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THE APPEALS CHAMBER

Before: Justice George Gelaga King, Presiding
Justice Emmanuel Ayoola
Justice Renate Winter
Justice Geoffrey Robertson, Q.C.
Justice Raja Fernando

Registrar: Lovemore Munlo, SC

Date: 11 September 2006

PROSECUTOR Against **Sam Hinga Norman**
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-2004-14-T)

DISSENTING OPINION OF HON. JUSTICE ROBERTSON ON DECISION ON INTERLOCUTORY APPEALS AGAINST TRIAL CHAMBER DECISION REFUSING TO SUBPOENA THE PRESIDENT OF SIERRA LEONE

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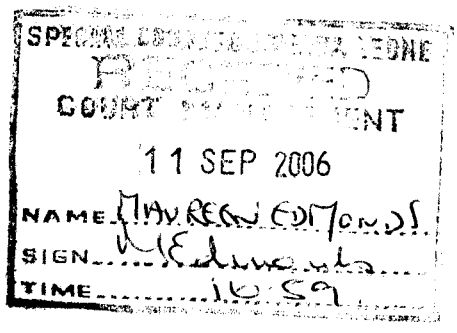

DISSENTING OPINION OF JUSTICE ROBERTSON ON SUBPOENA ISSUE

> *"Are men of the first rank and consideration – are men in high office – men whose time is not less valuable to the public than to themselves – are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody... Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly."*[1]

1. I commence this opinion, on the question of whether the court should issue a subpoena to the President of Sierra Leone, by reference to the views of Jeremy Bentham. They are apposite because they emphasize two fundamental principles of fair trial:

    i. no potential witness, however high and mighty, in possession of information that might determine the outcome, can be spared from the public duty of divulging it, and

    ii. no defendant, however demonised and otherwise disempowered, should be denied access to the court's compulsory machinery if that is necessary to bring such evidence into the courtroom.

Both these principles are critical to the modern right to a fair trial, vouchsafed by every universal and regional human rights treaty and explicitly set out in Article 17(2) of the Statute of the Special Court for Sierra Leone ("the Statute"): viz

> "The accused shall be entitled to a fair and public hearing subject to measures ordered by the Special Court for the protection of victims and witnesses."

2. Article 17(4)(e) of the Statute expressly provides:

    4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: ...

    e. To examine, or have examined, the witnesses against him or her, to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; ...

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[1] Jeremy BENTHAM, *The Works of Jeremy Bentham*, Vol. 4, p. 320 - 321 (J. Bowring, ed., 1843).

Article 17(4)(e) of the Statute is not, as one judge below wrongly held,[2] confined only to willing witnesses: on the contrary, it expressly guarantees that a mechanism will be available to the accused "*to obtain the attendance and the examination*" of witnesses, whether they are willing or not. That mechanism, available to prosecution and defence alike, is provided by Rule 54 of the Rules of Procedure and Evidence ("the Rules):[3]

> 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.

3. This Rule empowers the court to issue orders, subpoenas etc in cases where compulsory procedure is "necessary for the purposes of" the prosecution investigation or either side's preparation for or conduct of the trial. It says nothing about the nature of the evidence to be elicited, from witnesses or document custodians to whom the orders may be directed, and it sets out no "requirements" (of the kind detected by the trial chamber majority), before it can be activated. It simply enables the court, of its own motion or upon application by either party, to order that valuable evidence must be brought into the courtroom: it will be "necessary" to make the order if the witness likely to give such evidence refuses to attend or surrender documents.

4. There is no presumption in the Rule that such applications shall be granted only "sparingly" or after the defence has jumped through multiple hoops to satisfy the court that the evidence it hopes to elicit is in some degree indispensable. Other international courts – notably the ICTY and ICTR – have enunciated various tests for deciding whether evidence is likely to be material, and the trial chamber majority in this case has mistakenly read them into a Rule concerned only with whether a compulsory order to obtain that relevant evidence should be granted. Its mistake has been to adopt what are no more than considerations or factors which are relevant to deciding whether evidence is likely to be material, and to fashion them into a complicated test which requires subpoena applicants

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[2] 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, 13 June 2006, ("Concurring Opinion"), para. 80.

[3] Special Court for Sierra Leone, Rules of Procedure and Evidence, as amended on 13 May 2006.

to satisfy "purpose" requirements and "necessity" requirements.[4] The purpose of Rule 54 is expansive: it provides that a compulsory order may be issued wherever the court is satisfied that it is "necessary", in the sense that relevant evidence will not otherwise be brought to court. That is all Rule 54 says, and all that Rule 54 means.

5. The Rule can only apply to evidence that is likely to be material, because that is the only evidence worth bringing to court. This preliminary question involves two aspects, firstly a range of considerations relevant to the person and status of the potential witness. He may have immunity, e.g. as a Red Cross worker.[5] He may have testamentary privilege (as a "war correspondent"[6] or a human rights monitor[7]) defeasible only upon a showing that the evidence is critical and unobtainable elsewhere. He may have public commitments (e.g. as a medical practitioner or judge or politician) or be engaged overseas: in such cases, the court will carefully scrutinise the alleged materiality of his evidence before it will incommode him by issuing the subpoena. He may be an international statesperson or other public figure whose presence is sought in bad faith - not for the importance of the evidence he can give, but to embarrass or humiliate him in the witness box. In such cases, the application will be refused as an abuse of process.

6. The applicant must also show that the evidence likely to be elicited from the documents or witness under subpoena is likely to be relevant to the investigation or to the preparation or the conduct of the trial. It would be logical to apply a different standard at each stage – a more permissive standard at the stage of investigation; a more focused standard at the stage of preparation (where relevance will be informed by the particulars in the indictment), and a more precise standard still during the trial, after the issues have been defined and the available defences clarified. There are various approaches that have been helpfully suggested by international criminal courts, but I can see no reason why this Court should

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[4] 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 14 June 2006 ("Majority Decision"), paras. 28-32.

[5] *Prosecutor v. Simic et al.*, Case no. IT-95-9, [Public Version] *Ex Parte Confidential* Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

[6] *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002.

[7] *Prosecutor Against Alex Tamba Briman, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-AR73(B), Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify without being Compelled to Answer Questions on Ground of Confidentiality, 26 May 2006; and *Prosecutor Against Hinga Norman, Moinina Fofana, Allieu Kondewa*, Case No.SCSL-04-14-AR73(B), Decision on Prosecution Appeal Against Confidential Decision on Defence Application Concerning Witness TF-2-218, 26 May 2006.

not adopt the developed standard of the Anglo-American common law, as approved by the European Court of Human Rights. In short, once a criminal court is satisfied that "a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence", and that "the person will not voluntarily attend as a witness or will not voluntarily produce the document or thing" then the court should issue a summons.[8]

7. The applicant must briefly describe the evidence to be elicited from the witness or the document being sought, together with the reasons why it is likely to be material, and why it is anticipated that the person sought to be summonsed will not attend voluntarily. This enables the court, after hearing argument, to decide whether the evidence really is likely to be material, in the sense of directly relevant to an issue, not as a matter of probability but of real possibility (the test, for defence applications in serious criminal cases, should be whether it is "on the cards" that the evidence will assist the defence).[9] Potential witnesses are entitled to intervene, in order to satisfy the court that they have no evidence which is likely to be material.[10]

8. I can see no reason why this simple approach should not be adopted by international courts, certainly by international hybrid courts sitting in the country where the crime has been committed and in respect of witnesses available in that country. Having satisfied itself that the evidence is likely to be relevant, the court should then make the Rule 54 determination of whether a compulsory order is really necessary to obtain it. That usually means that the applicant must show that the witness has been approached and has refused to testify unless forced to do so. The applicant must also satisfy the court that nothing less than a court order will change that witness's mind. The court may prefer, instead of granting a witness summons, to request a witness to testify. I cannot imagine that President Kabbah or any other member of his government would decline to respond favourably to such a request, were it made by a trial chamber of this court.

9. Every experienced defence counsel knows the importance of the court's power to order the production of evidence likely to assist an accused. Innocent men have been saved from

[8] Criminal Procedure and Investigation Act 1996 (UK), § 2(a), (b). "Subpoena", as a term from a foreign language (Latin) has been abandoned in English courts, and replaced by "witness summons".
[9] *See Sankey v. Whitlam & Ors.*, 142 CLR 1 (Australia 1978).
[10] Criminal Procedure and Investigation Act 1996 (UK), § 2C.

heavy prison sentences after subpoenas have been issued to extract documents from governments who would otherwise have covered up the truth.[11] Moreover, many potential witnesses are unwilling to be associated with a defendant accused of serious crime, and are only prepared to come forward to help him when compelled by a court. Especially in cases where defendants have been demonised by the media or charged with grotesque war crimes, it is quite common for potential witnesses to tell defence lawyers that they do not want to be publicly perceived as testifying in their client's favour, and they will only do so under subpoena. Furthermore, many "neutral" organisations, such as the UN and NGOs and the media, will insist upon a subpoena if their employees are to testify for either side. (An example has already been provided in this court: the UN itself was only prepared to allow one of its human rights monitors to testify for the prosecution if he did so under subpoena.)[12] This explains why Rule 54 orders can be vital to a fair trial for defendants in these courts, and why I cannot accept the almost routine incantation found in ICTY and ICTR judgements that subpoenas and other disclosure orders must only be issued "sparingly".

10. There may be an historical explanation for the nervousness that seems to infuse the language of international courts when their compulsory process is invoked, especially to summons a political leader. They are, after all, picking up the Nuremberg baton, where *tu quoque* ("you did it, too") evidence had been rigorously excluded in order to prevent the proceedings from being turned into a forum for accusing the allies of war crimes. There was a concern, when political and military leaders were put in the dock, that they would use the subpoena as a weapon to continue their war by other means, harassing and embarrassing victorious political leaders by subjecting them to verbal assault in the courtroom. There was certainly a "feet finding" period in which the ICTY was concerned to avoid inconveniencing states whose cooperation with this new Court was essential: the

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[11] *See, for example,* Lord Justice Scott enquiry into the "Arms to Iraq" affair, resulting from a criminal trial which collapsed after the UK government was ordered to disclose documents which revealed ministered sanction of the defendant's actions. *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (the Scott Inquiry), Volume 5, HMSO, London, 1996.

[12] *Prosecutor Against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-AR73(B), Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify without being Compelled to Answer Questions on Ground of Confidentiality, 26 May 2006; and *Prosecutor Against Hinga Norman, Moinina Fofana, Allieu Kondewa*, Case No.SCSL-04-14-AR73(B), Decision on Prosecution Appeal Against Confidential Decision on Defence Application Concerning Witness TF-2-218, 26 May 2006.

case of *Blaskic* in 1997, which upheld an immunity for state officials in relation to production of documents, provides an early example.[13] In due course, international courts became more confident that their indictments and orders would be respected by the international community: in 2003 *Blaskic* was largely overruled by *Krstic*. ICTY decisions must therefore be read with some caution, and principles they enunciate should be related to their facts and to the stage of development of international criminal law they represent, always remembering that the ICTY and ICTR and soon the ICC are invariably dealing with government officials in foreign countries, who are frequently reluctant to co-operate, whilst this Court sits with the advantage of a local government pledged to co-operate with its processes.

11. I reject, therefore, any presumption that Rule 54 should be used "sparingly" - it should be used whenever its use is necessary to achieve fair trial, no more and no less. I also reject the notion that "tactics" are a ground for rejecting a subpoena application. In the adversary system, the prosecution will have its trial "tactics" as well as the defence, and the mere fact that considerations are "tactical" does not make their forensic purpose illegitimate. Indeed, no competent defence lawyer can avoid "tactical" considerations when deciding whether to apply for a subpoena, for the very good reason that witnesses subpoenaed to testify cannot be cross-examined by the party that calls them, nor (arguably) by any co-defendant standing in the same position. The potential witness may have observed the incident in question and be capable of testifying helpfully to the defence, but through hostility or malice would, if subpoenaed, come to court and give an adverse account, the falsity of which could not be exposed by cross-examination. For that reason, the defence will often decide not to apply for an order to summon a relevant witness, or else will invite the court to call that witness of its own motion so that both sides can cross-examine. The "tactics" that the court will always be astute to reject will be evinced by an application which is not made in good faith but rather for an ulterior "political" purpose, to embarrass a political or military leader who could give no evidence of any real value to the defence.[14] If a statesperson does have important evidence, then to accommodate his other pressing public commitments, the

[13] *Prosecutor v. Blaskic*, Case No. IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997 ("*Blaskic* Subpoena Decision").
[14] A good example is provided by the ICTY case rejecting Milosevic's attempt to subpoena Prime Minister Blair and Chancellor Schröder in *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, 9 December 2005.

court will consider whether it can be appropriately received by written deposition, or through a video link, rather than by requiring him to make a personal appearance.

12. Finally, in these prefatory remarks, let me evince some unhappiness with the reason often given by national and international courts to reject subpoena applications by defence lawyers, namely that they are "going on a fishing expedition". This metaphor came into vogue, in the language of English judges for whom fishing seems to have been regarded as an idle pastime which involved dozing by the grassy banks of streams and rivulets, without caring about or anticipating the landing of a palatable fish. It strikes me as a singularly inappropriate reason to reject a subpoena application. Any serious fisherman today goes on a "fishing expedition" in order to catch fish, and with every reason to believe that fish will indeed be caught, just as a good defence lawyer makes a subpoena application to obtain documents or evidence relevant to his client's defence which he has reason to believe the subpoena will produce. The fisherman, whether sporting or professional, goes on his expedition guided by experience or by reports from other fishermen, on predictions based on tide and weather and movements of schools of fish; on irresistible bait, on sight of boiling water and now, even, on sonar detection. The defence lawyer relies on inference from his client's instructions, upon previous statements made by the potential witness, upon the role and position of that witness, and so on. Neither fisherman nor defence lawyer can in those circumstances be accused of preparing their expedition merely on speculation or guess-work or conspiracy theory. A proper subpoena application, like a sensible fishing expedition, reasonably anticipates a good catch.

13. Some ICTY cases seem to elevate into a legal reason for rejecting a subpoena application what is termed "the last resort requirement" – a portentous description of the common sense rule that compulsion should not be used against an unwilling witness if that unwillingness can be overcome in other ways or the same evidence is available from another witness prepared to volunteer it. This is an entirely correct reason for refusing an application – it means, in other words (those of Rule 54) that the subpoena would not be "necessary" for the purpose of investigation or trial, because that purpose could be achieved without compulsion. But even here there are distinctions that must be made, in the interests of the defence. Take this hypothetical: suppose the proposition the defence seeks to establish is that the accused's position in a rampaging army was not one of direct

authority. That could be confirmed by the commander-in-chief of the force, but he refuses to attend court. A foot soldier, however, is willing to confirm it. Could the court refuse to subpoena the Commander, on the ground that the same evidence can be given by the foot soldier? Obviously not: the latter's limited observation and experience might make his testimony admissible, but the evidence of the commander-in-chief would be much more reliable and authoritative. Although in one sense the foot soldier's evidence is "the same" as the commander's, the latter's is in reality different, because it carries much greater authority and credibility.

14. I have briefly summarised what I consider to be the correct approach to the exercise of the court's power to issue a subpoena or other compulsory order. The mechanism is Rule 54, but the controlling principles are to be found in Article 17 of the Statute. Any application to subpoena a witness requires a three-stage process:

    i. Does the named witness have immunity (in which case the court may not proceed further) or a testamentary privilege?

    ii. Is the potential evidence likely to be material to an issue in the trial – in particular to a legitimate defence?

    iii. Are the court's compulsory powers really necessary to bring that relevant evidence to court, or may it be delivered by some other means?

<u>This Application</u>

15. The defendant Fofana and the defendant Norman applied for a subpoena to order President Kabbah to attend for an interview with defence lawyers and then to give evidence at their ongoing trial.[15] President Kabbah is the Head of the State of Sierra Leone, having been elected President in 1996 and again in 2001. He was President, Commander-in-Chief and Defence Minister during the period in which the defendants, allegedly the leaders of the CDF, are accused in the indictment of committing war crimes. It is not disputed by the prosecution that the CDF was fighting for the democratically elected government, i.e.

[15] Fofana Motion for Issuance of a Subpoena *Ad Testificandum* to President Ahmed Tejan Kabbah, 15 December 2005 ("Fofana Motion"); 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, ("Norman Motion").

fighting to restore President Kabbah. They claim him as their commander-in-chief, and say that he had regular meetings with Chief Norman and other CDF personnel; although he was in Guinea for part of the time, he received visits and stayed in touch with the situation "on the ground" in Sierra Leone by satellite telephone. Defence lawyers had been granted an audience with President Kabbah at which they asked him to testify voluntarily, but he declined because he had "informally agreed" with United Nations Secretary-General Kofi Annan "not to involve himself in Special Court affairs" although he expressed sympathy with the CDF defendants and "hoped they would be acquitted."[16]

16. Whether this is an accurate account of the meeting or not, it is understandable that President Kabbah would be concerned about appearing as a witness. The court was established at his request, by agreement between his government and the UN, as an international court which had the power to indict those who had the "greatest responsibility" for war crimes. The President might, very reasonably, have thought it inappropriate to volunteer evidence for any party, and that view may have been informally agreed by the Secretary General. But any "informal agreement" must give way, as I am sure Kofi Annan and President Kabbah would appreciate, to the overriding duty to afford a fair trial. As the US Supreme Court has said, "The public... has a right to every man's evidence"[17], including evidence in the possession of the Head of State - as President Nixon discovered when his claim for executive privilege over the Watergate tapes was rejected.[18] Were President Kabbah uniquely possessed of evidence exonerating the defendants, he would have a public duty to give it, and I am sure he would do so if requested by the judges of this court. It is, after all, a court set up with plenary power to indict anyone, including President Kabbah himself, and that power to indict must, *a fortiori*, include a power to direct that he should testify.

17. In the court below, the Attorney General appeared on behalf of President Kabbah to resist the subpoena. He argued firstly that it was an application made in bad faith – it was merely an attempt to embarrass and harass the President. Secondly, he argued that the President as Head of State was immune from legal process: this court, he pointed out, had to enforce

[16] Fofana Motion, para. 4. Concurring opinion, para 15, recounting submissions on behalf of Fofana.
[17] *United States v. Bryan*, 339 U.S. 323, 331 (U.S. 1950) (quoting Wigmore, *Evidence* (3d ed.) § 2192).
[18] *United States v. Nixon*, 418 U.S. 683, 703-716 (U.S. 1974). As early as 1807, in *United States v. Burr*, 25 F. Cas. 30, 34, (U.S. 1807), Chief Justice Marshall opined that a subpoena could be issued to the President of the United States.

its subpoena under Sierra Leone law, from which the President was constitutionally immune. However, the Attorney General very properly accepted that if this court did subpoena the President, he would advise the President to comply with the order. The prosecution did not enter into the immunity argument: it contended only that the applicants had failed to satisfy the test required by Rule 54.

18. The argument was heard in February 2006 but the decisions were not delivered until four months later. They were polarised. Judge Bankole Thompson forcefully rejected the notion that President Kabbah was immune, and inferred from his involvement in the war as leader of the democratic forces that he must have relevant evidence to give on behalf of those who had been fighting for him.[19] He would have issued a subpoena, for that evidence to be given by video-link to the courtroom. Judge Itoe delivered a somewhat impassioned opinion that the President was above, and immune from, any court or legal process.[20] Logically, Judge Itoe's "sovereign immunity" approach would brook no enquiry at all into the *bona fides* of the application or into the materiality of the evidence that President Kabbah might give: his absolute immunity would be breached by the Court upon its entering into any such enquiry. Surprisingly, for this reason, Judge Itoe joined with Judge Boutet in a joint opinion which made no finding at all on immunity, but which analysed the President's likely evidence in some detail and held that the subpoena application failed a "two pronged test" under Rule 54.[21] This opinion has been treated as the decision of the Trial Chamber.

19. Both Fofana and Norman applied for leave to appeal. This was opposed by the prosecution on the basis that the decision whether to issue a subpoena was a matter for judicial discretion, and should not be dealt with on appeal because it involved no question of law. So far as immunity was concerned, the prosecution sought to side-step the need to deal with this on the ground that the actual judgement of the court had been a joint opinion of Justices Itoe and Boutet. Judge Itoe's concurring opinion – that the President was immune – could not be made the subject of appeal since it was not the conclusion of majority opinion. These arguments were not accepted by the Trial Chamber judges: they unanimously granted leave to appeal.

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[19] Dissenting Opinion, para. 14.
[20] Concurring Opinion, para. 138.
[21] Majority Decision, paras. 10-19.

Standard of Review

20. This is an interlocutory appeal, leave for which can only be given, pursuant to Rule 73(B), "in exceptional circumstances and to avoid irreparable prejudice to a party". Here, the Trial Chamber found exceptionality in "the novel nature" of the Rule 54 standard for issuing of a subpoena, "together with the diverse legal perspectives from which it can be viewed, as evidenced by the Majority Decision, Separate Opinion and Dissenting opinion."[22] The majority opinion turned on the application of what it described as a "two-pronged test" under Rule 54. The separate opinion of Judge Itoe turned on his view that President Kabbah was immune from any compulsory process. The dissenting opinion of Judge Thompson was largely directed to refuting Judge Itoe's immunity argument. In these confused circumstances, this appeal court is in my view seized of three issues – 1) whether the President is immune from any process (logically, the first issue)? And 2) if he is not, whether his evidence is likely to be material (the second issue, a mixed question of fact and law) and 3) if it is material, what is the test for issuing a subpoena under Rule 54? and 4) was that test correctly applied by the Trial Chamber majority?

21. My colleagues treat the fourth issue as merely a matter of discretion, and in consequence as unappealable on its merits. I disagree. It is a mixed question of fact and law. The merits of the decision must be controlled by the accused's right to obtain witnesses, vouchsafed by Article 17(4)(e). In any event, under Rule 73(B) leave has been granted "to avoid irreparable injury to a party". If we are satisfied that a trial chamber's application of law to facts has produced an unfair decision, which will handicap a party throughout the trial, we are entitled to strike it down before it contributes to a miscarriage of justice. In the exceptional cases where leave for interlocutory appeal is given, the "judicial review" standard developed in public law as a self-denying ordinance for appeal courts in reviewing administrative decisions is in my view inappropriate, and should not be applied to criminal appeals, notwithstanding the ICTY jurisprudence cited in this Court's opinion in this case. As Lord Atkin has said, in the administration law context,

[22] Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber's Decision on Their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone, filed 29 June 2006, ("Motion by First and Second Accused for Leave to Appeal"), at para. 12.

"While the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of that judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it."[23]

If the Appeal Chamber is satisfied that a Trial Chamber decision has produced serious unfairness to either side then it should intervene, whether or not that decision can be described as "discretionary".

Legal Standard for the Issue of a Subpoena

22. My view on the correct interpretation of Rule 54 is set out at paragraphs 3-8 above. I concur with paragraph 9 of the Court's judgement in this case, namely that the test is "satisfied if the applicant shows that the subpoena is likely to elicit evidence material to an issue in the case which cannot be obtained without judicial intervention. The key question is whether the effect that the subpoena will have is necessary to try the case fairly."[24]

23. Where I diverge from my colleagues over whether the Trial Chamber majority applied test. Under the rubric **Standard for issuing a subpoena pursuant to Rule 54,** at paras 28 to 31, the two judges seem entirely to have misunderstood it. They begin, at para 28, by stating:

> 28. "The applicant for the issuing of 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)."[25]

24. These two separate "requirements" do not appear in the Rule. All it requires is a showing that an order is necessary to bring the relevant evidence into the court. Yet the Trial Chamber goes on, in paragraph 29, to elaborate these two "requirements" or "prongs" that it purports to find in Rule 54:

> "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

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[23] Wade and Forsythe, *Administrative Law*, Oxford, 8th edn, p 926, and note Lord Denning's view that "an erroneous exercise of discretion is nearly always due to an error in point of law": Re DJMS (1977) 3 All ER 582 at 589

[24] Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006, ("Appeals Decision"), para. 9. (At paragraph 25, however, the Court seems to resile from this correct position, and to approve the incorrect "two prong" approach of the Trial Chamber).

[25] Majority Decision, para. 28.

> 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. Whether the information would be of material assistance to the applicant's case would 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. 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 (sic) 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."[26]

25. These are not "requirements" that have any relevance to the test for issuing a subpoena. They are all considerations that bear on the anterior question of whether the witness is likely to possess any relevant evidence. They have nothing to do with the Rule 54 test of whether an order is necessary to elicit it. They are commonsense considerations that have been articulated in the case law to help a court decide whether the evidence of the potential witness is likely to be material, but they are by no means exhaustive considerations. They do not embody rules of law, but rather counsels of prudence and common sense. Paragraph 29 shows that the Trial Chamber mistakenly conflated these practical considerations as to whether evidence might be material with the test in Rule 54 for deciding whether it is necessary to issue a summons to obtain it. There is no "purpose" requirement in Rule 54 at all. The only test is whether a court order is necessary at any of the three stages mentioned (investigation, preparation and trial) or whether the relevant evidence might instead be forthcoming by a lesser measure or from another source. This test is addressed in paragraph 30 of the Trial Chamber majority decision:

> "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. 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 chamber should not hesitate to use this instrument when it is necessary to elicit information material to the case and to

[26] Majority Decision, para. 29.

> 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. 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. We consider that it would be inappropriate to issue a subpoena if the information sought to be obtained is obtainable through other means."[27]

26. I have pointed out, at paragraphs 5-11 above, that there is nothing in Rule 54 that requires court orders to be used "sparingly". They should be used whenever a court order is necessary to secure the attendance of a relevant witness who will not otherwise come willingly to court. If the information can be secured by other means there is obviously no "necessity" for a subpoena, so long as it is the same information – i.e. the "other means" will produce evidence which carries similar weight. There is no warrant in Rule 54 for a two-pronged test of "necessity" and "purpose". The Trial Chamber's two-fold error was to read into Rule 54 some (and some only) of the considerations which inform the anterior decision as to whether the information is likely to be relevant, and then to insist that Rule 54 be used "sparingly". (These errors are, regrettably, repeated in this Court's decision.)[28] The only test under Rule 54 is whether it is necessary to issue a subpoena or other order so as to bring relevant evidence before the court. That test obviously involves consideration of whether it can be put before the court without compulsion – e.g. by the other party (here, the prosecution) agreeing to it; or by taking it in a manner acceptable to the hitherto unwilling witness (who may be willing to give it by way of affidavit or video link) or by the court initially requesting, rather than ordering, that it be given.

27. This is the relatively narrow dimension of a Rule 54 decision. In my view the Trial Chamber majority in the paragraphs I have quoted clearly failed to appreciate the true nature of the test, which they confused with the test for likely relevance. They also erred, in my view, in adopting a restrictive approach to the purpose of Rule 54. There is no basis in its wording for the inference that it "is designed to limit the use of coercive measures to a minimum".[29] On the contrary, it is designed to make available to the parties, and in particular to the defence, a range of coercive measures which may be necessary to bring to

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[27] Majority Decision, para. 30.
[28] See the mantra that compulsory orders are to be used "sparingly": Court opinion, paras 10 and 29. This restrictive approach inevitably disadvantages the defence by predisposing the Court against granting an application for a compulsory order.
[29] Majority Decision, para. 30.

court evidence which is highly relevant to a serious criminal trial. It requires generous interpretation because it effectuates a fundamental defence right enshrined in Article 17 of the Statute. Paragraph 30 of the Trial Chamber majority adopts dicta from ICTY decisions that the Rule is "to be used sparingly", and in my view that dicta is mistaken. Because a subpoena is an instrument of judicial compulsion, it must be used carefully. It does not follow that it must be used sparingly, if its unsparing use is the only way to ensure a fair trial.

28. We have been pressed by the parties with their interpretations of various ICTY and ICTR cases, but these tend to be fact specific and citations offer no more than helpful comments on some of the considerations that will apply, almost always in cases where the evidence sought is in a foreign state - which is not the case here. In *Krystic*, for example, the court points out that the question of whether the evidence is material (i.e. that the application serves "a legitimate forensic purpose") will "depend largely" on the position held by the prospective witness in relation to the events in question, any relevant relationship he has had with the accused and any opportunity to observe the events and any statement he has made about them.[30] This observation is repeated by the Trial Chamber in paragraph 29 of its judgement, cited at para 24 above. But on any view, these factors - and they are no more than factors to be balanced - are certainly not exhaustive. Often, the relevance of potential evidence can be inferred from other facts in evidence, and very often witnesses and documents are properly made the subject of subpoena because the accused instructs counsel, e.g. that he has seen the documents or has had a particularly important conversation which he wants the witness to confirm. The Trial Chamber endorsed the view in *Krystic* that when "the applicant has been unable to interview the prospective witness, the test will have to be applied in a reasonably liberal way".[31] Whether the Trial Chamber majority applied the test in a reasonably liberal way in this case is incapable of review on appeal if the application is regarded as a matter merely of discretion.

29. Since I am satisfied that the Trial Chamber majority did not apply the correct test for the issuance of a subpoena, I would prefer to dispose of this appeal by directing the Trial Chamber to rehear the matter and decide first, whether the President is immune; secondly

[30] *Krstic* Subpoenas Decision, para. 11.
[31] *The Krstic* Subpoenas Decision, para. Para. 11.

whether the President's evidence is likely to be material to an identified issue, and finally to determine the Rule 54 question by applying the correct test. On that rehearing the Trial Chamber might well conclude that a subpoena was not at this stage necessary, because President Kabbah would be likely to respond favourably to a request from the court. But it might well conclude that there is no Rule 54 issue, because there is no relevant evidence that President Kabbah can give. That opinion, indeed, seems to have been the majority finding. It has been vigorously contested in this appeal, but is upheld by this court on the basis that it was acceptable as an exercise in discretion, however mistaken it may have been on the merits. Had the court been prepared to consider those merits, I would have favoured an oral hearing: there are important factual matters which are not clear from the written submissions in front of us. However, neither party has sought a hearing and both sides have stressed the urgency of our decision, which has in consequence been prepared over the August vacation. I have dealt with the main question – the correct test for subpoena issue under Rule 54. I shall now consider, in reverse order, the two issues that should, logically, precede that decision: whether the evidence sought might be material, and whether the President of Sierra Leone now has testamentary immunity.

Was President Kabbah's Evidence Likely to be Material to the Defence?

30. This is the issue that the Trial Chamber majority addressed under the misapprehension that it was part of the standard for issuance of a subpoena under Rule 54. It is rather, as I have explained, a preliminary issue about which the court must be satisfied before it decides whether a subpoena is necessary. It is an issue which normally should be left to the good sense of Trial Chamber judges who have spent (in this case) several years immersed in the facts of the case. It requires the applicant accused to show that the evidence is likely to be significant either because it tends to refute incriminating evidence given against him by prosecution witnesses or because it will tend to support a legitimate defence. This issue divided the Trial Chamber, so we must first consider how the application was put.

31. The applicant Fofana (allegedly, the CDF's "director of war") and Chief Hinga Norman (allegedly, the CDF's operational leader) are accused of committing, between October 1997 and December 1999, various war crimes in the course of fighting, so they say, to restore the democratically elected government of President Kabbah, whom they regarded as their

"President, Commander-in-Chief and Minister of Defence".[32] Although he was forced for security reasons to remove himself to nearby Guinea for some months, it is said that President Kabbah was visited there by Norman and other CDF commanders and throughout this period he kept in touch with his pro-government forces on the ground in Sierra Leone via satellite telephone. There have been various references to President Kabbah in this capacity in the evidence of prosecution witnesses, and on this basis it is argued that his testimony is necessary to get at the "full truth" of what happened in the war.

32. I have no doubt that it is, but equally I have no doubt that it is not the function of a war crimes court to get at the "full truth" about the war. That lengthy exercise must be left to historians and to truth commissions. This court is only concerned to get at the truth concerning the specific acts that are charged against the defendants: more precisely, to examine whether the prosecution evidence proves the charge beyond reasonable doubt. It is a frequent mistake, often made by prosecutors who overload indictments but here made by counsel on behalf of the defendants, to think that the court can cope with receiving evidence which is "relevant" only because it illuminates some aspect of the conflict. No doubt President Kabbah has much of interest to tell about the war – indeed, he gave evidence to the Truth and Reconciliation Commission – but unless he can throw some light on the guilt or innocence of these accused men, the courtroom (or even a video-link to it) is not the place for him to tell it. The references to him by prosecution witnesses may or may not be accurate – he may indeed, for example, have kept in regular touch with Chief Norman and arranged for funds to be transmitted to his troops – but that of itself does not mean he can help with evidence which is material to allegations of specific criminal acts. It is not enough to show that President Kabbah is mentioned by prosecution witnesses: there must be a real likelihood that his evidence would undermine or refute some accusatory statement or inference that they have made against the defendants. Otherwise, his evidence will only be likely to be "material" if it would go to support a legitimate defence.

33. In this respect, the application by Fofana appears at first blush on stronger ground. He is alleged to have held a specific position in the CDF, but he argues that his actions in that position excluded him from the class of persons who "bear the greatest responsibility" for

[32] *Prosecutor v. Norman et al.*, Case No.SCSL-04-14-T, Indictment, 05 February 2004.

alleged violations of international law committed in the course of the fighting. The Trial Chamber has already ruled that this issue "is an evidentiary matter to be determined at the trial stage"[33] although I would have thought that it is first and foremost a question of law as to whether (and if so, to what extent) it is a legitimate defence for a defendant to argue that he bears lesser rather than greater responsibility for a war crime. Is this actually a defence, or a jurisdictional bar that can avail a defendant, or does it merely limit prosecutorial selection of the class of persons to be tried in the Special Court? We have heard no argument and I express no view, other than to say that if it is not a defence or jurisdictional bar then President Kabbah's evidence about Mr Fofana's position cannot be relevant in this trial at all. If, however, it provides some form of defence, then his opinion and observation, as commander-in-chief, of Mr Fofana's role and authority might well be the best evidence available. It would certainly come with more weight and credibility than any evidence to the same effect given by a foot soldier or another less well-placed or less well-informed observer.

34. The Trial Chamber majority seems to accept that President Kabbah could testify admissibly and relevantly as to the "relative culpability" of Mr Fofana, but rejected the subpoena on the basis that "the information is obtainable through other means".[34] They did not identify those "other means". Since the "information" sought is information about Fofana's level of responsibility *as recognised by his commander-in-chief*, I doubt whether information of this quality could be given by anyone else. Later, the Trial Chamber says that such evidence (specifically, that Fofana was only following Kabbah's orders, i.e. that he had no command responsibility) might be admissible at the sentencing stage: "Should he be convicted, it may then be considered in mitigation of punishment".[35] Quite apart from the appalling prospect of this proceeding, which has already lasted several years, being delayed further by extensive sentencing hearings, I find this approach irrational. If it really is a defence for Fofana to show that it had no (or no great) command responsibility, then evidence about his role must be relevant at the trial. If President Kabbah were subpoenaed only at sentencing stage, and then testified authoritatively that Fofana had no responsibility at all, then there might have been a miscarriage of justice which could lead to a retrial.

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[33] Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, 3 March 2004, para. 44.
[34] Majority Decision, para. 37.
[35] Majority Decision, para. 48.

35. These problems arise in my view because the Trial Chamber proceedings did not take the correct course. The applicants should have been required to specify the defence to which President Kabbah's evidence was likely to be material. The Trial Chamber should then have decided whether the defence specified was good in law, and whether it was likely that President Kabbah's evidence would assist it. Then - and only then - should it have addressed the Rule 54 question, as to whether a compulsive order was necessary to obtain it, or whether the President might give it voluntarily (if requested by the Court) or whether it might be given with equal credibility by someone else. By conflating the entirely different tests of materiality and necessity, and by failing to identify a legitimate defence to which the evidence might be relevant, the proceedings below have produced a confusion that should in my view be unconfounded by returning this matter to the Trial Chamber with a direction to reconsider it correctly.

36. In certain other respects the applicants' explanation of their need to question President Kabbah appears to be motivated by a desire to associate him with their activities: if so, this would be an attempt to elicit inadmissible *tu quoque* evidence. There are certain exceptions to this rule, most notably where the evidence is relevant to whether the action charged as a war-crime has the necessary quality of universal disapprobation (hence at Nuremberg, evidence was admitted, on behalf of Admiral Dönitz, that his allegedly criminal order to submarines were in fact the same as orders by Admiral Chester Nimitz, commander of the allied Pacific Fleet).[36] Another exception to the rule is where *tu quoque* evidence supports a defence based e.g. on reasonableness of the force used to put down an insurrection or on the necessity of taking an impugned measure in order to save lives or (perhaps) to defend a democratically elected government. To take a hypothetical example, a commander accused of the war crime of recruiting fifteen year old children into his force might support a defence of necessity, or self-defence, by calling the President to say that he approved this measure as a last resort to save innocent lives in peril from "barbarians at the gates". It is not enough for Chief Hinga Norman to say that because he had conversations with President Kabbah throughout the war then the President's evidence is likely to be material to his defence. Only if he can assert that a particular conversation induced in him the reasonable belief that an action now charged as a war crime was, e.g. absolutely necessary *in*

[36] Robert E. Conot, *Justice at Nuremberg*, (Wiedenfeld, 1983), p68

extremis to save innocent civilian lives or amounted to force reasonable in the circumstances to deal with criminal violence, might that conversation go to support a legitimate defence. However, it would be necessary for the applicant to identify the precise defence that he was raising and to show that if made out it would be a good defence in law, as well as to show that the evidence of the conversation would be likely to support it. I do not find in the submissions as they have been placed before us a sufficient showing on either score: it is not enough to say that the relevance of President Kabbah's evidence is "self-evident" or that (in Norman's case) "he knew what the first accused was doing at all times because he was in contact with President Kabbah by mobile phone."

Is President Kabbah Immune from any Court Order?

37. This is, logically, the first issue to be decided in this appeal, as it should have been the first issue to be decided in the court below. If, as the Attorney General argued and one trial judge determined, an incumbent president has absolute immunity from any legal process in this court, then it would violate that immunity to embark upon argument and decisions and appeals which treat him and his potential evidence as he were not immune. For that reason (amongst others), I cannot side-step a decision on this point simply because there was no actual finding on it by the Trial Chamber majority. In a lengthy concurring opinion, Judge Itoe expanded his reasoning for joining Judge Boutet in that majority opinion, and a central part of that expanded reasoning was his view that the President had sovereign immunity. Judge Bankole Thompson's opinion was primarily directed to refuting the immunity argument. So I feel bound to deal with the point briefly, to explain why I am not persuaded that an immunity is relevant to this case.

38. Immunities from criminal jurisdiction must be narrowly interpreted or "recognised with restraint", so the onus is on those who assert the immunity of a witness in international law to establish it beyond doubt. Judge Itoe notes, quite correctly, that national law in a number of countries, including Sierra Leone, attaches immunity from prosecution, or from civil proceedings, to incumbent heads of state and/ or government ministers.[37] However, national law does not bind international courts and the Appeals Chamber of this international court has made very clear that it is in no way subject or subservient to the

[37] Concurring Opinion, paras. 94-118.

Sierra Leone constitution or to local laws. It operates in an international dimension unaffected by any immunity bestowed by local law unless that reflects immunities in customary international law. Thus, in Prosecutor v. Kallon, this Chamber held:

> "...the Special Court is not part of the Judiciary of Sierra Leone. It is the product of a treaty agreement between the Government and the UN. ...although Article 8 may appear repugnant when viewed in light of Sections 122 and 125 of the Constitution, it does not, in our judgement, amend the judicial framework or court structure of Sierra Leone because the Special Court is not part of the Sierra Leone Judiciary and is outside the structure of the national courts."[38]

The fact that aspects of the Special Court's operation may depend on local laws and local law enforcement does not alter this fundamental position.

39. The classic reason for Head of State immunity was described by Judge Itoe in terms that echo Machiavelli and Jean Boudin:

> Commonly referred to as "'The Princes who govern us", Heads of State are granted these immunities, not for their personal aggrandisement, comfort, needs or aspirations, but because the seat and position they occupy as the highest ranking Officials and Citizens of 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 State 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.[39]

40. This was the mind-set that prevailed in Europe in 1648, at the time of the Treaty of Westphalia. England was not a party to that treaty, however, and a few months later it rejected sovereign immunity by convicting and executing Charles I, a precedent followed over a century later by the National Assembly in France in respect to Louis XVI. Moving to modern times, ever since the Nuremberg Charter in 1945 the atmosphere of tranquillity surrounding Heads of State has been capable of disruption by indictments and arrests for war crimes and crimes against humanity. It follows that it must also be capable of polite and dignified interruption by requests or directions to assist an international criminal court, if the statesperson happens to be the unique possessor of evidence that will help acquit or condemn a prisoner charged with a crime against humanity.

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[38] *Prosecutor v. Kallon et al.*, Case No.SCSL-04-15-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, paras. 67-68.

[39] Concurring Opinion, para. 132.

41. There is now such overwhelming authority that incumbent heads of state are amenable to international law, that the very proposition that they have sovereign immunity from the processes of international criminal courts must be viewed as the jurisprudential equivalent of the proposition that the earth is flat. Galileo's telescope is here represented by Article 7 of the Nuremberg Charter, which expressly rejected sovereign immunity for military and political leaders: *"The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."*[40] The judgement at Nuremberg heralded the removal of the shield of state sovereignty for crimes against humanity,[41] and shortly afterwards, the United Nations General Assembly formally adopted a resolution "affirming the principles of international law recognised in the Charter of the Nuremberg tribunal and the judgement of the tribunal."[42] In 1950, the International Law Commission authorities stated these principles, including (as principle 3):

> *"The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him of responsibility under international law."*[43]

42. In 1997 Jean Kambanda, Prime Minister of Rwanda during the genocide, was indicted and pleaded guilty. His indictment was upheld by the ICTR, notwithstanding his official position.[44] The Statute of the ICTY provides that "the official position of any accused person, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment." Slobodan Milosevic was indicted while he was incumbent president of Yugoslavia and charged in relation to acts committed whilst he served as Head of State. The ICTY rejected his claim to be immune from prosecution and observed that the rule set out in its statute "at this time reflects a rule of customary international law."[45] Article 27 of the Rome Statute of the International Criminal Court provides:

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[40] Article 7, Charter of the International Military Tribunal, 8 August 1945.
[41] See proceedings, at p446-7.
[42] Judgment - Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, House of Lords, 24 March 1999. (2000) 1AC 147
[43] Report of the International Law Commission to the General Assembly, UN document A/ 1316 (1950).
[44] *Prosecutor v Kambanda*, Case No.ICTR-97-23-A, 19 October 2000.
[45] *Prosecutor v Milosevic*, Decision on Preliminary Motion, 8 November 2001.

> "... official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute... Immunities or special procedural rules which may attach to the official capacity of the person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

43. As if this array of state practice and international treaty law were not enough, the International Court of Justice has made crystal clear that no immunity of an incumbent Head of State under national law could avail a Head of State or government minister in an international criminal court. In paragraph 61(iv) of its decision in DRC v Belgium,[46] that proposition is spelled out. Judge Itoe misunderstands this decision, thinking that it "sustained that this immunity protects any Head of State from prosecution." It did exactly the opposite, in relation to international criminal courts, of which this court is one. Similar confusion between national and international courts is apparent from his reliance upon a *Cour de Cassation* decision upholding a domestic law immunity of President Chirac. This case does not affect the position of a Head of State in an international court.

44. The Statute of the Special Court for Sierra Leone reflects the true position: Article 6(2) provides that "*the official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.*" In the Appeal Chamber decision in Prosecutor v Taylor this Appeal Chamber held:

> "The principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court. ...the Appeal Chamber finds that Article 6(2) of the Statute is not in conflict with any peremptory norms of general international law and its provisions must be given in effect by this court. We hold that the official position of the Applicant as an incumbent Head of State at the time when these criminal proceedings were initiated against him is not a bar to his prosecution by this court."[47]

45. There is an early decision of the ICTY, Prosecutor v Blaskic, in which the Appeals Chamber "dismisse[d] the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity".[48] However, in the later case of Prosecutor v

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[46] *Case Concerning the Arrest Warrant of 11 April 200 (Democratic Republic of Congo v. Belgium)*, (2002) ICJ Reports, 14 February 2002.

[47] *Prosecution Against Charles Ghankay Taylor*, Case No.SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, paras. 52-53.

[48] *Blaskic* Subpoena Decision, para. 38.

Krstic this decision was confined to subpoenas relating to state documents which are in the custody of state officials, as distinct from subpoenas to a person such as President Kabbah, to give evidence of what he saw or heard at a time when he was a state official and even if his testimony related to information derived from or during the official functions.[49] I do not for myself consider Blaskic a compelling authority on discovery of state documents, and today it stands for little more than the proposition that documents in the custody of states rather than individuals should be sought by orders rather than subpoenas, but that is another matter. Krstic makes clear that Blaskic is not to be relied upon as an authority that state officials have any immunity to a subpoena requiring them to divulge material evidence:

> "The Appeals Chamber did not say that the functional immunity enjoyed by State officials provided immunity against being compelled to give evidence of what the official saw or heard in the course of exercising his official functions. Nothing which was said by the Appeals Chamber in the *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."[50]

46. The most recent decision on the subject, by a strong ICTR Trial Chamber in Prosecutor v Bagasora, confirms that "government officials enjoy no immunity from a subpoena even where the subject matter of their testimony was obtained in the course of government service."[51] Judge Itoe nonetheless argues that since President Kabbah is provided with immunity from "civil or criminal proceedings" under Section 48(4) of the Sierra Leone Constitution, any enforcement of a subpoena by local policemen arresting him or taking him to prison for contempt of this court would put them in breach of local law and disrupt the national tranquillity.[52] Alternatively, if somewhat incompatibly, he argues that because "the Presidency of the Republic is a sacred national institution"[53], the President never would be arrested by his policemen, so the issue of a subpoena would be an exercise in futility, and calls for "the application of the Common Law (sic) doctrine of 'Equity does not act in vain'".[54]

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[49] *Krstic* Subpoenas Decision.
[50] *Krstic* Subpoenas Decision, para. 27.
[51] 14th July, 2006, ICTR, para 4.
[52] Concurring Opinion, paras. 111-118, 132.
[53] Concurring Opinion, para. 152.
[54] Concurring Opinion, para. 160.

47. These purport to be arguments from experience. Yet realistically, it is difficult to imagine the President disobeying an order of this court. The consequences to him and to his country of alienating the United Nations, the international community and donor nations make the prospect of disobedience far-fetched, quite apart from the full-blooded support the President has pledged for this court in negotiating it into existence and indeed in opening it. Moreover, the Attorney General has made very clear that if a subpoena were issued, he would advise the President to comply.[55] The spectacle of President Kabbah being dragged off in chains for contempt of court, which features in Judge Itoe's opinion, not only is unrealistic, but seems based on the notion that contemnors are jailed: on the contrary, a finding of contempt would be followed by activation of the Rule 8(a) machinery which permits the President of this court to raise directly with the United Nations any lack of co-operation by the Sierra Leone government with the Special Court.

48. Judge Itoe's alternative argument, that equity does not act in vain, reflects a maxim of equity courts, but the SCSL is not an equity court – it is an international criminal court which takes whatever actions are necessary to ensure fair trial. Whether or not its orders are likely to be enforced by local police officers, they have a moral force which will assuredly engage the attention of the UN Security Council, a party to the agreements which established the court, and all the nations which support it. I cannot accept that an order, or a request, directed by a chamber of this court to the President or any other Minister would be what equity would term a "*brutum fulmen*" (an empty sound) in light of 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[56], which specifically provides:

Article 17

(1) The government shall cooperate with the organs of the Special Court at all stages of the proceedings;

(2) The government shall comply without undue delay if any request for assistance by the Special Court or an order issued by the chambers.

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[55] Oral Argument on Motion by First and Second Accused for Leave to Appeal, Transcripts, 14 February 2006, page 83, at line 11.
[56] 16 January 2002.

These rules are supplemented by Rule 8(A) of the Rules:

> "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."

In these circumstances it cannot be said that the issue of a subpoena to the President would be an "exercise in futility".

49. For these reasons, shortly stated, I am not persuaded that there is any question of immunity that would preclude the court in a proper case from issuing a subpoena directed to the President. However, it is entirely appropriate for the court to consider the special public position of any persons summonsed as a witness. If persuaded that the application is not made *bona fide*, but rather to embarrass or harass, then the application will be refused. The Attorney General's contention to this effect was carefully considered by Judge Itoe who rejected it and acknowledged that if President Kabbah were capable of being summoned, the Trial Chamber could protect him from any embarrassment or irrelevant questioning.[57] Where an incumbent government minister is the subject of a subpoena, the court will consider very carefully whether the evidence he could give is important enough to incommode him: Prosecutor v Milosevic provides a good example, where careful examination demonstrated that the evidence sought to be elicited from the Prime Minister of Britain and the former Chancellor of Germany did not in fact relate to any live issue in the trial, and so the application was refused.[58] The public position of the witness will also be relevant in considering whether a request would be sufficient to obtain his cooperation, and if not whether the subpoena or order should direct him to provide the evidence by way of deposition, or video link, rather than by disrupting his public duties by insisting upon his presence in the courtroom.

Conclusion

[57] Concurring Opinion, paras. 175-176.

[58] *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, 9 December 2005.

50. For the reasons given above, I would remit this application to the Trial Chamber, with the direction to decide whether the evidence sought from President Kabbah is or may be material to an issue which, if decided in the applicant's favour, would support a defence in law to any of the charges in the indictment. If so, then the Chamber should decide, pursuant to Rule 54, whether evidence can only be brought before it by directing an order to the President, and if so, whether that order should direct him to produce the evidence by deposition or by video link testimony rather than by requiring his presence in the courtroom.

Justice Geoffrey Robertson QC

Monday 11 September, 2006