SPECIAL COURT FOR SIERRA LEONE

In the Appeals Chamber

Before: Justice George Gelaga King, President
Justice Emmanuel Ayoola
Justice Raga Fernando
Justice Geoffrey Robinson
Justice Renate Winter

Registrar: Mr Lovemore Munlo, SC

Date: 6 July 2006

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

PUBLIC

FOFANA NOTICE OF APPEAL OF THE SUBPOENA DECISION AND SUBMISSIONS IN SUPPORT THEREOF

For the Office of the Prosecutor:
Mr Christopher Staker
Mr James C. Johnson
Mr Joseph Kamara

For Moinina Fofana:
Mr Victor Koppe
Mr Michiel Pestman
Mr Arrow Bockarie

For H.E. Ahmad Tejan Kabbah:
The Attorney General and Minister of Justice of the Republic of Sierra Leone,
Mr Frederick M. Carew

For Samuel Hinga Norman:
Dr Bu-Buakei Jabbi
Mr John Wesley Hall
Mr Alusine Sani Sesay

For Allieu Kondewa:
Mr Charles Margai
Mr Yada Williams
Mr Ansu Lansana
Ms Susan Wright

NOTICE OF APPEAL

The Impugned Decision

1. Counsel for the Second Accused, Mr Moinina Fofana, (the "Defence") hereby files its notice of appeal of the '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', filed by Trial Chamber I (the "Trial Chamber") on 14 June 2006[1] (the "Subpoena Decision").

Summary of Proceedings

2. The Defence filed its 'Motion for Issuance of a Subpoena *ad Testifcandum* to President Ahmad Tejan Kabbah' on 15 December 2005[2] (the "Motion"). Counsel for the First Accused filed a similar motion on the following day[3]. Responses to the motions were filed by the Office of the Prosecutor (the "Prosecution") on 13 January 2006[4] and by the Attorney General and Minister of Justice of Sierra Leone (the "Attorney General") on 23 January 2006[5]. The Defence and counsel for Mr Norman duly filed their replies to the responses of the Prosecution and the Attorney General[6], and the matter was scheduled for oral argument by the Trial Chamber[7]. Six months after the filing of the Motions, the Subpoena Decision was

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[1] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-617.
[2] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-522.
[3] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-523, 'Norman Motion for Issuance of a Subpoena *ad Testificandum* to H.E. Alhaji Dr Ahmad Tejan Kabbah, President of the Republic of Sierra Leone', 16 December 2005. Copies of the Motions were served on the President's representative on 13 January 2006. *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-530, 'Affirmation of Service with Respect to Fofana and Norman Motions for Issuance of a Subpoena *ad Testifcandum* to President Ahmad Tejan Kabbah'.
[4] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-528, 'Prosecution Response to Fofana Motion for Issuance of a Subpoena *ad Testifcandum* to President Ahmad Tejan Kabbah' and *Prosecutor v. Norman et al.*, SCSL-2004-14-T-529, 'Prosecution Response to Norman Motion for Issuance of a Subpoena *ad Testifcandum* to President Ahmad Tejan Kabbah'.
[5] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-541, 'The Response of the Attorney General and Minister of Justice to the Applications Made by Moinina Fofana and Samuel Hinga Norman for the Issuance of a Subpoena *ad Testifcandum* to President Alhaji Dr Ahmad Tejan Kabbah'.
[6] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-532, 'First Accused Reply to the Prosecution Response to Norman Motion for Issuance of a Subpoena *ad Testificandum* to President Ahmad Tejan Kabbah', 16 January 2006; *Prosecutor v. Norman et al.*, SCSL-2004-14-T-533, 'Reply to Prosecution Response to Fofana Motion for Issuance of a Subpoena *ad Testificandum* to President Ahmad Tejan Kabbah', 18 January 2006 (the "Reply"); *Prosecutor v. Norman et al.*, SCSL-2004-14-T-546, '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', 25 January 2006; and *Prosecutor v. Norman et al.*, SCSL-2004-14-T-547, 'Norman Reply to the Response of the Attorney General to the Fofana Motion for Issuance of a Subpoena *ad Testificandum* to President Ahmad Tejan Kabbah', 30 January 2006.
[7] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T, Trial Transcript of 14 February 2006.

filed by the Trial Chamber[8]. The Subpoena Decision is comprised of a majority decision endorsed by Justices Boutet and Itoe (the "Majority Decision"), a separate concurring opinion authored by Justice Itoe (the "Concurring Opinion"), and Justice Thompson's dissenting opinion (the "Dissenting Opinion").

3. The Defence sought leave to appeal the Subpoena Decision on 19 June 2006[9], as did counsel for the First Accused[10]. The Prosecution's consolidated response to the applications was filed on 22 June 2006[11], and the Defence filed its reply on 26 June 2006[12]. Leave was granted by the Trial Chamber on 29 June 2006.

Grounds for Appeal

4. The Defence hereby presents the following grounds for appeal:

   a. The Trial Chamber applied an unduly restrictive standard for the issuance of a subpoena pursuant to Rule 54 of the Rules of Procedure and Evidence (the "Rules"), such that one of Mr Fofana's fundamental rights under the Statute has been unnecessarily limited by considerations not wholly applicable to this tribunal.

   b. Assuming, *ex arguendo*, the application of the proper standard for the issuance of a subpoena pursuant to Rule 54, the Trial Chamber erred in its application of that test to the Motion, which any reasonable trier of fact would have granted.

   c. The demonstrably flawed reasoning exhibited in the Concurring Opinion with respect to the question of the compellability of a sitting head of state as a witness before an

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[8] *See* n 1 *supra*.
[9] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-626, 'Urgent Fofana Application for Leave to Appeal the Subpoena Decision'.
[10] See *Prosecutor v. Norman et al.*, SCSL-2004-14-T-624, 'Application by First Accused for Leave to Make Interlocutory Appeal Against the 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'.
[11] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-630, 'Prosecution Response to Applications by the First and Second Accused for Leave to Appeal the Subpoena Decision'.
[12] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-634, 'Fofana Reply to Prosecution Response to Applications by the First and Second Accused for Leave to Appeal the Subpoena Decision'. Counsel for Mr Norman filed its reply on the same day. *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-633, 'First Accused Reply to Prosecution Response to Application by the First and Second Accused for Leave to Appeal the Subpoena Decision', 26 June 2006.

international criminal tribunal casts significant doubt upon the legal validity of the Majority Decision, *in toto*, and suggests that one of Mr Fofana's fundamental rights under the Statute has been unduly compromised by political considerations.

Relief Sought

5. Under normal circumstances, the Defence would request this Chamber to vacate the Subpoena Decision and order the Trial Chamber to reconsider the Motion in accordance with the arguments advanced herein. However, given the limited time remaining for Mr Fofana to present his case, and given the additional commitments of the Trial Chamber, the Defence hereby respectfully requests this Chamber to reverse the Subpoena Decision and grant the Motion without delay.

SUBMISSIONS IN SUPPORT OF THE APPEAL

6. As noted above, the Defence raises three grounds of appeal for determination by this Chamber and advances the following submissions in support thereof.

The Trial Chamber Applied the Wrong Standard

7. The Motion presented to the Trial Chamber an issue to be decided for the first time by the Special Court, that is, the interpretation of Rule 54 in the context of an application for the issuance of a *subpoena ad testificandum*. The Defence submits that, by adopting without distinction the test employed by the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"), the Trial Chamber applied an unduly restrictive standard for the issuance of a subpoena pursuant to Rule 54, such that one of Mr Fofana's fundamental rights under the Statute has been unnecessarily limited by considerations not wholly applicable to this tribunal.

8. Rule 54 provides: "At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". Because its language is identical to the corresponding rules at both the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") and the

International Criminal Tribunal for Rwanda (the "ICTR"), the Trial Chamber found it appropriate to look to the jurisprudence of those tribunals for guidance in the determination of the Motion[13].

9. While reliance on the jurisprudence of other tribunals may at times be "desirable and justified"[14], such dependence should always be "constructive"[15] and consistent with the "purposive"[16] approach to the application of the Rules espoused by this Chamber. When taking up a standard endorsed by a sister tribunal, chambers of this Court should focus on the necessity and extent of such reliance, keeping in mind that "indiscriminate reliance on the jurisprudence of other tribunals can inhibit the constructive growth of one's own jurisprudence"[17]. In any event, requirements should not be "unduly burdensome and exacting"[18], as this would conflict with this Court's generally liberal approach to the admission of evidence pursuant to Rule 89(C) as well as the principle of orality[19], upon which the parties have come to rely as one of the key evidentiary principles applicable to these proceedings.

10. While both the ICTY[20] and ICTR[21] employ a two-prong test with respect to applications for the issuance of subpoenas pursuant to their identical rules, there are significant

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[13] Majority Decision, ¶ 27.
[14] Dissenting Opinion, ¶ 11.
[15] *Ibid.*
[16] *Prosecutor v. Norman et al.*, SCSL-2004-14-AR73-397, Appeals Chamber, 'Decision on Amendment of the Consolidated Indictment' (the "Indictment Decision"), ¶ 45. With respect to the construction and interpretation of the Rules, this Chamber has long ago held that: "[P]rocedures and practices that have grown up in the [International Criminal Tribunal for Rwanda (the "ICTR")] and [ICTY] should not be slavishly followed—they often reflect the different or difficult circumstances in which these courts have to operate ... . We have not, therefore, been impressed by Prosecution submissions which seek to justify unnecessary or inconvenient procedural steps on the basis that 'this is the way it is usually done in The Hague'. The question must always be whether a particular procedure is appropriate under the rules and practices of this Court". *Ibid.*, ¶ 46.
[17] Dissenting Opinion, ¶ 12.
[18] Dissenting Opinion, ¶ 23.
[19] *See, e.g.*, Dissenting Opinion, ¶ 26.
[20] *See, e.g., Prosecutor v. Halilovic*, IT-01-48-AR73, Appeals Chamber, 'Decision on the Issuance of Subpoenas', 21 June 2004 (the "*Halilovic* Decision").
[21] *See, e.g., Prosecutor v. Bagosora*, ICTR-98-41-T, Trial Chamber I, 'Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana', 23 June 2004, ¶ 4 (Pursuant to that standard the Defence must "first demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful ... [and] ... have a reasonable belief that the prospective witness can materially assist in the preparation of its case"); *see also Prosecutor v. Simba*, ICTR-01-76-T, Trial Chamber I, 'Decision on Defence Request for Subpoeans', 4 May 2005, ¶ 2 ("the Defence must only show that it has made reasonable efforts to obtain the witnesses' voluntary cooperation and was unsuccessful") and ¶ 3 (granting an application for the issuance of two subpoenas where one of the targets is "the only witness whose testimony allegedly provides first-hand corroboration for the entirety of the alibi", and the other's "testimony is relevant to the proceedings ... [as] ... he has been implicated as a co-author of the crimes charged against the Accused".)

disparities between the two standards: Where the ICTY imposes a rather searching analysis with respect to the so-called "purpose" requirement[22], the ICTR requires only a *prima facie* showing of relevance[23]. As to the second prong—the so-called "necessity" requirement—the ICTY places greater emphasis on the necessity of the information (i.e., whether the information is available through other means), whereas the ICTR appears more concerned with the necessity of the requested process (i.e., the possibility of voluntary cooperation). Yet, with only a passing reference to the first distinction[24], the Trial Chamber endorsed the much stricter approach of the ICTY and then proceeded with its analysis of the Motion. This, the Defence submits, was the Trial Chamber's first and most serious error.

11. By failing to recognize the ICTR approach as the one more in harmony with the purpose of this Court and the practices that have developed here to date, the Trial Chamber has—without sufficient explanation—significantly diverged from its generally flexible position on the admission of evidence in favour of a highly restrictive requirement with respect to Rule 54. The Defence submits that such undue and unexplained preference has imposed an unnecessary burden on Mr Fofana, a burden at odds with the liberal approach to admissibility adopted so far in the CDF proceedings. The effect of the Trial Chamber's decision to impose a procedural requirement not readily discernable from the plain and ordinary meaning of Rule 54[25] was to unnecessarily deny Mr Fofana one of his fundamental statutory rights, namely, the right to "obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her"[26]—a witness whose testimony, it is submitted, is of unique importance to a full and fair hearing of the CDF proceedings.

12. The Defence submits that the ICTY's version of the purpose test creates a double-standard of relevance: one extremely low with respect to witnesses willing to appear

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[22] *See, e.g., Halilovic*, at n 20 *supra*.
[23] *See, e.g., Bagosora*, at n 21 *supra*.
[24] *See* Majority Decision, at n 78.
[25] The additional nuance of the purpose requirements as formulated by the ICTY is not obvious from a plain reading of Rule 54. In holding that the language of that Rule is unambiguous, and "given its plain and ordinary meaning (gathered from its precise and unambiguous language), is sufficiently broad to encompass the authority of this Court ... to issue a subpoena ... for the *purpose of the fulfilment of the mandate of the Special Court*", Justice Thompson, at least, appears to have heeded this Chamber's directive in the Indictment Decision. Dissenting Opinion ¶ 7 (emphasis added).
[26] Statute of the Special Court for Sierra Leone (the "Statute"), Article 17(4)(e).

voluntarily (where only Rule 89(C) governs), and the other unusually high with respect to reluctant witnesses (where the disputed test would apply). What is more, the stricter application of the necessity test wrongly places emphasis on the *necessity of the evidence* as opposed to the *necessity of the subpoena*, further widening the "relevance gap" between the two categories of witnesses. The Defence submits that the same standard of relevance should apply to all witnesses, and that the necessity test should be limited to imposing obligations aimed at securing the voluntary attendance of a reluctant witness rather than imposing additional heightened requirements of relevance[27]. The operative language of Rule 54 is unambiguous and should only require a moving party to make a *prima facie* demonstration that the process sought is necessary for the relevant purpose indicated, rather than, as the Majority Decision implies, by showing through clear and convincing evidence or a preponderance of the evidence[28] that the information sought by such process is indispensable.

13. The ICTY approach is unwise in so far as it invites a trial chamber to embark upon premature evaluations of the probative value of the anticipated evidence, rather than merely assessing its relevance and potential admissibility. Indeed, the Majority Decision takes the ICTY approach to its extreme, scrutinizing the putative factual submissions in support of the Motion to a degree wholly inconsistent with the practice of the Trial Chamber to date and additionally at odds with the principle of orality. As Justice Thompson noted in his Dissenting Opinion: "Recognizing 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

[27] The Defence submits that any necessity requirement should focus on the traditional preference for the voluntary cooperation of witnesses. For example, where a party has exercised all diligence and sought to secure voluntary cooperation by all possible means but failed and where the proposed evidence is not available from any other source, then a subpoena becomes necessary. Such a requirement should not, however, be used to impose an additional standard of heightened relevance. In this regard, the ICTY approach is misconceived. It is submitted that the social or political status of a proposed witness should not be used to impose additional burdens on accused persons. The excessive scrutiny given to the proffered relevancy explanations in the Motions under the Majority Decision's test compared to the cursory showing required with respect to the testimony of a witness who appears voluntarily are incompatible. Such approach is generally at odds with the principle of equality of arms, especially where the Prosecution had all the coercive resources of the State at its disposal when conducting its investigation and presenting its case.

[28] Dissenting Opinion, ¶ 28.

whether the subpoena should issue or not is not only premature but amounts to a blurring of the legal distinction between admissibility of evidence and its probative value"[29].

14. The justification typically advanced in support of the ICTY approach is that such a standard is necessary "to guard against the subpoena becoming a mechanism which is used routinely as part of trial tactics"[30]. While acknowledging the competing public interests of an accused person's right to secure information necessary for his defence and the necessity for limits on the use of coercive measures, the Defence submits that the balance must be struck in favour of the former. In any event, a trial chamber should be able to weigh such competing concerns on a case-by-case basis without the imposition of an unnecessarily restrictive Rule 54 regime.

15. For these reasons, the Defence submits that the ICTY methodology is not the process envisaged by the Rules, and that its application to the Motion begs the question as to whether Mr Fofana's Article 17(4) rights have truly been recognized in full equality[31]. Prior to the Subpoena Decision, the principles that have guided the Trial Chamber in the CDF proceedings have been ones of extreme flexibility with a view to advancing the purpose of the fulfilment of the mandate of the Court. It appears inconsistent, indeed unfair, to begin now—at the Defence stage of the proceedings—to give highly restrictive interpretations to our Rules. Accordingly, the Defence submits that this Chamber should vacate the Subpoena Decision and instruct the Trial Chamber to re-evaluate the Motion using the methodology endorsed by the ICTR in light of the arguments advanced above and in the Dissenting Opinion.

The Trial Chamber Erred in the Application of the Chosen Standard

16. Assuming, *ex arguendo*, the propriety of employing the ICTY approach to this case, the Trial Chamber failed to draw the necessary factual analogies between the cited case law and the instant case and further erred in its application of that ICTY standard to the facts of Mr Fofana's case. This amounts to a serious misapplication of Rule 54 and calls for a

[29] Dissenting Opinion, ¶ 26.
[30] Majority Decision, ¶ 30.
[31] *See* n 26 *supra*.

reversal of the Subpoena Decision. It is submitted that any reasonable trier of fact would have applied the ICTY standard in a less restrictive manner and granted the Motion.

17. In its disposition of the Motion, the Trial Chamber explicitly adopted the test as formulated by the Appeals Chamber of the ICTY: "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 the preparation or conduct of the trial (the 'purpose' requirement)"[32]. The Trial Chamber was particularly impressed by the *Krstic*[33] and *Halilovic*[34] decisions and accordingly drew much—not to say all—of its guidance from those cases. In order to further analyse the Majority Decision, it will be helpful to briefly set out the basic contours of the ICTY standard, as applied by the Trial Chamber to the Motion.

18. According to the Trial Chamber, the necessity requirement imposes upon the applicant the burden of showing that the information sought to be obtained by the subpoena is not "obtainable through other means"[35]. The putative rationale being that the use of coercive judicial measures such as subpoenas must be limited[36] to "guard against the subpoena becoming a mechanism which is used routinely as part of trial tactics"[37].

19. Additionally, the purpose requirement obliges the applicant "to 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"[38]. This determination 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"[39]. Further, "if the applicant has been unable to

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[32] Majority Decision, ¶¶ 27–28.
[33] *Prosecutor v. Krstic*, IT-98-33-A, Appeals Chamber, 'Decision on Application for Subpoenas', 1 July 2003 (the "*Krstic* Decision").
[34] *Halilovic* Decision.
[35] Majority Decision, ¶ 30.
[36] *Ibid.*
[37] *Ibid.*
[38] Majority Decision, ¶ 29.
[39] *Ibid.*

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"[40].

By Failing to Appreciate the Ratio Decidendi of the Preferred Decisions, the Trial Chamber Applied the ICTY Standard in an Unnecessarily Restrictive Manner

20. While the Trial Chamber made a deliberate point of relying on the reasoning of the *Krstic* and *Halilovic* cases in particular, it inexplicably failed to take account of the factual contexts of those decisions, which the Defence submits were significantly distinguishable from those presented by the Motion. By failing to appreciate the *ratio decidendi* of both decisions, the Trial Chamber erred in disposition of the Motion. The Defence does not dispute that general legal principles may be drawn from cases with different factual underpinnings. However, it is the Defence position that a reasonable trier of fact would have gone beyond the mere statement of the rule in the *Krstic* and *Halilovic* cases and, in looking closely at the underlying facts and ultimate determinations therein, would have arrived at a conclusion different from that of the Majority Decision.

The Halilovic Decision

21. In *Halilovic*, the targets of the requested subpoenas were prosecution witnesses whose attendance the Defence sought to compel by way of Rule 54 in order to assist in preparation of its cross-examination before the witnesses took the stand to testify. Upon motion for reconsideration of its original denial and supplied with additional, more specific information in support of the defence's original request, the trial chamber denied the motion[41]. The issue for determination by the ICTY Appeals Chamber was "whether, in deciding a motion for a subpoena, a Trial Chamber may reject the motion merely because the proposed witness will in any event be called by the other party and so will be available for cross-examination by the moving party"[42].

[40] Majority Decision, ¶ 29.
[41] *Halilovic* Decision, ¶ 3.
[42] *Halilovic* Decision, ¶ 1.

22. After canvassing the applicable standards, the ICTY Appeals Chamber held that when the sole rationale for a request to subpoena a prosecution witness is to prepare for a more effective cross-examination, a trial chamber may properly reject such application on the basis that the coercive method of a subpoena is not justified "merely" to "facilitate a party's task in litigation", in that case cross-examination[43]. However, the ICTY Appeals Chamber held that it was erroneous to deny the application without examining, as the trial chamber failed to do, "whether the Defence request for a subpoena went beyond the scope of the issues on which the Prosecution witnesses were expected to testify"[44].

23. The Defence submits that two important considerations emerge form this holding, both of which the Trial Chamber failed to appreciate in deciding the Motion. First, with respect to its position that a trial chamber may properly reject an application on the basis that the coercive method of a subpoena is not justified "merely" to "facilitate a party's task in litigation"[45], the ICTY Appeals Chamber limited its holding to a situation where the *only* reason advanced was to gain a tactical advantage on cross-examination. Because the Defence would have ample opportunity to cross-examine the prosecution witness on the stand (and because it had apparently asserted no other reason in support of its application), there was no need to employ the coercive measure of issuing a subpoena; that is, a subpoena was not necessary because the witness was coming to testify anyway. Further, with respect to the ultimate holding, the ICTY Appeals Chamber was clearly motivated by a desire to promote fairness and protect the rights of the parties, in this case the Defence[46].

24. Accordingly, apart from its general language with respect to applications pursuant to ICTY Rule 54, the Defence submits the *Halilovic* decision stands for the following propositions: (i) a subpoena should not be issued merely to assist a party with a routine litigation task[47]; and (ii) Rule 54 should not be applied in an overly restrictive manner to

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[43] *Halilovic* Decision, ¶ 10.
[44] *Halilovic* Decision, ¶ 11.
[45] *Halilovic* Decision, ¶ 10.
[46] Noting, as it did, the risk of a party attempting to "block its opponent's ability to interview crucial witnesses simply by placing them on its witness list". *Halilovic* Decision, ¶ 12. (Additional "fairness" concerns were canvassed by the appeals chamber. *Halilovic* Decision, ¶¶ 13, 14).
[47] The fact that there was never any doubt that the Defence would be given some access to the witness, led the appeals chamber to hold that a subpoena is inappropriate simply to increase the *level or degree*—but not the fact of—defence access.

deny the issuance of a subpoena where the applicant has shown a legitimate need which may assist in the preparation of its case[48].

25. It does not however, explicitly or by extension, support the exclusionary approach adopted by the Trial Chamber, whereby the Majority Decision places undue weight on its view that the target information is obtainable through other means[49], despite the fact that President Kabbah has refused to appear as a witness and that the Defence has shown a legitimate need which may assist in the preparation of its case. As the Defence is interested in the President's personal observations with respect to the issues outlined in the Motion and Replies, no other means is available. In any event, the extent to which the *Halilovic* Decision supports the "obtainable by other means" inquiry as applied by the Trial Chamber is limited if not negligible[50]. While it may form one factor in the larger analysis, as *Halilovic* teaches, the ultimate goal is to ensure that "the trial is informed and fair"[51].

The Krstic Decision

26. In the Krstic case, the accused sought to subpoena two prospective witnesses to give counsel the opportunity to interview them in anticipation of adding material to an application made pursuant to rule 115, witnesses he admits he did not know about during the trial. In deciding the application, the ICTY Appeals Chamber noted that the obligation of due diligence, of particular importance to the Rule 115 analysis, is also "directly relevant to the procedures of the Tribunal (in particular, Rule 54) both before and during

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[48] "The opposing party may have a legitimate expectation of interviewing such witness in order to obtain ... information and thereby better prepare a case for its client". *Halilovic* Decision, ¶ 12.
[49] *See* Majoritiy Decision, ¶ 37.
[50] *See Halilovic* Decision, ¶ 7 (*citing Krstic* Decision and *Prosecutor v. Brdanin and Talic*. IT-99-36-AR73.9, 'Decision on Interlocutory Appeal', 11 December 2002.) The *Krstic* analysis in that regard was related to the fact that the target of the subpoena was not called or attempted to be called during the entire trial, and was only sought to be compelled to testify later. The inquiry there focused on the possibility of getting the post-trial confidential material elsewhere, though subpoenas were nonetheless issued. The fact that the material may have been obtainable through other means does not appear to have been dispositive in that case. In *Brdanin and Talic*—which stated that, in deciding whether a subpoena should be issued, a trial chamber must take into account not only the interests of the litigants but the overarching interests of justice and other public considerations—the court was concerned with balancing "the public interest in accommodating the work of *war correspondents* with the public interest in having all relevant evidence available to the court". The distinction between subpoenaing a war correspondent compared to the top official of the organization being examined must not be lost in drawing on *Brdanin and Talic* for this Court's purposes. As in *Halilovic*, it was generally considered prudent to tip the balance in favour of the interest of a fair and well-informed trial.
[51] *Halilovic* Decision, ¶ 7.

the trial, as well as on appeal"[52]. Just as the *Halilovic* Decision cautioned against the use of the subpoena to gain a tactical advantage, so the court in *Krstic* held that "the defence will not be permitted to undertake a fishing expedition—where it is unaware whether the particular person has *any* relevant information, and it seeks to interview that person merely in order to discover whether he has *any* information which may assist the defence"[53]. Yet the Application was ultimately granted, where it was shown that each of the targets had knowledge of issues relevant to his appeal and that it was reasonably likely that further questions of them would elucidate the precise nature of that knowledge[54].

27. Here again, as with the means analysis in *Halilovic*, the Trial Chamber has failed to appreciate the *ratio decidendi* of the *Krstic* Decision, extrapolating from its limited holding an unnecessarily restrictive approach to applications under Rule 54[55]. Rather than the unknown commodity envisioned in *Krstic*'s "fishing expedition"[56], President Kabbah is a familiar character in the CDF *dramatis personae*: the putative leader of the CDF and superior of the Accused Persons with apparent knowledge of several aspects of CDF activity. While it might reasonably have been considered dubious, for example, for the Defence to have requested that subpoenas be issued to President Obasanjo of Nigeria or Prime Minister Blair of the UK simply because the Defence suspected those men of potentially having some knowledge of events that transpired in Sierra Leone during the indictment period given their government's involvement in the conflict[57], the suggestion that the Defence was somehow engaged in a fishing expedition with regard to President Kabbah is patently unreasonable given the specifics of the Motion and Reply.

28. In sum, the Defence submits that the Trial Chamber's application of the ICTY standard was unnecessarily restrictive and not in keeping with the holdings of the key decisions on which the Majority Decision based its analysis. Accordingly, and as shown in greater detail below, Mr Fofana's right to a fair and informed trial has been unduly compromised

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[52] *Krstic* Decision, ¶ 5
[53] *Krstic* Decision, ¶ 11.
[54] *See Krstic* Decision, ¶ 18 (however, the reasons were confidential).
[55] Majority Decision, ¶ 47.
[56] *Krstic* Decision, ¶ 11.
[57] *See, e.g., Prosecutor v. Milosevic*, IT-02-54-T, Trial Chamber, 'Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Shcroder', 9 December 2005.

by several analytical errors resulting from this mischaracterisation and misapplication of the ICTY test.

The Trial Chamber Made Several Errors in its Application of the ICTY Standard

29. The Trial Chamber's unduly restrictive application of the ICTY standard—as explained above—resulted in several erroneous legal and factual determinations leading to an improper denial of the Motion. The Defence notes here that it is not seeking to supplement its arguments on appeal with the presentation of additional facts. Rather, it is the Defence position that the factual explanations contained in the Motion and Replies, as well as the factual record before the Trial Chamber, should have been sufficient to satisfy the requirements of Rule 54, even under a correct application of the ICTY standard[58].

Greatest Responsibility

30. The Trial Chamber stated that it was "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"[59]. It then went on to note that "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"[60].

31. First of all, the claim that such information is available through other means is erroneous. As noted elsewhere in these submissions, the Defence is interested in the personal observations of the President in this regard. Accordingly, it is disingenuous to suggest that the Defence should be able to locate other witnesses equal to the singular value of the President, who as noted in the Motion and Replies is of peculiar importance. Further, read in conjunction, these statements by the Trial Chamber could create a chilling effect on the cooperation of high-level witnesses, encouraging any targets to avoid assisting the Defence simply by claiming that someone else is in a better position to provide the

[58] *N.B.* The Defence makes this argument in the alternative in no way abandons its primary argument that the ICTY standard is the wrong approach for the Special Court.
[59] Majority Decision, ¶ 37.
[60] Majority Decision, ¶ 38.

requested evidence. It is respectfully submitted that, investigations being as difficult as they are, the Defence needs fewer rather than more obstacles in its path.

32. Finally, and perhaps most importantly, the latter statement is inconsistent with the Trial Chamber's earlier ruling 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 ... is an evidentiary matter to be determined at the trial stage"[61]. We are now at the evidentiary stage of the proceedings where only the actual evidence, rather than any hypothetical assessments of potential probity, can be useful or appropriate to the determination of Mr Fofana's alleged culpability. The Defence should be entitled to pursue the question of greatest responsibility as fully as possible without being unduly pre-empted by substantive evaluations of potential evidence not yet before the trier of fact, especially given that the question of the legal significance of the term "greatest responsibility" to these proceedings is a novel and potentially far-reaching one.

33. Contrary to the Trial Chamber's position[62], the Defence submits that, if President Kabbah admitted to certain facts placing either him or others in positions of great responsibility, then his evidence indeed could affect the Trial Chamber's final analysis and evaluation of the evidence. If the concept of greatest responsibility is to have any evidentiary weight—as the Trial Chamber has already held that it has—then it cannot mean that the role of a proposed CDF commanding authority is meaningless, if only partially dispositive of the issue. By making a qualitative evidentiary evaluation at this point, Mr Fofana has been deprived of a crucial opportunity to shed doubt on the Prosecution's theory that he in fact is one of those who bears the greatest responsibility for the crimes with which he has been charged. As noted in the Motion and Replies, President Kabbah is likely in possession of material information with respect to his own activity as well as that of various CDF, ECOMOG, and SLPP government officials.

Individual Responsibility

[61] *Prosecutor v. Norman et al.*, SCSL-2004-14-PT, Trial Chamber I, 'Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana', 3 March 2004, ¶ 44.
[62] Majority Decision, ¶ 38.

34. As to Mr Fofana's individual culpability under Article 6(1) of the Statute, the Trial Chamber found that "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"[63]. Contrary to this finding, there is indeed evidence before the Trial Chamber in this regard. Specifically, as canvassed in the Motion and Replies, President Kabbah was apparently informed of events unfolding in Sierra Leone via telephone and personal messengers[64]. Again, the Trial Chamber's premature evaluation of both the existence and probative value of this information, had worked a disadvantage to the Defence, who fully intended to put the information to President Kabbah for his confirmation, denial, or further explanation.

35. The Trial Chamber further found that the Defence failed to provide sufficient explanation as to why it believes President Kabbah would be able to provide information relevant to the Prosecution's joint criminal enterprise theory, and this, "coupled with the fact that the Consolidated Indictment does not allege that President Kabbah was a party to the common purpose"[65], indicated that the proposed witness was not likely to give information that would materially assist Mr Fofana's case. Yet the Trial Chamber failed to appreciate that evidence of meetings between the President and his subordinates proffered in the Motion and Replies could shed doubt on the existence of a criminal plan and bolster the idea that the CDF leadership was in favour of prosecuting the war only by legal means. Further, simply because the Indictment fails to mention President Kabbah as a part of the Indictment's putative enterprise, sufficient grounds for ruling out the relevance of his proposed testimony on that point have not been shown. An indictment contains allegations, not historical facts. If the Defence is able to show that President Kabbah and others were part of a criminal enterprise that excluded Mr Fofana, then clearly such evidence would exculpate the Second Accused of liability under Article 6(1) of the Statute[66].

Command Responsibility

[63] Majority Decision, ¶ 41.
[64] *See, e.g.*, Dissenting Opinion, ¶ 25.
[65] Majority Decision, ¶ 42.
[66] *See* Simba, n 21 *supra.*

36. The Trial Chamber erroneously concluded that President Kabbah's position could have no bearing on Mr Fofana's alleged culpability under Article 6(1) of the Statute[67]. However, the President, as putative leader of the CDF, can testify to the existence or absence of Mr Fofana's *de jure* authority and/or *de facto* influence relevant to the charges in the Indictment made pursuant to Article 6(3) of the Statute, specifically Mr Fofana's alleged effective control over CDF subordinates. As the top official of the CDF, President Kabbah arguably knows how and where Mr Fofana was situated within the organisation, both in theory and in reality, and he may have been instrumental in formulating its policies and designing its structure. If the position of "Director of War" has any meaning, surely President Kabbah, the ultimate CDF boss, would know what that was.

37. The Defence cannot deny that it may be possible to gain some of this information from other individuals within the CDF. In fact, it has already done so. However, it is submitted that President Kabbah's personal view on these issues is of particular importance as he is alleged to have been the top CDF official throughout all periods relevant to the Indictment, notwithstanding his exile in Guinea. While it is apparent from the evidence to date that within the CDF there were thousands of fighters, hundreds of commanders, dozens of directors and administrators, numerous initiators, and multiple councils in various locations, there was only one President, Commander-in-Chief, and Minisister of Defence. Simply put, there is no surrogate for President Kabbah, and the Trial Chamber was in error to suggest otherwise.

Generally

38. It is submitted that the Trial Chamber's quarrel with the use of the words "self-evident"[68] is unfounded, and to equate the use of such language with embarking on a "fishing expedition"[69] is disingenuous. The phrase was simply a rhetorical device used to indicate that the relevance of the specifically iterated information in President Kabbah's possession should be obvious for the reasons clearly stated in the Motion and Replies. The Trial Chamber's further reference to the "vague and general"[70] assertions of the Motion ignore the specific references contained in the Replies which do in fact

[67] Majority Decision, ¶ 46.
[68] Majority Decision, ¶ 47.
[69] *Ibid.*
[70] *Ibid.*

"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"[71].

39. Accordingly, the Defence submits that the above-referenced conclusions of the Trial Chamber with respect to the relevance and materiality of the proposed evidence to Mr Fofana's alleged liability under Articles 1(1), 6(1), and 6(3) of the Statute are in error, and that any reasonable trier of fact would have concluded otherwise.

The Majority Decision is Tainted by Political Considerations

40. The Motion presented to the Trial Chamber a novel and substantial issue of international criminal law for which no guidance can be derived from national criminal law systems, namely the compellability of a sitting head of state as a witness before an international criminal tribunal. Although the Majority Decision did not reach this question, the existence of the Concurring Opinion, it is submitted, demonstrates a questionable juridical approach to the Motion, one which openly injects political considerations into the legal arena and fails to take cognizance of the law applicable to international criminal tribunals. In short, because it is apparent that one author of the Majority Decision was overly anxious with regard to the potential political implications of the Motion, the Defence submits that the Majority Decision is tainted[72].

41. Shocking in its endorsement of capitulation to political considerations, the Concurring Opinion inexplicably ignores the development of international criminal law away from categories of immunity[73] as well as the law of the case with respect to the issue of greatest

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[71] *Ibid.*

[72] *N.B.* In its opening statement, the Defence urged the Trial Chamber not to be influenced by political considerations in discharging its duties. *See Prosecutor v. Norman et al.*, SCSL-2004-14, Trial Transcript, 19 January 2006 at 25:23–26:11. Yet, it is submitted that the Concurring Opinion reveals a judicial mind disposed to denying the Motion for reasons of political expediency. While the Defence does not make these comments lightly, it is submitted that Courts should not avoid difficult issues because they fear the political consequences of their actions. *See, e.g., United States v. Nixon*, Supreme Court of the United States, 418 U.S. 683, 24 July 1974.

[73] *See, e.g., Krstic* Decision, n 33 *supra*. The Concurring Opinion's analysis of the laws of Sierra Leone with respect to immunity is inappropriate given the existence of international criminal jurisprudence on the matter. In any case, if a sitting head of state is not immune from prosecution under international criminal law, then there is nothing "absurd" about him not enjoying immunity from process. Concurring Opinion, ¶ 95. Surely the trend in

responsibility[74]. Deliberately or not, it amounts to an unwarranted departure from this Court's existing jurisprudence[75] and places undue reliance on domestic law[76] while failing to properly take account of, let alone distinguish, the *Blaskic* and *Krstic* decisions[77]. As stated previously[78], these are the most appropriate precedents for determining the compellability issue, and their holdings render Justice Itoe's lengthy recourse to statutory interpretation of the Constitution of Sierra Leone wholly inappropriate[79].

42. The Defence submits respectfully, but with grave concern for the fairness of the proceedings, that the approach employed in the Concurring Opinion gives undue preference to the privileges of high office over the rights of the Accused. Although the Majority Decision is on its face limited to the *forensic* analysis of the application of Rule 54 and does not explicitly reach the question of immunity, the Concurring Opinion (the author of which formed half of the majority) promotes an unnecessary deference to considerations of *realpolitik* which, the Defence submits, is at odds with the notion of judicial independence[80]. The Defence submits that, in dispensing justice, this Court should endorse the view that no one is above the law, rather than clinging to old notions of exceptionalism with respect to the so-called "Princes who govern us"[81]. Such an approach would erroneously place the administration of international justice at the mercy of municipal political processes[82]. Accordingly, it is submitted that this Chamber must

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international criminal law has been to move away from the categories and regimes of immunity endorsed by the Concurring Opinion: "It should be said here that The President belongs to a different category and regime of immunities". Concurring Opinion, ¶ 98.

[74] *See* Concurring Opinion, ¶¶ 86–88, which directly contravenes the Trial Chamber's previous decision with respect to greatest responsibility. *See* n 61 *supra*.

[75] *See, e.g., Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I-59, Appeals Chamber, 'Decision on Immunity from Jurisdiction', 31 May 2004.

[76] *See, e.g.*, Dissenting Opinion, ¶¶ 94–98.

[77] *See Prosecutor v Blaskic*, IT-95-14, Appeals Chamber, 'Judgement on Request of Republic of Croatia for Review of Decision of Trial Chamber II', 29 October 1997 (the "*Blaskic* Decision") (recognizing a functional immunity for state officials called upon to produce documents as representatives of their state) and *Krstic* Decision, n 33 supra (declining to recognize immunity of state officials called upon to give evidence of what they saw or heard in the course of their official duties).

[78] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-546, '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', 25 January 2006, ¶¶ 22–25 (discussing the *Blaskic* and *Krstic* Decisions).

[79] *See* Dissenting Opinioin, ¶¶ 99–118.

[80] The author of the Concurring Opinion is of the belief that a relevant factor to a judicial decision should be the affects on the "interests of peace, law and order and the stability of the Country and of its Institutions at peril or in jeopardy". Concurring Opinion, ¶ 62.

[81] Concurring Opinion, ¶ 132.

[82] According to the Concurring Opinion, if a target declines to cooperate for political reasons such as "peace and security" then that individual should be treated with "caution". Concuring Opinion, ¶ 63.

review the Subpoena Decision with additional scrutiny given the views expressed by the Concurring Opinion.

Relief Requested

43. Under normal circumstances, the Defence would request this Chamber to vacate the Subpoena Decision and order the Trial Chamber to reconsider the Motion in accordance with the arguments advanced herein. However, given the limited time remaining for Mr Fofana to present his case, and given the additional commitments of the Trial Chamber, the Defence hereby respectfully requests this Chamber to reverse the Subpoena Decision and grant the Motion without delay.

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APPENDIX A

Defence List of Authorities

Constitutive Documents of the Special Court

1. Statute of the Special Court for Sierra Leone: Article 1(1), 6(1), 6(3), and 17(4)

2. Rules of Procedure and Evidence: Rules 54 and 89(C)

Jurisprudence of the Special Court

3. *Prosecutor v. Norman et al.*, SCSL-2004-14-AR73-397, Appeals Chamber, 'Decision on Amendment of the Consolidated Indictment', 18 May 2005

4. *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I-59, Appeals Chamber, 'Decision on Immunity from Jurisdiction', 31 May 2004

5. *Prosecutor v. Norman et al.*, SCSL-2004-14-PT, Trial Chamber I, 'Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana', 3 March 2004

Jurisprudence of the *Ad Hoc* Tribunals

6. *Prosecutor v Blaskic*, IT-95-14, Appeals Chamber, 'Judgement on Request of Republic of Croatia for Review of Decision of Trial Chamber II', 29 October 1997

7. *Prosecutor v. Simba*, ICTR-01-76-T, Trial Chamber I, 'Decision on Defence Request for Subpoeans', 4 May 2005

8. *Prosecutor v. Milosevic*, IT-02-54-T, Trial Chamber, 'Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Shcroder', 9 December 2005

9. *Prosecutor v. Bagosora*, ICTR-98-41-T, Trial Chamber, 'Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana', 23 June 2004

10. *Prosecutor v. Halilovic*, IT-91-48-AR73, Appeals Chamber, 'Decision on the Issuance of Subpoenas', 21 June 2004

11. *Prosecutor v. Krstic*, IT-98-33-A, Appeals Chamber, 'Decision on Application for Subpoenas', 1 July 2003

Other Jurisprudence

12. *United States v. Nixon*, Supreme Court of the United States, 418 U.S. 683, 24 July 1974