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SCSL-04-14-T
(18567-18579)

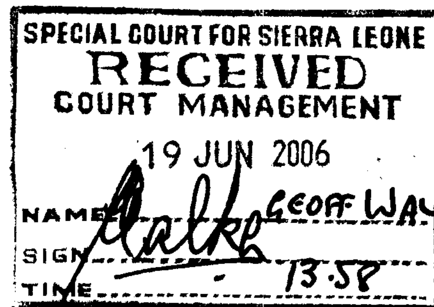
SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber I

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

Registrar: Mr Lovemore Munlo, SC

Date: 19 June 2006



THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

PUBLIC

URGENT FOFANA APPLICATION FOR LEAVE TO APPEAL THE SUBPOENA DECISION

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

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

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

For Samuel Hinga Norman:
Dr Bu-Buakei Jabbi
Mr Alusine Sani Sesay
Ms Clare DaSilva
Mr Kingsley Belle

For Allieu Kondewa:
Mr Charles Margai
Mr Yada Williams
Mr Ansu Lansana
Mr Martin Michael

INTRODUCTION

1. Counsel for the Second Accused, Mr Moinina Fofana, (the "Defence") hereby files its application for leave to appeal 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 "Chamber") on 14 June 2006[1] (the "Subpoena Decision"). This application (the "Application") is filed pursuant to Rule 73(B) of the Rules of Procedure and Evidence (the "Rules").

2. The Defence submits that exceptional circumstances exist for the granting of leave to appeal in so far as the Subpoena Decision (i) implicates a fundamental right enshrined in the Statute of the Special Court for Sierra Leone (the "Statute"); (ii) concerns novel and substantial aspects of international criminal law which require definitive interpretation by the Appeals Chamber given the divergent views expressed in the various opinions of the Chamber; and (iii) contains several legal and factual errors. Further, the Defence will suffer irreparable prejudice in so far as the deprivation of unique, relevant, and potentially crucial evidence cannot be remedied on a final appeal.

3. As a result of the Subpoena Decision, the Defence may be required to make significant modifications to its case strategy for the next trial session and would appreciate a decision from the Chamber as soon as possible. Accordingly, the Application is styled as urgent.

SUMMARY OF PROCEEDINGS

4. The Defence filed its 'Motion for Issuance of a Subpoena *ad Testifcandum* to President Ahmad Tejan Kabbah' on 15 December 2005[2]. Counsel for Mr Norman filed a similar motion on the following day[3]. Responses to the motions (the "Motions") were filed by the Office of the Prosecutor (the "Prosecution") on 13 January 2006[4] and by the Attorney

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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'.

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 Chamber[7]. Six months after the filing of the Motions, the Subpoena Decision was filed by the 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").

SUBMISSIONS

The Applicable Law

5. While there is no right to appeal the denial of a motion filed under Rule 73, leave to make an interlocutory appeal may be granted by the Trial Chamber "in exceptional circumstances and to avoid irreparable prejudice to a party"[9]. The Defence acknowledges that the Appeals Chamber has construed Rule 73(B) narrowly and that the applicable two-prong test is a conjunctive one, obliging the moving party to show *both* "exceptional circumstances" and "irreparable prejudice" before leave can be granted[10].

6. Since the issuance of the Appeals Chamber's decision of 18 May 2005[11] (the "Appeals Chamber Decision"), both Trial Chambers I and II have hewn closely to the principle that "the procedural assumption [at the Special Court] is that trials will continue to their

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[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; *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.

[8] *See* n 1 *supra*.

[9] Rule 73(B).

[10] *See Prosecution v. Norman et al.*, SCSL-2004-14-406, Trial Chamber I, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on First Accused's Motion on Abuse of Process', 24 May 2005, at p 2; *see also Prosecutor v. Brima et al.*, SCSL-2004-16-308, Trial Chamber II, 'Decision on Joint Defence Application for Leave to Appeal Against the Ruling of Trial Chamber II of 5 April 2005', 15 June 2005, ¶ 14.

[11] *Prosecutor v. Norman et al.*, SCSL-2004-14-AR73-397, Appeals Chamber, 'Decision on Amendment of the Consolidated Indictment'.

conclusion without delay or diversion caused by interlocutory appeals on *procedural matters*, and that any errors which affect the final judgment will be *corrected in due course* ... on appeal"[12]. Faithful adherence to this standard has produced certain well-established principles.

7. Generally, the mere fact that there has been a dissenting opinion by one of the judges, that there is disagreement among the judges, or that a particular issue strikes a Trial Chamber as interesting or important for the development of international criminal law is not sufficient[13]. However, the nature and significance of the matters sought to be appealed, in conjunction with the presence of disagreement or dissent, may be considered as factors relevant to the determination[14].

8. When denying leave to appeal, Chambers have routinely called attention to the singular nature of the reasons advanced in support of the applications (e.g., the *mere* fact of a dissenting opinion, the probability of an erroneous ruling *of itself*, abuse of discretion *on its own*)[15]. The Defence submits that such emphasis suggests that *cumulative* allegations of error may satisfy the test of exceptional circumstances. Despite the development of a generally restrictive Rule 73(B) jurisprudence, a case-by-case analysis—one that takes full account of the severity and multiplicity of the factors proffered in support of the application—is appropriate.

9. Notwithstanding the Court's restrictive approach with respect to alleged *procedural errors*, leave to appeal should be granted, as a matter of course, where the application involves "a

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[12] *Ibid.*, ¶ 43 (emphasis added).

[13] *See* Appeals Chamber Decision, ¶ 43; *see also Prosecutor v. Sesay et al.*, SCSL-2004-15-T-401, Trial Chamber I, 'Decision on Application for Leave to Appeal the Ruling (2 May 2005) on Sesay Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor', 15 June 2005, ¶ 19 (motion denied); *Prosecutor v. Norman et al.*, SCSL-2004-14-T-515, Trial Chamber I, 'Majority Decision on Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on Admissibility of Evidence', 9 December 2005, ¶ 9 (motion denied).

Nor does the probability of an erroneous ruling by the Trial Chamber, *of itself*, constitute exceptional circumstances. *See Prosecutor v. Sesay et al.*, SCSL-2004-15-T-401, Trial Chamber I, 'Decision on Application for Leave to Appeal the Ruling (2 May 2005) on Sesay Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor', 15 June 2005, ¶ 20 (motion denied); *Prosecutor v. Norman et al.*, SCSL-2004-14-T-545, Trial Chamber I, 'Decision on Prosecution Application for Leave to Appeal *Proprio Motu* Findings in Decisions on Motions for Judgment of Acquittal Pursuant to Rule 98', 24 January 2006, at 3 (motion denied).

[14] *See Prosecutor v. Norman et al.*, SCSL-2004-14-T-404, Trial Chamber I, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base', 24 May 2005, at 2 (motion denied).

[15] *See* n 13 *supra*.

fundamental right enshrined in Article 17(4) of the Statute"[16]. Additionally, granting leave is appropriate where the question presented by the application concerns "a novel and substantial aspect of international criminal law", which is likely to arise again and therefore requires a definitive interpretation by the Appeals Chamber[17], or where the impugned decision expresses a variety of irreconcilable legal opinions with respect to an issue "of fundamental importance to the Special Court and to international criminal law generally"[18]. Such scenarios amount to "exceptional circumstances" within the meaning of Rule 73(B)[19].

Exceptional Circumstances Exist in this Case

The Subpoena Decision Implicates a Fundamental Right Enshrined in Article 17(4) of the Statute

10. As noted above, Trial Chamber II has held that where an application for leave to appeal implicates a fundamental right enshrined in Article 17(4) of the Statute, the very nature of the application may satisfy Rule 73(B)'s conjunctive test[20]. In that case, counsel for Messrs Brima and Kamara sought leave to appeal from a decision denying the re-appointment of their previously assigned counsel, a decision that impacted the rights of the accused under Article 17(4) of the Statute, including the right "to communicate with counsel of [their] own choosing"[21]. Recognizing the fundamental importance and extensive impact of the

[16] *Prosecutor v. Brima et al.*, SCSL-2004-16-T-367, Trial Chamber II, 'Decision on Brima-Kamara Application for Leave to Appeal From Decision on the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel', 5 August 2005 (the "Re-Appointment Decision"), at 3 (holding that "the very nature of the application" satisfied Rule 73(B)'s test).

[17] *Prosecutor v. Brima et al.*, SCSL-2004-16-T-414, Trial Chamber II, 'Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality', 12 October 2005 (the "Confidentiality Decision") at 3 (granting the Prosecution's application for leave to appeal the decision regarding the compelling of a witness to testify over objections based on grounds of confidentiality).

[18] *Prosecution v. Norman et al.*, SCSL-2004-T-313, Trial Chamber I, 'Decision on Application by First Accused for Leave to Make Interlocutory Appeal Against the Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment', 16 December 2004, at 3.

[19] *See also Prosecutor v. Norman et al.*, SCSL-2004-14-T-515, Trial Chamber I, 'Majority Decision on Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on Admissibility of Evidence', 9 December 2005, ¶ 6 (motion denied) (where this Chamber specified the following factors to be considered in the exceptional circumstances analysis: "(i) an issue of general principle to be decided for the first time (ii) a question of public international law importance upon which further argument or decision at the appellate level would be conducive to the interests of justice, (iii) a question which raises a series of issues of fundamental legal importance to the Special Court in particular, international criminal law in general, or (iv) an issue of some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems").

[20] *See* Re-Appointment Decision at 3, n 16 *supra*.

[21] Statute, Article 17(4)(b).

issue raised by the application—the accused persons' entitlement to certain minimum guarantees in full equality[22]—the Chamber summarily granted the motion.

11. Similarly, the instant Application raises an issue concerning a fundamental statutory right guaranteed to all persons facing charges before this Court, 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"[23]. The effect of the Subpoena Decision is to deny Mr Fofana the attendance and examination, by his counsel, of a potential witness on his behalf—a witness whose testimony, it is submitted, is of unique importance to a full and fair hearing of the CDF proceedings.

12. Accordingly, and for this reason alone, the Chamber should recognize the existence of exceptional circumstances as well as the danger of irreparable prejudice and summarily grant the application without delay, such that a decision of the Appeals Chamber can be rendered before Mr Fofana is required to close his defence.

The Subpoena Decision Concerns Novel and Substantial Aspects of International Criminal Law Requiring Definitive Interpretation by the Appeals Chamber Given the Divergent Views Expressed by the Justices

13. In the AFRC case, the Prosecution sought leave to appeal a decision regarding the compelling of a witness to testify over objections based on grounds of confidentiality. In granting leave to appeal, Trial Chamber II held that the question presented by the application was "not only a novel and substantial aspect of international criminal law, but [was] also likely to arise again with regard to other witnesses in the present case" and that consequently a definitive interpretation of the relevant Rules by the Appeals Chamber was "of fundamental importance to both the Defence and Prosecution cases"[24].

14. Likewise, the instant Application concerns an issue of general principle to be decided for the first time by the Special Court, that is, the interpretation of Rule 54 in the context of a motion for the issuance of a *subpoena ad testificandum*. Additionally, the Application involves 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. What is more, the

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[22] *See generally* Statute, Article 17(4).
[23] Statute, Article 17(4)(e).
[24] Confidentiality Decision at 3, n 17 *supra*.

Subpoena Decision reflects significantly divergent legal opinions with respect to both of these important questions.

15. It is conceded that the mere fact that judges of a trial chamber do not agree on a particular issue does not *of itself* amount to exceptional circumstances under Rule 73(B). However, given the very nature and significance of the matters at issue in the instant case, the widely opposing views expressed by the Justices, as well as the considerable likelihood of the question arising again before this Court, it is submitted that the interests of justice would be served by a definitive appellate decision in these exceptional circumstances.

16. The Subpoena Decision reveals significant differences between and among the three Justices of this Chamber, not only with respect to the resolution of the substantive issues raised, but also as to their jurisprudential outlook and analytical approach to questions of serious importance to the development of international criminal law. Regarding the applicable test to be applied to a request for relief under Rule 54, the Majority Decision adopts wholesale and without distinction the approach of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"), while the Dissenting Opinion endorses an application of Rule 54 based solely on its plain and ordinary meaning without reference to the case law of other tribunals.

17. Without arguing the merits of either approach at this juncture, it is submitted that the mere existence of a split along this particular fault-line is significant to the "exceptional circumstances" analysis for the simple reason that, with respect to the construction and interpretation of the Rules, the Appeals 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[25].

18. The Majority Decision imposes procedural requirements not readily discernable from the plain and ordinary meaning of Rule 54. What is more, these conditions are imposed without taking due account of the underlying factual context which led to their imposition

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[25] Appeals Chamber Decision, ¶ 46.

by the ICTY—an exercise which, it is submitted, is fundamental to the principle of *stare decisis* and necessary to ensure that the application of the Rules of this Court reflect its own unique circumstances rather than those which inform proceedings at The Hague. The views expressed by the Dissenting Opinion, however, are more in keeping with the "purposive approach" to construction espoused by the Appeals Chamber[26]. Accordingly, an appellate decision is necessary in this case to settle the matter definitively.

19. Although the Majority Decision did not reach the second question raised by the Motions—the compellability of a sitting head of state as a witness before an international criminal tribunal—both the Concurring and Dissenting Opinions did so. More than mere disagreement, this particular fracture reveals the existence of two diametrically opposed jurisprudential approaches to questions of serious importance to the development of international criminal law. Endorsing a judicial methodology that includes deference to political institutions and over-reliance on considerations of *realpolitik* as two of its key components[27], the Concurring Opinion disregards settled precedent[28] and acknowledges a special category of persons before the law: "The Princes who govern us"[29]. The Dissenting Opinion, by contrast, takes due cognisance of the recent developments in international criminal law[30], and argues for a strictly legal approach where no individual is above or beyond the law's reach.

20. Again, without taking up the merits of the debate at this point, the Defence submits that the very existence of such divergent and irreconcilable views requires an appellate intervention, especially given that the somewhat troubling positions expressed by the Concurring Opinion likely formed part of the analysis leading to the Majority Decision. The various opinions comprising the Subpoena Decision leave the jurisprudence of the Special Court in a confused state, creating a very real danger of future reliance by other parties on, what are submitted to be, fundamentally flawed positions[31]. This alone amounts to exceptional circumstances.

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[26] *Ibid.*, ¶ 45.
[27] *See, e.g.*, Concurring Opinion, ¶¶ 62, 98, 132, and 133.
[28] For example, this Chamber has *unanimously* held that "in the ultimate analysis, whether or not in actuality the Accused is one of the persons who bears the greatest responsibility … is an evidentiary matter to be determined at the trial stage". *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-26, 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. However, despite appending his signature to this decision, Justice Itoe is now of the view that the concept of greatest responsibility is "just an expression of art relating to the standard to be applied in the choice of the category of those to be indicted". Concurring Opinion, ¶ 86.
[29] Concurring Opinion, ¶ 132.
[30] *See, e.g.*, Dissenting Opinion, ¶¶ 16, 20, and 21.
[31] The Prosecution is still presenting evidence in the RUF proceedings, and the Charles Taylor case has yet to begin in earnest. Accordingly, the effects of the decisions of this Chamber will not be limited to Mr Fofana and his co-defendants but are likely to impact the other accused persons currently facing trial before this Court.

The Majority Decision Contains Several Legal and Factual Errors

21. Again it is conceded that the probability of an erroneous ruling by the Trial Chamber does not, *of itself*, constitute exceptional circumstances[32]. However, it is submitted that alleged errors of law and fact may cumulatively, and in conjunction with additional factors such as those already canvassed above, satisfy the first prong of Rule 73(B)'s test.

22. The Defence submits that the Majority Decision contains significant legal errors. First and most problematic is the undue and unexplained preference given to the highly technical approach employed at the ICTY over either (i) the more flexible one adopted by the ICTR[33] or (ii) the even more liberal course endorsed by the Dissenting Opinion[34]. Without explanation, the Chamber has chosen to dispense with its normally flexible position on admission of evidence in favour of a highly restrictive requirement with respect to Rule 54. It is submitted that, by endorsing the two-prong approach of the ICTY, the Chamber has imposed unnecessary burdens on the Defence, burdens which are at odds with the liberal approach to admissibility adopted so far in the CDF proceedings.

23. By accepting the so-called "purpose" test, the Chamber creates a double-standard of relevance: one extremely low with respect to witnesses willing to appear 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 Chamber's application of the so-called "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[35].

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[32] *See* n 13 *supra*.

[33] *See, e.g.*, *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. *N.B.* Although the ICTR Rules were initially adopted, *mutatis mutandis*, by the Special Court, the Chamber dismisses out of hand the ICTR approach, citing the *Bagasora* case with disapproval. *See* Majority Decision, n 78. However, a closer look at that case reveals that its factual underpinnings are far more analogous to the instant case than those of *Halilovic* and *Krstic*. *See* nn 36 and 37 *infra*.

[34] *See generally* Dissenting Opinion; *see also* Appeals Chamber Decision, ¶ 46 (where the Appeals Chamber specifically instructed the Trial Chambers to construe SCSL Rules with reference to the *sui generis* nature of the Court and without slavish reference to the jurisprudence of other tribunals).

[35] 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

24. Even assuming, *ex arguendo*, the propriety of employing ICTY jurisprudence in this case, the Chamber's failure to draw the necessary factual analogies between the cited case law and the instant case amounts to a serious misapplication of Rule 54. While the Chamber makes a deliberate point of relying on the reasoning of the *Halilovic*[36] and *Krstic*[37] cases in particular, it inexplicably fails to take account of the factual context of those decisions, decisions which the Defence submits are distinguishable on their facts[38]. Such analysis, it is submitted, shows an improper disregard for the Appeals Chamber's admonition to give our Rules a "purposive" evaluation based on the context and peculiarities of the Special Court[39], and ignores the underlying rationale of *stare decisis*, which requires, when relying on a particular authority, an evaluation of the factual context which led to the decision.

25. Finally, the Defence submits that the Majority Decision's evaluation of the relevance of the proposed evidence to the specific issues related to Mr Fofana's alleged culpability under Articles 1(1), 6(1), and 6(3) was erroneous in several respects[40]. In other words, assuming, *ex arguendo*, the Chamber applied the proper test, it nonetheless erred in its application of that test to the facts of Mr Fofana's case. For example, the Chamber's assessment that there is "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"[41] is both inaccurate and premature. As outlined in the Motions and subsequent replies, there is evidence before the Chamber that President Kabbah was informed of events unfolding in Sierra Leone via telephone and personal messengers[42]. Furthermore, the Defence will present additional evidence in this regard during the course of its case, evidence it was surely expecting to put to President Kabbah

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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.

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

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

[38] For example, in *Halilovic*, the target of the requested subpoena was a prosecution witness whose attendance the Defence sought to compel by way of Rule 54 before the witness took the stand to testify in order to assist in preparation of the Defence's cross-examination. The Appeals Chamber—assuming that the "purpose" requirement had been satisfied—rejected the motion *solely* on the grounds that because the Defence would have amply opportunity to cross-examine the prosecution witness on the stand, there was no need to employ the coercive measure of issuing a subpoena prior to his testimony. The subpoena was unnecessary because the witness was already coming to testify. The facts of the *Krstic* case are equally distinguishable.

[39] *See* n 34 *supra*.

[40] *See, e.g.*, Majority Decision, ¶¶ 38, 41, 42, 45–48.

[41] Majority Decision, ¶ 41.

[42] *See, e.g.*, Dissenting Opinion, ¶ 25.

for confirmation or denial. The probability of such errors, combined with the additional factors outlined above, amount to exceptional circumstances.

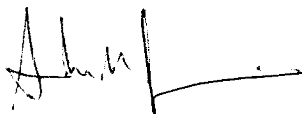
Failure to Hear President Kabbah's Proposed Evidence Will Result in Irreparable Prejudice Which May Not be Remedied at the Final Appeal Stage

26. As a result of the Subpoena Decision, the Defence will be deprived of evidence which it cannot obtain from any other source, relevant evidence with goes to Mr Fofana's alleged culpability under Articles 1(1), 6(1), and 6(3) of the Statute and key portions of the Indictment. The Defence submits that it is self-evident that the deprivation of unique, relevant, and potentially crucial evidence may not be remedied on a final appeal. Unless the Chamber is willing to inform the Defence that it is already satisfied that the Defence has raised sufficient doubt as to these "core issues"[43], the Defence submits that the Chamber should not seek to impose unnecessary burdens on the presentation of Mr Fofana's proposed evidence.

CONCLUSION

27. For the above-stated reasons, the Defence respectfully and urgently requests the Chamber to grant its Application without delay. Nearly three months remain before the resumption of the CDF trial, ample time for this Chamber to rule on the instant Application and, if granted, for the Appeals Chamber to produce a reasoned decision. Accordingly, granting leave to appeal in this case will not delay the proceedings.

COUNSEL FOR MOININA FOFANA



Victor Koppe

[43] *See* Confidentiality Decision at 3, n 17 *supra* (noting "that the impugned Decision ... may be capable of causing irreparable prejudice in that the Prosecution has been unable to call this witness to testify to a core issue at trial").

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, 89(C) and 73(B)

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. Norman et al.*, SCSL-2004-14-T-545, Trial Chamber I, 'Decision on Prosecution Application for Leave to Appeal *Proprio Motu* Findings in Decisions on Motions for Judgment of Acquittal Pursuant to Rule 98', 24 January 2006

5. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-515, Trial Chamber I, 'Majority Decision on Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on Admissibility of Evidence', 9 December 2005

6. *Prosecution v. Norman et al.*, SCSL-2004-14-406, Trial Chamber I, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on First Accused's Motion on Abuse of Process', 24 May 2005

7. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-404, Trial Chamber I, 'Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base', 24 May 2005

8. *Prosecution v. Norman et al.*, SCSL-2004-T-313, Trial Chamber I, 'Decision on Application by First Accused for Leave to Make Interlocutory Appeal Against the Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment', 16 December 2004

9. *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-26, Trial Chamber I, 'Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana', 3 March 2004

10. *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-401, Trial Chamber I, 'Decision on Application for Leave to Appeal the Ruling (2 May 2005) on Sesay Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor', 15 June 2005

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