SPECIAL COURT FOR SIERRA LEONE
IN THE APPEALS CHAMBER

Before: Justice George Gelaga King, Presiding
Justice Emmanuel Ayoola
Justice A. Raja N. Fernando
Justice Geoffrey Robertson, QC
Justice Renate Winter

Registrar: Mr. Lovemore G. Munlo, SC

Date: 6 July, 2006

PROSECUTOR **Against** **Samuel Hinga Norman**
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

Public

NORMAN NOTICE OF APPEAL AND SUBMISSIONS AGAINST THE TRIAL CHAMBER'S DECISION ON THE ISSUANCE OF A *SUBPOENA AD TESTIFICANDUM* TO H.E ALHAJI DR. AHMAD TEJAN KABBAH, PRESIDENT OF THE REPUBLIC OF SIERRA LEONE

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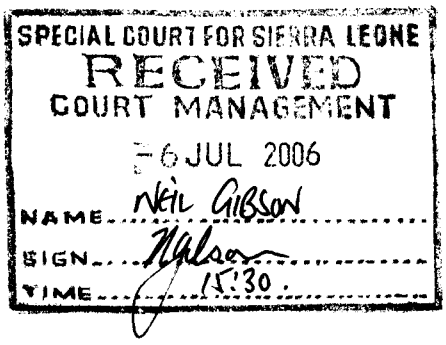

NOTICE OF APPEAL

I. DETAILS OF THE APPEALED DECISION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (the "Rules"), and pursuant to paragraph 10 of the Practice Direction for Certain Appeals Before the Special Court dated 30 September 2004 (the **"Practice Direction"**)[1], Counsel for the First Accused file this Notice of Appeal against the Trial Chamber's 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, dated 13 June, 2006 (the **"Subpoena Decision"**)[2].

2. The Subpoena Decision was given by Majority. Justice Benjamin Mutanga Itoe appended a Separate Concurring Opinion to that Decision (**"Justice Itoe's Separate Opinion"**)[3]. Justice Bankole Thompson, appended a Dissenting Opinion (**"Justice Thompson's Dissenting Opinion"**)[4].

II. DETAILS OF THE DECISION GIVING LEAVE TO APPEAL

3. The Trial Chamber gave leave to the First and Second Accused to bring this interlocutory appeal against the Subpoena Decision, pursuant to Rule 73(B), in its Decision for First and Second Accused for Leave to Appeal, "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", dated 28th of June, 2006 (**"Decision on Leave to Appeal"**).[5]
4. In its Decision on Leave to Appeal, the Trial Chamber considers that the novel nature of this issue and the likelihood that it will be raised again in this case and in other cases before the Special Court, together with the diverse legal perspectives from which it can be viewed, as evidenced by the Majority

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[1] Registry pages 5944-5949

[2] SCSL-04-14-T-617: The Prosecutor v. Norman et al , "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.

[3] SCSL-04-14-T-617: The Prosecutor v. Norman et al, "Separate Concurring Opinion of Hon. Justice Benjamin Mutang 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".

[4] SCSL-04-14-T-617: The Prosecutor v. Norman et al, "Dissenting Opinion of Hon. Justice Bankole Thompson on Decision on Motions by Moinina Fofana and Sam Hinga Norman for the issuance of a Subpoena ad Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone".

[5] SCSL-04-14-T-643: The Prosecutor v. Norman et al, "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 ad Testificandum to the President of Sierra Leone".

Decision, Separate Concurring opinion and Dissenting Opinion, amount to exceptional circumstances. In addition, it would be in the interests of justice to have this matter determined by the Appeals Chamber.[6]

III. SUMMARY OF THE PROCEEDINGS OF THE APPEALED DECISION

5. On the 15th of December 2005, Counsel for the Second Accused filed a motion for the issuance of a *Subpoena* to President Kabbah,"Fofana Motion for Issuance of a *Subpoena ad Testificandum* to President Ahmed Tejan Kabbah"[7]("**Fofana *Subpoena* Motion**").
6. In the Fofana *Subpoena* Motion, the Defence request the Trial Chamber, pursuant to Rule 54 of the Rules of Procedure & Evidence to issue a *subpoena ad testificandum* to the President of the Republic of Sierra Leone, Ahmed Tejan Kabbah.
7. Counsel submitted that because Mr Kabbah has refused to testify voluntarily, the Defence seeks the Chamber's assistance to compel, by force of law, his attendance at the CDF proceedings. The Defence submitted that the President does not enjoy a privilege against such process, under the laws of the Special Court or those of the Republic of Sierra Leone.[8] The Defence further submitted that Mr Kabbah is in possession of certain information highly relevant to the charges contained in the Prosecution's indictment against Mr. Fofana. The President's failure to testify in these proceedings would deprive the Chamber of evidence necessary to arrive at a comprehensive and considered decision in the instant case.[9]
8. Counsel for the second Accused further submitted that at least seven Prosecution witnesses have mentioned the President in their viva voce testimony at the CDF trial viz: TF2-140, TF2-096, TF2-190, TF2-001, TF2-005, TF2-014, and finally TF2-EW1[10].
9. On the 16th of December 2005, Counsel for the First Accused filed a Motion "Norman Motion for the issuance of a *Subpoena ad Testificandum* to H.E Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone[11], ("**Norman *Subpoena* Motion**") associating with the Fofana Motion for the issuance of a *Subpoena* to President Kabbah. In the Norman *Subpoena* Motion, Counsel while associating with the Fofana Motion requested the trial Chamber to invoke the powers provided for under *Rule 54* which provides that:

At the request of either party or of its own motion, a Judge or Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

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[6] SCSL-04-14-T-643: The Prosecutor v. Norman, Decision on Leave to Appeal, para 12
[7] SCSL-04-14-T-522: The Prosecutor v. Norman et al, "Fofana Motion for issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah".
[8] Ibid, para 2
[9] Ibid, para 3
[10] Ibid, para 7
[11] SCSL-04-14-T-523: The Prosecutor v. Norman et al, "Norman Motion for issuance of a Subpoena ad Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone.

10. Counsel for the First Accused submitted that the evidence of President Ahmad Tejan Kabbah is going to materially assist its case to rebut paragraphs 13, 14, 15, 18, 20, 21 of the indictment[12]. Counsel further submitted that the President is a relevant and important witness to his defence as he is constitutionally the Minister of Defence who appointed his Deputy Minister (First Accused) as the coordinator of the CDF and who at all material times was answerable to him throughout the period of the conflict. The whole case revolves around President Ahmad Tejan Kabbah as the President and Minister of Defence who created the Committee on National Militia/CDF to handle all policy relating to the National Militia/CDF and Chaired by the then Vice President with various Ministers as members.[13]

11. On the 13 of January 2006, the Prosecution filed its response to the Norman Subpoena Motion. In its response the Prosecution submits that, the Norman Motion contains no evidence or argument in support of the First Accused's request for a *subpoena*, beyond a brief statement that the First Accused "associates" with the Fofana Motion.[14] The Prosecution further submitted that, Fofana argues that President Kabbah possesses "certain information highly relevant to the charges contained in the Prosecution's indictment". However, that in order to satisfy the "legitimate forensic purpose" requirement, it is not sufficient for an applicant for a subpoena to show merely that the addressee of the subpoena has information or knowledge that is relevant to the case. Rather, the applicant for the subpoena must make an evidentiary showing of "a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial". It is not enough that the information requested may be "helpful or convenient" for one of the parties: it must be of substantial or considerable assistance to the Accused in relation to a clearly identified issue that is relevant to the trial. It is only where these requirements have been demonstrated that it can be said that the subpoena is "necessary" within the meaning of Rule 54 of the Rules of Procedure and Evidence ("Rules")[15].
12. On the 23 of January 2006, the Attorney General and Minister of Justice filed a Response[16] to applications made by Moinina Fofana and Samuel Hinga Norman. In his response, the Attorney General submits, that as a result of the rebel incursion and the activities of the CDF, AFRC/RUF, the President was obliged for security reasons to remove himself from the seat of Government in Freetown to neighbouring State, that is the Republic of Guinea.[17] The Attorney

[12] Ibid, para 20
[13] Ibid, para 21
[14] SCSL-04-14-T-529: The Prosecutor v. Norman, Prosecution Response to Norman Motion for Issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah, para 6
[15] Ibid, para 7.
[16] SCSL-04-14-T-541: The Prosecutor v. Norman et al, The Response of the Attorney General and Minister of Justice to the Applications made by Samuel Hinga Norman for the issuance of Subpoena ad Testificandum to President Alhaji Dr. Ahmad Tejan Kabbah
[17] Ibid, para 6.

General further submits that the allegations contained in Paragraphs 3, 13 and 14 of the Fofana Motion have no material effect and relevance in proving the accused's innocence or guilt in respect of the charges contained in the indictment against him, as at the material time the President was, because of the activities of the RUF, CDF/AFRC, outside of the jurisdiction in a neighbouring country.[18]

13. The Attorney General further submitted that, the application for the issuance of a *subpoena ad testificandum* to the President, is not bona fide but meant to embarrass the President and cause mischief and therefore an abuse of process of the Trial Chamber as provided for under Rule 54 of the Rules of this Honourable Trial Chamber.[19] The Attorney General submitted that, even if this Honourable Trial Chamber were to disagree with the above stated submissions and order the issuance of the subpoena prayed for in Fofana Motion, it is submitted that the President is not compellable as President and Head of State by reason of the fact that a subpoena requires a judicial penalty to enforce it were it to be disobeyed. This is by virtue of section 48(4) of the Constitution of Sierra Leone, Act No. 6 of 1991.[20]
14. On the 14th of February, the Trial Chamber heard oral submissions from Counsel for the First Accused, Second Accused, The Prosecutor and the Attorney General and Minister of Justice of the Republic of Sierra Leone. In his oral submissions, Counsel for the First Accused, submitted that the anticipated evidence from the President in those capacities already outlined, and more particularly, his knowledge of and connection with structure called CDF, his evidence would be most material and indispensable. He submitted that, the truth that this Court is charged with unearthing in the process of ensuring justice, one way or the other, will hardly be clearly unveiled and revealed without the evidence from the President.[21] Counsel further submitted that, valuable material evidence in respect thereof, is in the bosom and breast of His Excellency the President, and that this Court should not be deprived of that valuable evidence.[22] On the issue of the criteria of necessity under Rule 54 of the Rules of Procedure and Evidence, Counsel submitted that, the indictment and the showing of anticipated evidence from a witness, and of course the criterion of necessity for the purpose of conducting the trial, as just illustrated from Rule 54, are sufficient guides for the Court to adopt its own criteria in issuing subpoenas.[23]
15. In its Majority Decision[24], The Trial Chamber considers that the "purpose" requirement under Rule 54 imposes on the applicant the obligation to show that the subpoena serves a legitimate forensic purpose for an investigation or the preparation or conduct of the trial against the accused. The applicant must therefore demonstrate a reasonable basis for the belief that the information to be provided by a prospective witness is likely to be of material assistance to the

[18] Ibid, para 14
[19] Ibid, para 14
[20] Ibid, para 15
[21] Transcript of 14th February 2006, page 29
[22] Ibid, page 30
[23] Ibid, page 33
[24] SCSL-04-14-T-617: The Prosecutor v. Norman et al, Majority Decision

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 forth coming trial. Whether the information will be of material assistance to the applicant's case will depend largely upon the position held by the prospective witness in relation to the events in question, any relationship he may have or have had with the accused which is relevant to the charges, the opportunity which he may reasonably be thought to have had to observe those events or to learn of those events and any statements made by him to the applicant or to others in relation to those events. If the applicant has been unable to interview the prospective witness, the test will have to be applied in a reasonably liberal way, but the applicant will not be permitted to undertake a "fishing expedition"- where the applicant is unaware whether the particular person has any relevant information, and seeks to interview that person merely in order to discover whether he has any information which may assist the applicant.[25]

16. The Trial Chamber further said that after a careful review of the submissions presented, The Chamber finds that the Applicants' argument either fail to demonstrate that the proposed testimony would materially assist the cases of the First and Second Accused (the "purpose" requirement) or alternately fail to show that the proposed testimony is necessary for the preparation or conduct of the trial (the "necessity" requirement).[26] The Trial Chamber further ruled that, coupled with that the Norman Defence Pre-Trial Brief alleges that the CDF "was under the control of a coalition of organisations including, but not limited to, Economic Community of West African States Monitoring Group ("Ecomog"), Sierra Leone Army, and various local chiefs and war councils" leads The Chamber to conclude that the issuance of a subpoena to President Kabbah on that basis, ie that he could give information as to who exercised effective control over the CDF for the purposes of Article 6(3) of the Statute, where the information is obtainable through other means, would not be a "necessary" measure, and therefore declines to issue the subpoena on this basis.[27]
17. In his Separate Concurring Opinion, Justice Itoe, ruled that, where a Court, as in this case, cannot, for reasons of sovereign or constitutional immunity, enjoyed by a person like President Kabbah, against whom the issuance is sought, assume jurisdiction either to order the arrest or the trial of that person, The Court so seized of the application for its issuance should not issue it at all because adopting such a cause would amount, not only to an exercise in futility, but also a flagrant violation of the Constitution of this Country, the principles of the law on immunities, and the Constitutional Doctrine of Separation of powers[28]. Justice Itoe further opined that, the submissions and arguments presented to sustain these Motions fail to satisfy the standards stipulated in Rule 54 of the

[25] Ibid, para 29
[26] Ibid, para 32
[27] Ibid, para 53
[28] SCSL-04-14-T-617: Separate Concurring Opinion, para 157

Rules of Procedure and Evidence.[29] That the President, by virtue of the Provisions of Section 48(4) of the Constitution of Sierra Leone, enjoys an immunity, not only against criminal or civil action, but also against the issuance against him or service on him, of legal process such as a Subpoena whose issuance, in the context, amounts to a violation of Section 48(4) of the Constitution since a Subpoena, from its definition, has the potential of having the President prosecuted and convicted under the provisions of Rule 77(A)(iii) of the Rules of Procedure and Evidence.[30] Justice Itoe further ruled, that if granting an application for the issuance of a Subpoena has the potential of compromising the interest of peace and stability, Law and Order, and as well, violate the Law and the Constitution of this Country, This Chamber should not grant such an application.[31]

18. In his Dissenting Opinion[32], Justice Thompson Ruled that, expounding on the nature and scope of Rule 54 as a Statutory basis for the Orders sought, it is his considered view that the said Rule, given its plain and ordinary meaning (gathered from the precise and unambiguous language), it is sufficiently broad to encompass the authority of this Court, an international criminal tribunal (an issue that is now settled law), to issue a subpoena directed to any person in Sierra Leone, whether natural, corporate, governmental or otherwise, for the purpose of the fulfilment of the mandate of the Special Court.[33]
19. Justice Thompson further opined that, there is nothing, problematic about statutory powers to issue subpoenas, nationally or internationally. They do not ordinarily raise issues of constitutionality or illegality. His judicial comprehension of the context and purpose of the Rule leads him to conclude that it would seem fatuous to suggest that Rule 54, by its terms, was intended to be restrictive and limited in scope as to the persons amenable to the Court's jurisdiction for the purpose of the issuing of orders contemplated by the provision. It would, likewise, appear anomalous if the Court's constitutive instruments, not expressly or impliedly exempting international criminal process state actors or agents, implicitly, were to be interpreted as requiring a distinction between the individual and official capacities of such persons as a function of whether or not the Court should exercise its discretionary authority to issue subpoenas to such persons. He holds that Rule 54 contemplates no such distinction or limiting condition. Hence, it is clear from the said Rule that, as a matter of law, the Special Court can issue process in the form of any of the orders contemplated by its plain and ordinary meaning against any person amenable to its jurisdiction in Sierra Leone.[34]
20. Counsel for the First Accused now Appeals against the Subpoena Decision under the following grounds:-

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[29] Ibid, para 178(1)
[30] Ibid, para 178(3)
[31] Ibid, para 178(6)
[32] SCSL-04-14-T-617: Dissenting Opinion
[33] Ibid, para 7
[34] Ibid, para 8

IV. THE GROUNDS ON WHICH THE APPEAL IS MADE

21. The Decision being appealed herein comprises of both the Majority Decision and the Separate Concurring Opinion of Justice Itoe, especially as the latter rules upon certain crucial issues that are not directly adverted to in the findings and rulings of the former, both combined here as the "Impugned Decision". On the other hand, it is submitted here that it is a matter of regret that the Dissenting Opinion of Justice Thompson did not attract the entire Chamber into a unanimity of agreement upon it, as it so truly deserves. In the circumstances, the following grounds of appeal accordingly gratefully draw fairly heavily upon it.

22. **Firstly**, the Impugned Decision erred in law in holding in paragraph 178(3) of the Separate Concurring Opinion that, in the context of criminal proceedings before the Special Court for Sierra Leone, President Kabbah "enjoys an immunity, not only against criminal or civil action, but also against the issuance against him or service on him, of legal processes such as a subpoena."

23. In his analysis of the issue of immunity in paragraphs 94 – 142 inclusive of the Separate Concurring Opinion, Justice Itoe relies principally on certain immunity provisions in the Constitution of Sierra Leone 1991, to wit, sections 48(4), 100, 101, and 102 thereof, the first provision being concerned with the immunity of the President from substantive criminal and civil actions whilst in office and the latter three provisions with certain judicial process immunities of officials and Members of Parliament whilst the House is in session or they are proceeding thereto or therefrom. And this is notwithstanding such provisions to generally the contrary effect specifically enacted in respect of the Special Court itself as sections 21(2) and 29 of the Special Court Agreement, 2002 (Ratification) Act 2002, being an Act of the Sierra Leone Parliament, or Article 17 of the Agreement, or Article 6(2) of the Statute annexed to the Agreement, or indeed the provisions in Rule 8(A) & (B) of the Special Court Rules of Evidence and Procedure, all of which provisions are indeed fully cited in paragraphs 8 – 14 inclusive of the said Opinion.

24. It is respectfully submitted that, in this regard, the Separate Concurring Opinion's preference for the analytical force of the said provisions of the domestic national Constitution over and above the provisions enacted and operating on the international law plane is erroneous and is contrary to the jurisprudence not only of other international criminal law tribunals, including the Special Court itself, but also that of the Supreme Court of Sierra Leone. As has been held by the Supreme Court in a unanimous judgment of the Court delivered by the Chief Justice on 14 October 2005:

> "A serving Head of State is entitled to absolute immunity from process brought before national courts as well as before the national courts of third states except it has been waived by the state concerned.... **In contrast, where**

> **the immunity is claimed by a Head of State before an international Court the position ... is that there exists no *a priori* entitlement to claim immunity particularly from criminal process involving international crimes**"(Emphasis added).[35]

As Justice Thompson more pertinently concludes,

> " ... *if* ***a priori*** *there is no entitlement to immunity from international prosecution reserved to a Head of State or government or any responsible government official under international law as regards the perpetration of international crimes,* ***a fortiori*** *international lawdoes not confer any like immunity on such officials from testifying as witnesses in international criminal trials .... The Special Court for Sierra Leone is neither a municipal court of Sierra Leone nor a municipal court of a foreign state. It is an international criminal tribunal authorised to apply international law"* (Emphasis in original text).[36]

As the Appeals Chamber also held and warned in ***P. v. Blaskic*** ,

> "The Appeals Chamber holds that domestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal proceedings. .... Hence, the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension. In addition to causing opposition among States, it could end up blurring the distinctive features of international courts." [37]

The analysis of the immunity of President Kabbah before the Special Court for Sierra Leone, as conducted in the Separate Concurring Opinion was obviously derailed from the appropriate international law plane to the inappropriate domestic or municipal plane.

25. **Secondly**, the Impugned Decision also erred in holding that since the Special Court would have no means of itself enforcing a subpoena order it might make against President Kabbah as a sitting Head of State, since for whatever reason he may not comply with it and the agencies of the state of Sierra Leone may refuse or find it impossible to enforce it against their own President, therefore, in effect, the Special Court ought not to make the said order so as to avoid acting in vain or engaging in an exercise in futility or be thereby exposed to ridicule and

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[35] *Sesay et al. v. President of the Special Court et al.* (unreported), p. 13. Also cited inter alia at para. 14 of the Dissenting Opinion of Justice Thompson.

[36] SCSL-04-14-T-617, "Dissenting Opinion of Hon. Justice Bankole Thoimpson...," paras. 15 & 18 at pp. 6 & 8. See generally paras. 14- 21 at pp.6-9 thereof for his immunity analysis.

[37] The Prosecutor v. *Blaskic*, "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997", October 29, 1997, paras. 23 & 40

contempt.[38] The most effective answer to such an approach is given in paragraph 19 of the Dissenting Opinion of Justice Thompson at page 8 thereof, as follows:

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

Indeed, such an approach as is berated here is antithetical to the very concept of subpoenas and all judicial injunctive powers; it is also oblivious of or averse to those crucial defining provisions of international law in respect of the Special Court which were referred to in paragraph 23 hereof above.

26. **Thirdly,** and finally, the Impugned Decision also erred by holding or applying in both the Majority Decision and the Separate Concurring Opinion[39] a consistently and an unrealistically too high a threshold of the standard and test for compliance with the provisions of the relevant Rule 54 for the issuance of subpoenas in the circumstances of the current state of the Defence proceedings in the present case, a threshold which effectively undermines and trivialises the rights of the accused persons making the application for the **subpoena ad testificandum.** The main problems with the Impugned Decision's applications of the relevant standard and test prescribed in Rule 54 tend to arise from or subsist in the following factors, among others:

    a). the (perhaps unconscious) extension of the "necessity" requirement in the Rule to the relevant testimony and not merely to the order or subpoena, as such;

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[38] See paras. 149-164 at pages 46-50 of the Separate Concurring Opinion.
[39] See paras. 25-55 at pages 11-20 of the Majority Decision and paras. 52-93 at pages 20-32 of the Separate Concurring Opinion.

b). the random or even indiscriminate requirement of a high degree of specificity for both the relevant testimony and the issue(s) or charge(s) it relates to; and/or

c). the application of the same high level of threshold irrespective of the type of material or kind of evidence that is the subject of the subpoena application, e. g. whether it is a request for documents generally or a specified document, or whether it is for a specified or revealed piece of evidence or for unspecified testimony hitherto unrevealed to the applicant; and/or

d). the rigid and indiscriminate application of a test of whether the relevant testimony may be otherwise obtained than from the target of the subpoena application (the so-called "last resort" requirement, which is not actually expressly stipulated in the Rule itself).

27. Here, for example, are samples of the threshold of the requirements of Rule 54 from the two Opinions constituting the Impugned Decision:

(1). The Majority Opinion.

a). "After a careful review of the submissions presented, The Chamber finds that the Applicants' arguments either fail to demonstrate that the proposed testimony would materially assist the cases of the First or Second Accused (the "purpose" requirement) or alternatively fail to show that the proposed testimony is necessary for the preparation or conduct of the trial (the "necessity" requirement)" (para.32) (Emphasis added).

b). "Furthermore, despite the allegation by Counsel for Fofana that 'personnel from the CDF travelled to Guinea and periodically held consultation(s) with (President Kabbah)', there is, however, no suggestion that President Kabbah has personal knowledge about what happened 'on the ground' so that he could be asked to verify the facts alleged in the Consolidated Indictment. Therefore, there is no legitimate forensic purpose in calling him to verify these facts."(para. 41) (Emphasis added).

c). "While The Chamber recognises that Counsel for Fofana have identified indictment-related issues which, in their submission, the proposed testimony would go to, The Chamber is not satisfied that a subpoena to President Kabbah on the basis that he could testify on the CDF command structure, where the information is obtainable through other means, would be a 'necessary' measure. Therefore, The Chamber declines to issue the subpoena on this basis."(para.45) (Emphasis added).

d). "Counsel for Norman submitted that President Kabbah's testimony would materially assist the First Accused in rebutting paragraphs 13, 14, 15, 18, 20 and 21 of the Consolidated Indictment, since (i) in his position as Minister of Defence he appointed the First Accused to the role of Coordinator of the CDF;

(ii) The First Accused was directly answerable to him, and the two were in constant contact as to the conduct of the war; and (iii) President Kabbah helped to raise money to pay for the war. The Chamber finds that these submissions fail to identify with sufficient specificity how the proposed testimony would materially assist the case of the First Accused in rebutting paragraphs 13, 14, 15, 18, 20 of the Consolidated Indictment, and further, how it might impact upon The Chamber's findings on any element of any crime or mode of liability with which the First Accused is charged." (para.49) (Emphasis added).

e) "In addition, Counsel for the First Accused Norman maintained that '(President) Kabbah knew what (the First Accused) was doing at all times because (he) was in contact with (President) Kabbah by satellite telephone'. However, Counsel for Norman have failed to show that the prospective witness' awareness of the acts of the First Accused at all times relevant to the Consolidated Indictment is something which, if established, would affect the First Accused's case in relation to any particular charge or mode of liability in the Consolidated Indictment. Thus, Counsel for Norman have failed to show a legitimate forensic purpose for the issuance of a subpoena pursuant to Rule 54" (para. 50) (Emphasis added).

f). "Counsel for Norman further submitted that President Kabbah possesses knowledge of the structures of the CDF and could testify about his involvement in that organisation..... In the course of the oral hearing, Counsel for Norman supplemented these submissions by stating that President Kabbah's evidence would clarify 'most indispensably, those allegations of exercise of authority, command and control over all subordinate members of the CDF'. Counsel for Norman do not, however, provide any additional explanation as to why they believe this would be the case. This ... leads The Chamber to conclude that the issuance of a subpoena to President Kabbah on that basis, i.e. that he could give information as to who exercised effective control over the CDF for the purposes of Article 6(3) of the Statute, where the information is obtainable through other means, would not be a 'necessary' measure, and therefore declines to issue the subpoena on this basis."(para. 53) (Emphasis added).

(2). Separate Concurring Opinion.

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

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

"In the absence of such specificity, as was the case in the ICTY case of THE PROSECUTOR VS. SLOBODAN MILOSEVIC, the application for the issuance of the Subpoena must fail" (paras 76 & 77) (Emphasis added).

Clearly, the threshold in each of these findings borders upon relative fullness of disclosure of the evidence of the Defence and even of actual 'testimony' in advance of calling the witness, in clear would-be breach of the lack of any disclosure obligations on the Defence as The Chamber has usually ruled with respect to Rule 73 ter, for instance.

28. The thresholds applied in each of the foregoing (sub)paragraphs from the Impugned Decision is certainly much higher and harder, for instance, than the following basic exposition by the ICTY Appeals Chamber in **P. v. Krstic** :

> "Rule 54 permits a judge or a Trial Chamber to make such orders or to issue such subpoenas as may be 'necessary (....) for the preparation or conduct of the trial'. Such a power clearly includes the possibility of a subpoena being issued requiring a prospective witness to attend at a nominated place and time in order to be interviewed by the defence where that attendance is necessary for the preparation or conduct of the trial.... (A)n order or subpoena pursuant to Rule 54 would become 'necessary' for the purposes of that Rule where a legitimate forensic purpose for having the interview has been shown. An applicant for such an order or subpoena before or during the trial would have to demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to the forthcoming trial.
>
> "The assessment of the chance that the prospective witness will be able to give information which will materially assist the defence in its case will depend largely upon the position held by the prospective witness in relation to the events in question, any relationship he may have (or have had) with the accused which is relevant to the charges, the opportunity which he may reasonably be thought to have had to observe those events (or to learn of those events) and any statements made by him to the prosecution or to others in relation to those events. The test would have to be applied in a reasonably liberal way but ....the defence will not be permitted to undertake a fishing expedition - where it is unaware whether the particular person has any relevant information, and it seeks to interview that person merely in

order to discover whether he has any information which may assist the defence".

"Where the prospective witness had previously been uncooperative with the defence, such a course would obviously be adopted only if the Judge or Trial Chamber considered that it was reasonably likely that there would be cooperation if such an order were made. That is not a determination which the defence may safely make for itself...." [40]

It is submitted that, on a disinterested application of the foregoing criteria, the application for subpoena ad testificandum which is subject of this appeal would have been easily granted in its entirety. It would be instructive to look at the disinterested application of the foregoing criteria by Trial Chamber I of the sister tribunal in Arusha in the case of **P. v. Bagosora, Kabiligi, Ntabakuze & Nsengiyumva**, wherein the defence sought an order requesting the cooperation of the Republic Ghana in arranging a pre-testimony interview with a former sector commander and military observer of the United Nations Assistance Mission in Rwanda (UNAMIR) and currently Chief of Staff of the Ghanaian army:

"Under the Statute, the Chamber has incidental and ancillary jurisdiction over persons, other than an accused, that may assist the tribunal in its pursuit of criminal justice. Rule 54 lays down the different mechanisms through which such testimony may be compelled including orders, summonses, subpoenas, warrants and transfer orders issued by the Chamber when deemed necessary for the preparation and conduct of the trial. When the Defence is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in the interests of justice to allow the Defence to meet the witness and assess his testimony. However, the Defence must first demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful. Additionally, the Defence must have a reasonable belief that the prospective witness can materially assist in the preparation of its case. Indeed, subpoenas should not be issued lightly. Major General Yaache's position as an official of UNAMIR and his meetings with the Accused Bagosora indicate that he had the opportunity to observe the events at issue and obtain information that may be relevant to these proceedings. Given that the Defence for Bagosora is interested in Major General Yaache's personal observations, the Chamber is satisfied that the information he may provide could not be obtained by other means. In light of the Chamber's determination that the Defence for Bagosora has met the requisite requirements, issuance of a subpoena to Major General Yaache is appropriate to the fair conduct of this trial".[41]

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[40] IT-98-33-A, "Decision on Application for Subpoenas", 1 July 2003, paras. 10-12.
[41] ICTR-98-41-T, "Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana"

29. Once again, it would be highly instructive to resort, forgivably ***in extensor,*** to the incomparable judicial balance and astuteness of the observations of Justice Thompson on the nature, meaning and scope of Rule 54 and its application within the context of the Special Court and the current proceedings as we bring these grounds of appeal to a close.

> "My judicial comprehension of the context and purpose of the Rule leads me to conclude that it would seem fatuous to suggest that Rule 54, by its terms, was intended to be restrictive and limited in scope as to the persons amenable to the Court's jurisdiction for the purpose of the issuing of the orders contemplated by the provision.... Without sounding pedantic, I take it to be an elementary principle of legislative interpretation that words have their plain and ordinary meaning within the context of the purpose of the enactment of which they form part, except where giving effect to such meaning produces extraordinary results.... In this regard, I subscribe to the view that the Court should not impose on itself any inhibiting factors, internal or external, on its authority to do what the Rule permits or empowers it to do merely to be strictly in conformity with the jurisprudence of sister international criminal tribunals that, in the context of their mandates and sometimes contextually different formulations of their own specific rules, in their judicial wisdom, determine their own normative preferences and methodologies in performing the complex and delicate tax of judicial interpretation.... In effect, it is my judicial conviction that indiscriminate reliance on the jurisprudence of other tribunals can inhibit the constructive growth of one's own jurisprudence. There is no incompatibility in advocating for the application of a doctrine of constructive reliance upon the jurisprudence of other criminal tribunals while at the same time reserving the judicial option of adhering to a principle recognizing the need for the constructive development of one's own jurisprudence" [42]

30. Norman Counsel hereby submit, with the greatest respect, that the applications of the terms and criteria of the provision in Rule 54 in the Impugned Decision are stiff and over-restrictive, and tend to rely on the mode of applications of the parallel provision in the Rules of other criminal tribunals, and sometimes as applied by those tribunals in respect of materials and/or modes of evidentiary presentation, which may not necessarily be on all fours with those with which the Impugned Decision is contending with. However, the differences of the context and circumstances of the Special Court for Sierra Leone from those of other international criminal tribunals must always be borne in mind in all statutory interpretation and contextual application of the provisions and rules, not least the fact that the Court, unlike the other main sister international criminal tribunals, operates so far within the country where the atrocities and international crimes allegedly took place and also the status of Sierra Leone itself as strictly a non-foreign jurisdiction in relation to the jurisdiction of the Court.

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[42] "Dissenting Opinion of Hon. Justice Bankole Thompson ....", 14 June 2006, paras. 8-10 at pp. 4-5.

V. RELIEF SOUGHT:

31. Norman Counsel accordingly urge the Appeals Chamber to reverse the Impugned Decision with respect to its findings as to immunity and its refusal of the application to issue a subpoena to President Ahmad Tejan Kabbah for both a pre-testimony interview by the Norman Defence Team and ultimate testimony in the defence of the First Accused, or alternatively any other binding order or request, in respect of the said criminal proceedings during the forthcoming Eighth Trial Session.

DR. BU-BUAKEI JABBI.
Court Appointed Counsel for Norman.

LIST OF AUTHORITIES

1.The Prosecutor v. Blaskic: Judgment on the Request of the Republic of Croatia for review of the Decision of the Trial Chamber II of 18 July 1997, dated October 29, 1997, paras 23 & 40.
2. The Prosecutor v. Krstic:IT-98-33-A, Decision on Application for subpoenas, 1 July 2003,
3. Prosecutor v. Bagosora et al ICTR-98-41-T: Decision on Request for Subpoena of Major General Yaache and cooperation of the Republic of Ghana
4. Sesay et al v. President of the Special Court et al (unreported), Dated 14th of October 2005, Delivered by the supreme Court of Sierra Leone.