedure and Evidence.

4. That it is legal and permissible, under the 'Absurdity Rule' Principle in matters relating to statutory interpretation, to integrate by analogy, the immunities provided for in Section 101(1) of the Constitution to those provided for in Section 48(4) of this same Constitution.

5. That the issuance of a Subpoena will violate the provisions of Section 48(4) of the Constitution of this Country.

6. That if granting an application for the issuance of a Subpoena has the potential of compromising the interest of peace and stability, of Law and of Order, and as well, violate the Law and the Constitution of this Country, This Chamber should not grant such an application.

III. CONCLUSION

179. For these reasons, and pursuant to the provisions of Rule 54, The Chamber hereby **DENIES** the Motions by Court Appointed Counsel for the Second Accused and Court Appointed Counsel for the First Accused, for the issuance of a Subpoena to H.E. Alhaji Dr. Ahmad Tejan Kabbah, The President of the Republic of Sierra Leone, for a pre-testimony interview and for testimony at this trial.

180. FURTHERMORE, and in the light of the foregoing analysis, findings and conclusions that appear in the said analysis, I do make the following Orders:

1. THAT President Kabbah enjoys immunity under Section 48(4) of the Constitution, not only against criminal or civil action, but also against the issuance against him or service on him of legal processes such as a Subpoena.

2. THAT the Subpoena solicited against him cannot, and should not, be issued because he enjoys this immunity not only under the provisions of Section 48(4) but also under International practice in Legal systems of other Countries in the World.

3. THAT President Kabbah cannot be compelled or Subpoenaed to appear in Court to testify as a witness of fact, as requested by the Applicants, unless he, President Kabbah on his own volition, voluntarily accepts and decides to so testify in these proceedings.

4. THAT the Motions filed by the 2 Accused Persons, do not amount to, nor do they constitute, an Abuse of Process.

5. THAT THESE ORDERS AND DIRECTIVES BE CARRIED OUT.

Done at Freetown this 13th of June, 2006

Hon. Justice Benjamin Mutanga Itoe
Trial Chamber I

[Seal of the Special Court for Sierra Leone]

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TRIAL CHAMBER I

Before:	Hon. Justice Pierre Boutet, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Benjamin Mutanga Itoe
Registrar:	Mr. Lovemore G. Munlo, SC
Date:	13th of June, 2006

PROSECUTOR **Against** SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

Public Document

DISSENTING OPINION OF HON. JUSTICE BANKOLE THOMPSON ON DECISION ON MOTIONS BY MOININA FOFANA AND SAM HINGA NORMAN FOR THE ISSUANCE OF A SUBPOENA *AD TESTIFICANDUM* TO H.E. ALHAJI DR. AHMAD TEJAN KABBAH, PRESIDENT OF THE REPUBLIC OF SIERRA LEONE

Office of the Prosecutor:
James Johnson
Kevin Tavener
Joseph Kamara

Attorney-General and Minister of Justice of the Republic of Sierra Leone for President Kabbah:
Fredrick M. Carew

Court Appointed Counsel for Sam Hinga Norman:
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Alusine Sani Sesay

Court Appointed Counsel for Moinina Fofana:
Victor Koppe
Arrow Bockarie
Michiel Pestman

Court Appointed Counsel for Allieu Kondewa:
Charles Margai
Yada Williams
Ansu Lansana

I. INTRODUCTION

1. I most respectfully dissent from the Majority Decision of my learned and distinguished colleagues, Hon. Justice Pierre Boutet, Presiding Judge and Hon. Justice Benjamin Mutanga Itoe denying the respective Motions filed on behalf of the Second and First Accused for the issue of a *subpoena ad testificandum* to President Alhaji Dr. Ahmad Tejan Kabbah to testify as a Defence witness in the CDF trial. I recognise that there are valid legal reasons for the Court's Majority Decision and that it was a product of much careful deliberation. My disagreement with it stems essentially from reasons anchored in the nature, scope, meaning and application of the Rule facilitating, implementing or executing the mandate of the Special Court *specifically in respect of investigations or the preparation or conduct of a trial, and on the existing state of international law regarding the grant of presidential immunity from criminal process.* In dissenting, I feel compelled to observe that a subject of such legal delicacy and complexity requires a comprehensive judicial exposition of the various facets of the law involved. Accordingly, I take my cue in wrestling with the issues involved from Judge Sir Hersch Lauterpacht when he wrote:

> "there are compelling considerations of international justice and of the development of international law which favour a full measure of exhaustiveness of judicial pronouncements."[1]

2. For the purposes of this Opinion, I do recall here, and place much emphasis on, the importance of the Court's mandate in the context of the absolute necessity of ascertaining the truth as to the events, incidents and episodes forming the factual bases of the charges as laid in the Indictment brought against the Accused persons herein. In this quest for the truth, I am guided by the principle that it is of paramount importance for the Chamber to continue to be flexible in the process of receptivity of evidence, as it had been in the case for the Prosecution, so as to ensure that no relevant evidence vital to the discovery of the truth is foreclosed by reason of legal technicalities, novel artificial judicial conceptual distinctions, or outmoded juridical doctrines not contemplated by the plain and ordinary meaning of the applicable statutory provisions and rules.

3. Let me, further, emphasize that such a flexible judicial approach is dictated, if not rendered imperative, by the doctrine of equality of arms and the principle of fundamental fairness, both of which are the conceptual underpinning of Article 17 (4) of the Court's Statute which guarantees that in the determination of any charge against an accused person he shall be entitled "to obtain the attendance and examination of witnesses on his behalf.... under the same conditions as witnesses against him, " and also of Rule 89 (C) which pre- eminently governs the question of admissibility of evidence.

II. THE ISSUES FOR DETERMINATION

4. Having established the analytical foundation for my Dissenting Opinion, I now proceed to identify the issues for resolution. In my considered view, two logically interrelated issues arise for determination from these Motions. *The first is whether the Special Court for Sierra Leone, an international criminal tribunal, has jurisdiction to issue a subpoena to any person in Sierra Leone, irrespective of status, in connection with the fulfillment of the Court's mandate. The second is, assuming the answer to (i) is in the affirmative, whether the orders sought are necessary for the purposes of an investigation or for the preparation or*

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[1] Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, reprinted edition, Cambridge: Grotious Publications, 1982, page 37.

conduct of the trial. It is not whether the issue of a subpoena to the person sought to be compelled to testify will serve "a legitimate forensic purpose"[2] *or will be "a last resort."*[3] To approach the issue from this perspective is too formalistic and deviates from the settled principle of law that Rule 89 does not authorize an assessment of the reliability of evidence at the stage of admission of the evidence but after the trial when the totality of the evidence has been presented.

5. Framing the issue as one of the legitimacy of the "forensic purpose" of the evidence or *subpoena* or that of an inquiry as to whether or not it will be "a last resort", is, I opine, logically flawed. It clearly inhibits the quest for the truth in so far as the impartial adjudication of the case is concerned, an unquestionably key imperative of the judicial process. The crux of the matter is whether the Special Court has jurisdiction to issue *subpoenas* directed to any person in Sierra Leone. In resolving this issue, recourse must be had to the constitutive instruments of the Court and the relevant rule governing applications of this type, and any applicable régime of international law principles.

III. RULE 54: ITS NATURE, MEANING, AND SCOPE.

6. I take it to be rudimentary that in addressing a judicial task of such complexity, it is necessary to begin with a citation of the specific applicable rule. In this regard, suffice it to say that it is Rule 54 of the Rules of Evidence and Procedure of the Court. The aforesaid Rule provides as follows:

> "At the request of either party or of its own motion, a judge or a Trial Chamber may issue orders, summons, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial"

7. Expounding on the nature, meaning and scope of Rule 54 as the statutory basis for the Orders sought, it is my considered view that the said Rule, given its plain and ordinary meaning (gathered from its precise and unambiguous language)[4], is sufficiently broad to encompass the authority of this Court, an international criminal tribunal (an issue that is now settled law)[5], to issue a *subpoena* directed to any

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[2] See Prosecution's Response, para. 5.

[3] Id.

[4] We have it on high authority in jurisprudence common to the major legal systems of the world, notably, the common law tradition that "if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense." (per Lord Tindal in the *Sussex Peerage Case*, (1844), 8.E.R. 1034 at 1057).

[5] The authority for this proposition is the Appeal Chamber's Decision on Immunity from Jurisdiction in *Prosecutor against Charles Ghankay Taylor*, Case Number SCSL-2003-01-1, 31 May 2004 at para. 42 where the Chamber stated:

> "We come to the conclusion that the Special Court is an international criminal court. The constitutive instruments of the Court contain indicia too numerous to enumerate to justify that conclusion. To enumerate these indicia will involve virtually quoting of the entire provisions of those instruments. It suffices that having adverted to those provisions, the conclusion we have arrived at is inescapable."

See also the Decision of the Supreme Court of Sierra Leone, delivered on the 14th of October 2005 in the case of *Issa Hassan Sesay et al. v. President of the Special Court et al.*, where Renner-Thomas CJ stated:

> "In my opinion any other Court in Sierra Leone exercising jurisdiction apart from those listed as constituting the Judicature cannot be considered as part of the Judiciary of Sierra Leone... It is in the same manner that section 11 (2) of the Ratification Act expressly provides that the Special Court shall not form part of the Judiciary of Sierra Leone. I therefore hold that the

person in Sierra Leone, whether natural, corporate, governmental or otherwise, for the purpose of the fulfillment of the mandate of the Special Court.

8. There is nothing, I reckon, problematic about statutory powers to issue *subpoenas*, nationally or internationally. They do not ordinarily raise issues of constitutionality or illegality. My judicial comprehension of the context and purpose of the Rule leads me to conclude that it would seem fatuous to suggest that Rule 54, by its terms, was intended to be restrictive and limited in scope as to the persons amenable to the Court's jurisdiction for the purpose of the issuing of the orders contemplated by the provision. It would, likewise, appear anomalous if the Court's constitutive instruments, not expressly or impliedly exempting from international criminal process state actors or agents, implicitly, were to be interpreted as requiring a distinction between the individual and official capacities of such persons as a function of whether or not the Court should exercise its discretionary authority to issue *subpoenas* to such persons. I hold that Rule 54 contemplates no such distinction or limiting condition. Hence, it is clear from the said Rule that, as a matter of law, the Special Court can issue process in the form of any of the orders contemplated by its plain and ordinary meaning against any person amenable to its jurisdiction in Sierra Leone.

9. To interpret Rule 54 other than in accordance with its plain and ordinary meaning is to blur the distinction between the process of *statutory interpretation* and that of *statutory construction*. It is settled law that where the language of a rule is plain and unambiguous, it only requires interpretation, and that only where the language is ambiguous and uncertain is construction required. Not to apply the plain and ordinary meaning of an enactment when the language is precise and unambiguous is to give the enactment a strained construction. *Without sounding pedantic, I take it to be an elementary principle of legislative interpretation that words have their plain and ordinary meaning* within the context and purpose of the enactment of which they form part, except where giving effect to such meaning produces extraordinary results.[6]

10. I am fortified in the view of the law that no such exemption is contemplated by the said Rule by the provisions of Article 6 (2) of the Statute of the Court which foreclose any claim of relief from criminal responsibility or mitigation of punishment by a Head of State or government or a responsible government official as an accused in international criminal prosecution. As to the primacy of Article 6

Special Court is not part of the Judiciary of Sierra Leone as established by the by the Constitution." (p.10)

[6] See Terence Ingman. *The Legal Process*, 9th ed. Oxford: Oxford University Press 2002 page 49, See also Richard Ward, *Walker & Walker's English Legal System*, 8th ed. London: Butterworths, 1998, page 34; see also the English case of *Franklin v. A-G (1974) QB 185* where this distinction was emphasized by Justice Lawson. For an analysis of the complexity of the judicial task of statutory interpretation, see *Separate and Concurring Opinion of Hon. Justice Bankole Thompson on Decision on Motions for Judgment of Acquittal Pursuant to Rule 98 in Prosecution Against Sam Hinga Norman, Moinina Fofana, Allieu Kondewa* (Case No. SCSL-04-14-T), 21st of October, 2005 at page 3, footnote 1. For some recent rationalizations in respect of the notion of 'rectifying construction' as a legitimate judicial technique justifying a departure from the plain and ordinary meaning approach to statutory interpretation, see Francis Bennison, *Threading the Legislative Maze-4*, Website: www.FrancisBennison.com. Documents List: 1998. 009 pages 1-5. He sets out four reasons warranting the application of the method of strained construction: (1) where the consequences of a liberal construction are so undesirable that the legislature cannot have intended, (2) where there is an error in the text, (3) where there exists a repugnance between the words of the enactment and those of another enactment, and (4) where there has been a passage of time since the enactment was originally drafted.

(2) in this regard, I draw authoritative support from the Appeals Chamber's observation in the case of *Prosecutor against Charles Ghankay Taylor*[7], that:

> "The path of enquiry into the merit of the claim made by the Applicant essentially starts from the constitutive instruments of the Special Court, and particularly, the Statute. The Special Court cannot ignore whatever the Statute directs or permits or empowers it to do unless such provisions are void as being in conflict with a peremptory norm of general international law."

By parity of reasoning, it is evident that Rule 54 directs the Court to issue, *inter alia, subpoenas.* In this regard, I subscribe to the view that the Court should not impose on itself any inhibiting factors, internal or external, on its authority to do what the Rule permits or empowers it to do merely to be strictly in conformity with the jurisprudence of sister international criminal tribunals that, in the context of their mandates and sometimes contextually different formulations of their own specific rules, in their judicial wisdom, determine their own normative preferences and methodologies in performing the complex and delicate task of judicial interpretation.

IV. EXTENT OF CONSTRUCTIVE RELIANCE ON JURISPRUDENCE OF OTHER TRIBUNALS

11. But this is not to detract from the value to be gained from reliance upon the jurisprudence of other international criminal tribunals in developing one's own jurisprudence when necessary and appropriate. Such reliance is desirable and justified. It must be constructive. However, a key question arises in this context as to the extent to which there should be such reliance. This is pre-eminent, but it is also problematic.

12. In my Separate and Concurring Opinion on the *Decision on Motions For Judgment of Acquittal Pursuant to Rule 98*[8], I articulated a three-dimensional perspective on this issue, to wit, i) that "it may sometimes be judicially prudent to look elsewhere for jurisprudential support for the plain and unambiguous meaning once that meaning has been determined and applied," ii) that "this was a judicial option not a mandate," and iii) that "it is not necessary to have recourse to case-law authorities far afield.....to seek guidance to interpret and apply the plain and ordinary meaning." In effect, it is my judicial conviction that indiscriminate reliance on the jurisprudence of other tribunals can inhibit the constructive growth of one's own jurisprudence. There is no incompatibility in advocating for the application of a doctrine of constructive reliance upon the jurisprudence of other criminal tribunals while at the same time reserving the judicial option of adhering to a principle recognizing the need for the constructive development of one's own jurisprudence. *Indiscriminate reliance has the potential of making us "judges, victims of the fallacy of slippery precedents."*[9]

13. Recognising, as I do, in the context of the present Motions, that legal consistency in the exposition and application of the law justifies recourse to the ICTY *Decision On Assigned Counsel*

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[7] *(Case No. SCSL-04016T), 21st of October, 2005 para. 9.*

[8] Id. *Prosecutor Against Sam Hinga Norman. Moinina Fofanah, Allieu Kondewa* (Case No. SCSL-04-14-T), 21st of October, 2005 at para. 9

[9] See Dissenting Opinion of Hon. Justice Bankole Thompson on *Prosecutor's Motion for Leave to Amend Indictment Against Accused Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Case No-SCSL-04-16-PT), 6th May 2004 at para. 5

Application For Interview And Testimony Of Tony Blair and Gerhard Schroeder for some judicial guidance, it is my considered view that such a choice requires a rigorous analysis of the respective factual contexts of the *Milosevic* applications (the base-point situation) and the instant Motions (the problem situation) so as to ascertain the factual similarities and differences between the two situations for the purpose of deciding whether the familiar analogical form of legal reasoning, to which we are accustomed, warrants the application of the *ratio decidendi* of the *Milosevic* Decision to the present Motions. A close examination of the two sets of factual features and the plausible relationships of similarity and difference between the congeries of those factual features leads to no other conclusion than that there is a major and decisive factual difference between the two situations, *namely, that it was not alleged in the Milosevic situation that Tony Blair and Gerhard Schroeder, as State actors, played a leadership role in mobilising military and logistical resources for any of the warring factions in the Balkan hostilities.*[10] This difference, in my view, is critical in the context of the resolution of the problem situation.[11] Given, therefore, that the two situations are legally distinguishable, where does this leave the immunity argument strenuously canvassed by the learned Attorney-General and Minister of Justice of Sierra Leone?

IV. THE IMMUNITY ARGUMENT

14. Predicated upon the plain and ordinary interpretation of Rule 54, the immunity argument put forward by the learned Attorney-General and Minister of Justice is legally unsupportable and therefore meretricious, both at the international level and in the context of the domestic jurisprudence of Sierra Leone. The principle that no Head of State or Government or responsible government official enjoys immunity from criminal process under international law was recently restated by the Supreme Court of Sierra Leone in the case, SC No.1/2003. Consistent with Rule 72 bis (iii), I take the liberty of quoting the relevant passage from that judgment. In that case, delivering the unanimous judgment of the Court, Renner-Thomas, CJ had this to say:

> "A serving Head of State is entitled to absolute immunity from process brought before national courts as well as before the national courts of third states except it has been waived by the state concerned. The principle was applied by the House of Lords in the Pinochet proceedings (see *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No. 2) at (2002), AC 119 and *R. v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No.3) at (2002), AC. 147 and the *Case concerning the Arrest Warrant of 11th April 2000 (Democratic Republic of Congo v. Belgium before the International Court of Justice)* (2002 ICJ Reports). In contrast, where the immunity is claimed by a Head of State before an international Court the position to be inferred from decisions of various national courts and international tribunals, and the writings of international jurists is that there exists no *a priori* entitlement to claim immunity particularly from criminal process involving international crimes.[12]

15. Endorsing the above statement of the law, I take for granted that, *if* ***a priori*** *there is no entitlement to immunity from international criminal prosecution reserved to a Head of State or government or any responsible government official under international law as regards the perpetration of international crimes,* ***a fortiori*** *international law does not confer any like immunity on such officials from testifying as witnesses in international criminal trials.* The validity of this proposition will become apparent in the further exposition of the law

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[10] *Prosecutor v. Slobodan Milosevic*, Case No. TT-02-54-T, 9 December 2005.

[11] See Steven J. Burton, *Introduction to Law and Legal Reasoning*, Boston: Little, Brown and Company, 1985, pages 25-40 for the various steps in the analogical form of legal reasoning.

[12] *Issa Hassan Sesay et al. v President of the Special Court et. al. Judgement* dated 14th October 2005, at page 13 para. 2.

in the succeeding paragraphs of this Opinion. *Specifically, therefore,in the context of the Special Court, no such immunity is expressly or impliedly provided for in the constitutive instruments or subordinate legislation of the tribunal. To suggest or imply the contrary flies in the face of Rule 54 interpreted in conjunction with Sections 21 (2) and 29 of the Special Court Agreement, 2002, Ratification, Act 2002.* Accordingly, it is pertinent to note that Section 21 (2) enacts thus:

> "Notwithstanding any other law, every natural person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court"

Significantly too, it is noteworthy that Section 29 provides that;

> "The existence of an immunity or special procedural rule attaching to the official capacity of any person shall not be a bar to the arrest and delivery of that person into the custody of the Special Court."

16. To my mind, the cumulative effect of these provisions is that presidential immunity from prosecution has been waived by the State of Sierra Leone. On this view, the President cannot claim immunity from *subpoena* as a logical derivative from his explicit immunity from prosecution since it is waived vis-à-vis the Special Court for Sierra Leone. Therefore, while the President enjoys immunity under the domestic law of Sierra Leone from prosecution by reason of Section 48(4) of the *Sierra Leone Constitution Act No. 6 of 1991*, no immunity to appear as a witness before the domestic courts is granted to the President. *No immunity to appear as a witness before international criminal tribunals, likewise, exists.* One is fortified in this reasoning by the exposition of the law in the *Prosecutor vs. Krstic*[13], a Decision of the ICTY Appeals Chamber, which I find persuasive, and accordingly adopt. On the immunity issue, the Appeals Chamber had this to say:

> "The [Blaskic] Appeals Chamber did not say that the functional immunity enjoyed by state officials includes an immunity against being compelled to give evidence of what the officials saw or heard in the course of exercising his official functions. Nothing which was said by the Appeals Chamber in Blaskic Subpoena Decision should be interpreted as giving such an immunity to officials of the nature whose testimony is sought in the present case. No authority for such a proposition has been produced by the Prosecution, and none has been found. *Such an immunity* does not exist."

17. Underlining the persuasiveness of this view of the law, it seems to follow that in the present era of civilization, and given the existing state of international law, a court would be laying itself open to the criticism of undermining the very principle of legality which is the bedrock of the judicial process, if it were to permit characterization of the aggregation of the functions of a Head of State or Government or a responsible government official as *'public'* to obfuscate the issue of whether a person holding public office should, by reason of such characterization, be deemed immune from testifying on matters concerning allegations as to the commission of crimes against humanity in the sphere of international law where such testimony may be relevant to the issues in controversy between the parties.

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[13] IT-98-33-A, Appeals Chamber 'Decision on Application for Subpoena', 1 July 2003.

18. For the purposes of this analysis, it is absolutely necessary to make a pertinent legal distinction here. It is that a purported claim of functional immunity on the part of State actors from compulsion to testify before international criminal courts is certainly not on all fours with that of a claim of immunity by a Head of State or Government to testify before the courts of a foreign state. In this regard, different legal considerations may apply. It may be claimed that in such circumstances the key legal consideration is the need to preserve the sovereign equality of states on a practical as well as theoretical level. In this context, it may be necessary to have recourse to first principles of international law, and to contend that a foreign Head of State, the embodiment of the sovereignty of his State, is entitled to the same immunity as the State itself. Lord Millet in *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening (No. 3)*[14] summed up the law in these terms:

> "The immunity of a serving Head of State is enjoyed by reason of his special status as the holder of his State's highest office. He is regarded as the personal embodiment of the State itself. It would be an affront to the dignity and sovereignty of the State which he personifies and a denial of the equality of sovereign States to subject him to the jurisdiction of the municipal courts of another State, whether in respect of his public acts or private affairs."[15]

However, it must be emphasized that the immunity which is the subject of Lord Millet's analysis is not in issue in the context of the present Motions. The Special Court for Sierra Leone is neither a municipal court of Sierra Leone nor a municipal court of a foreign state. It is an international criminal tribunal authorised to apply international law.

19. Furthermore, a court would not, in my view, be acting with due regard for the principle of legality if it were to base its determination of the merits of the applications of this type on whether or not there will be compliance with the orders sought, if granted.[16] Such an approach is both unorthodox and unprincipled. *The Court's function is to declare the law without fear, favour or prejudice, thereby reinforcing the principle of legality. Hence, it cannot be right, that where judges are confronted with a situation where they might think the enforceability of their decision may be problematical in the sense that declaring the law will be characterized as an exercise in futility, or in familiar judicial vocabulary, as 'acting in vain', for them to wring their hands and say 'there is nothing we can do about it'. Adopting this kind of reasoning is tantamount to an abdication of the principle of legality. In addition, to submit that the subpoena should not be issued because if it is disobeyed, the court will be 'acting in vain', in my view, savours of executive high-handedness of which courts usually take a dim view. It is also, in my view, a dangerous policy for the rule of law to assert that subpoenas in the international law domain must not issue against state actors because of the possibility of disobedience.*

20. Moreover, I do not doubt that it is clear from the opinion of highly-recognized publicists, that any governmental or state immunity from legal process in the domain of crimes against humanity or war crimes, formerly recognized by traditional international law, no longer holds sway in modern international law. Professor Cassese sums up the position in the context of criminal liability for international crimes in these terms:

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[14] (1999) 2 AII ER 97, House of Lords. See also Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law*, Oxford: Oxford University Press, 2003 at pages 310-315 and generally Hazel Fox, *The Law of State Immunity*, Oxford: Oxford University Press, 2002.

[15] Id.

[16] See Response of the Attorney-General and Minister of Justice to the Applications Made by Moinina Fofana and Samuel Hinga Norman for the Issuance of Subpoena Ad Testificandum to President Alhaji Dr. Ahmad Tejan Kabbah, para. 15 for this argument.

> "The rationale behind the forfeiture of a right to immunity by state officials who have perpetrated international crimes is simple: in the present international community respect for human rights and the demand that justice be done wherever human rights have been seriously and massively put in jeopardy, override the traditional principle of respect for state sovereignty. The new thrust towards protection of dignity has shattered the shield that traditionally protected state agents acting in their official capacity."[17]

21. Pursuing the analysis further, it is worth noting that before the promulgation of the Nuremberg Principles, the theoretical position in traditional international law was to recognize the existence of such immunity because of the entrenched and hegemonic character of the doctrine of state sovereignty. Contrastingly, the undisputed position in contemporary international law is that this theoretical position has changed, evidencing the dynamic nature of international law and its capability of adapting itself to new circumstances, impelled variously by common sense, logic and experience. Indeed, it is this quality of adaptability that has rendered the erstwhile immunity, once impregnable, now devoid of doctrinal content. Hence, it is presently a mere legal fiction. Accordingly, there is now no rule of international law depriving international criminal tribunals of authority to issue orders to State actors and agents to testify before them in cases where "human rights have been seriously and massively put in jeopardy." It is evident that the contemporary law on the subject of state immunity reflects a sharp legal distinction between the post-internationalisation of human rights' era of accountability and respect for human rights and the pre-internationalisation of human rights' era with its accent on the absolute sovereignty of states over their nationals.

V. THE COMPETING VALUES CRUCIALLY AT STAKE

22. Jurisprudentially speaking, crucially at stake here are two competing values, namely, the overriding need to ascertain in matters of such grave humanitarian law dimensions the absolute truth, on the one hand, and the need to protect State actors or agents, acting in their official capacity, from forensic scrutiny as to the role, if any, they might have played during the course or sequence of events, incidents or episodes forming the factual bases of the charges laid in the Indictment, on the other hand. Viewed from a related perspective, it may plausibly be claimed that at issue here is whether upholding the value or principle of ascertaining the absolute truth should be subject to some carefully-crafted exemption from testifying in favour of State actors or agents even where their evidence may be relevant in assisting the Court in arriving at the truth. Whichever perspective is tenable, resolving the issue implies the exercise of judgment in interpreting and applying Rule 54, the relevant statutory provisions and the applicable régime of international law principles. It calls for a judicial effort to do what is right and not what is expedient, consistent with the freedom of judges in democratic societies "to perform their judicial duties dispassionately, impartially and objectively",[18] a clear manifestation of the primacy accorded to the authority of judgment in the adjudicatory process. In reinforcing this position, I can do no better than adopt the observation of Professor Palley underscoring the power of judicial judgment. The learned author noted:

> "The Court has neither sword nor purse to enforce its views and there are certainly United States precedents for the executive to ignore judicial decisions.

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[17] Antonio Cassese, *International Criminal Law*, Oxford: Oxford University Press, 2003.

[18] See Bankole Thompson, *The Constitutional History and Law of Sierra Leone (1961-1995)*, Maryland: University Press of America Inc, 1997 page 64.

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> In the end the judiciary depends on willingness of those in power to accept disabilities."[19]

VI. HAVE THE DEFENCE SHOWN THE 'NECESSITY' FOR THE ISSUE OF THE SUBPOENA?

23. The various facets of the analysis thus far shift the focus back to the issue of the application of Rule 54 as the controlling principle in determining the merits of these Motions. The relevant inquiry now is whether the orders sought are *necessary for the purposes of an investigation or for the preparation or conduct of the trial.* In effect, the crucial question is whether the Defence have made a *prima facie* showing that the issue of the *subpoena* is *necessary for the purposes of an investigation or for the preparation or conduct of the trial.* The answer lies in the application of Rule 54. The Rule does not require the Defence to show by clear and convincing evidence or on a preponderance of evidence that the issuing of the *subpoena* is necessary for the purposes of investigation or for the preparation or conduct of the trial. Any such requirement would be unduly burdensome and exacting.

(A) THE FACTUAL CONTEXT OF THE MOTIONS

24. In my view, the Indictment, cumulatively, alleges that human rights were seriously and massively put in jeopardy and that certain persons, now facing trial before the Court, are alleged to have been involved in a leadership capacity in those activities. Two of these accused persons aver that at times relevant to the indictment, "Mr. Kabbah was commanding, materially supporting and communicating with various members of the CDF leadership, both from his exile in Conakry and later from his presidential offices in Freetown."[20] They further aver that "the Kamajors claimed to be fighting in part, on behalf of Mr. Kabbah with a view to affecting his restoration as the democratically-elected President of the nation."

25. Furthermore, Second and First Accused point out that some Prosecution witnesses have mentioned the President in their oral testimonies. A few examples will suffice for the purpose of this Opinion. Firstly, reference is made to TF2-140 as "having testified that he travelled to Guinea with Mr. Norman where he met Mr. Kabbah, the then Vice-President Albert Joe Demby, the then British High Commissioner Peter Penfold." They also say that according to the witness, Mr. Demby "indicated that it was Mr. Norman's responsibility to handle security in Sierra Leone during the President's absence, and Mr. Kabbah gave Mr. Norman a sum of money to support the war effort."[21] Secondly, reference is made to Witness TF2-096 as "having testified that Mr. Norman arrived at Talia in 1997 along with Maxwell Khobe." They say further that according to the witness, "Mr. Norman said that "Papa Kabbah" told him and General Khobe to fight the war together.[22] Third, reference is made to Witness TF2-190 as having testified that he travelled to Freetown to receive Mr. Kabbah from exile at the request of Mr. Norman.[23] The records confirm the existence of such evidence. These are, in my judgment, quite significant pieces

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[19] See article by Claire Palley entitled "Rethinking the Judicial Role: The Judiciary and Good Government" in the *Zambian Law Journal (1969) 1-35.* To a similar effect is the view of Thomas Hobbes that "in the matter of government when nothing else is turned up clubs are trump" in *Dialogue between a Philosopher and a Student of the Common Law of England,* of Punishment (1681).

[20] Second Accused's Motion, para. 13.

[21] Second Accused's Reply to Prosecution's Response, para. 7 (a).

[22] Id. para. 7 (b).

[23] Id. para 7 (c).

of evidence calling for either rebuttal, explanation, or confirmation by the person alleged to have been at the helm of affairs of the Civil Defence Forces. They do not call for argumentation or speculation by way of legal submissions but for resolution on a factual plane as to what actually transpired at the highest level of the CDF hierarchy. In effect, the resolution of these issues is indeed necessary for an investigation or for the preparation or conduct of the trial. Who best can rebut, explain, confirm, or in any other way shed some light on these pieces of evidence than the President himself? To my mind, philosophically and practically, the answer lies in the dispensation of even-handed justice.

26. I have also carefully reviewed the summary of President Kabbah's evidence as filed by the Defence. Recognising the possibility of expansion or modification of the said evidence, being merely a summary at this point and the permissible flexibility of expanding or modifying such evidence within the context of the principle of orality, to evaluate the weight of the evidence for the purpose of determining whether the *subpoena* should issue or not is not only premature but amounts also to blurring the legal distinction between admissibility of evidence and its probative value.

27. In this connection, I deem it inappropriate, at this point, to determine whether the evidence that may be given by the witness against whom the *subpoena* is sought will be favourable or adverse to the Defence, or to decide, as a matter of law whether such a consideration should be a conclusive factor in the equation whether the issue of the said *subpoena* is necessary for the purposes of an investigation or for the preparation or conduct of the trial. It would be improper for the Chamber to embark upon such an exercise, at this stage, as it would amount to a predetermination of the probative value of such evidence.

(B) SIGNIFICANT FINDING

28. Some of the foregoing matters remain contentious and are germane to the alleged massive violations of human rights and international humanitarian law. ***Given these specific pieces of evidence, and having regard to the fact that there was no judicial restriction on the Prosecution's ability to call witnesses of their choice, regardless of their alleged role in the alleged hostilities and however classified, I say without the least hesitation that the Defence should not be precluded from calling President Kabbah to assist the Court with evidence on these matters.*** I find significantly that the very nature of the charges, the gravity of the allegations, the state of the evidence, and the state of the Defence to the charges, as it is emerging and the overall interests of justice do override all considerations not to afford President Kabbah the opportunity of assisting the Court with the resolution of these matters.

VII. CONCLUSION

29. Predicated upon the several considerations, analyses undertaken thus far, and finding in this Opinion, I conclude that whenever there is a normative conflict of the nature articulated in Part V of this Opinion, the need for discovering the absolute truth, through the judicial process, becomes the paramount consideration and no legal technicalities must encumber such an objective or shield from process anyone who may assist the court in realizing this objective. [24] *In this regard, my strong judicial inclination is to err on the side of Dicey's juristic conception that no one is above the law.* Any other view would detract from the sacrosanctity of the doctrine of the rule of law which, if I may add, the Government of the Republic of Sierra Leone is on record as having consistently defended and unreservedly committed

[24] For this view of the law, I draw constructive support from the principle enunciated by the International Criminal Tribunal for Yugoslavia (ICTY) in *Brdanin and Talic* Admission of Evidence Order (15 February 2002) at paragraph 10 that a Trial Chamber "should not be hindered by technical rules in its search for the truth."

itself to uphold. I, therefore, rule that there is merit in both Motions, in so far as they relate to the issue of a *subpoena ad testificandum* to President Alhaji Dr. Ahmad Tejan Kabbah. In effect, I am satisfied that the Defence have demonstrated by *prima facie* evidence that the issue of the said *subpoena* is necessary for the purposes of an investigation or for the preparation or conduct of the trial from the Defence perspective. In short, the explicit test of *necessity* prescribed by Rule 54 has, in my considered view, been met by the Applicants. Hence, my dissent from the Majority Decision.

VIII. DISPOSITION

30. I, accordingly, grant the said Motions, and order that a *subpoena ad testificandum* as prayed for, be issued to President Alhaji Dr. Ahmad Tejan Kabbah to testify as a witness for the Defence in the CDF trial, with the option being granted to the President to give such testimony through the medium of closed-circuit television as provided for by Rule 85(D) of the Court's Rules of Procedure and Evidence.

Done in Freetown, Sierra Leone, this 13th day of June, 2006.

Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]