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SCSL-04-14-T
(18948-18958)

18948

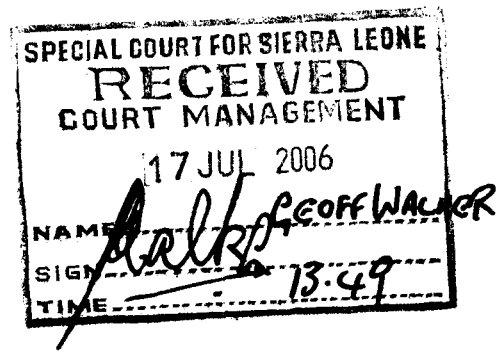
SPECIAL COURT FOR SIERRA LEONE

In the Appeals Chamber

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

Registrar: Mr Lovemore Munlo, SC

Date: 17 July 2006



THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

PUBLIC

REPLY TO PROSECUTION RESPONSE TO FOFANA NOTICE OF APPEAL OF THE SUBPOENA DECISION AND SUBMISSIONS IN SUPPORT THEREOF

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

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

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

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

INTRODUCTION

1. Counsel for the Second Accused, Mr Moinina Fofana, (the "Defence") hereby files its reply to the 'Prosecution Response to Fofana Appeal of the Subpoena Decision and Submissions in Support Thereof'[1]. The Defence has appealed[2] against the decision of Trial Chamber I[3] denying its 'Motion for Issuance of a Subpoena ad Testificandum to President Ahmad Tejan Kabbah'[4]. The Office of the Prosecutor (the "Prosecution") submits that the Appeal should be denied for a variety of reasons. The Defence addresses these in turn.

SUBMISSIONS

Urgency of the Appeal

2. The Prosecution has requested that the Appeals Chamber dispose of the Appeal as a matter of urgency "in view of the present stage of the proceedings before the Trial Chamber"[5]. The Defence supports this position and similarly requests this Chamber to move as expeditiously as possible in determining the Appeal.

Standard of Review on Appeal

3. It is generally accepted that different standards of review apply to different claims of error on appeal. The Defence acknowledges that a claim of error based on a misconception of the law[6] should be treated somewhat differently by an appellate court than an alleged error of fact[7], and accepts—as a general matter—the familiar standards articulated in the Response[8]. That an appellate court will review alleged errors of law *de novo* but will assess claimed errors of fact with some amount of deference to the findings of the Trial Chamber is clear

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[1] *Prosecutor v. Norman et al.*, SCSL-2004-14-AR73B-663, 13 July 2006, (the "Response").
[2] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-648, 'Fofana Notice of Appeal of the Subpoena Decision and Submissions in Support Thereof', 6 July 2006 (the "Appeal").
[3] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-617, Trial Chamber I, 'Decision on Motions by Moinina Fofana and Sam Hinga Norman for Issuance of a Subpoena ad Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone', 14 June 2006 (the "Subpoena Decision"). The Subpoena Decision consists of a majority decision (the "Majority Decision"), a separate concurring opinion (the "Concurring Opinion"), and a dissenting opinion (the "Dissenting Opinion").
[4] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-522, 15 December 2005, (the "Motion").
[5] Response, ¶ 6.
[6] The Defence agrees with the Prosecution that, with respect to alleged errors of law, the Appeals Chamber—"as the final arbiter of the law of the Court"—has great leeway to review an impugned decision without according "particular deference to the findings of law made by the Trial Chamber". Response, ¶ 9. In other words the Appeals Chamber may review such a question *de novo*, based on its own independent assessment.
[7] "[W]e adopt a judicial review standard and will only quash the decision if satisfied that it is logically perverse or evidentially unsustainable". *Prosecutor v. Norman et al.*, SCSL-2004-14-T-371, Appeals Chamber, 'Fofana – Appeal Against Decision Denying Bail', 11 March 2005 (the "Bail Decision"), ¶ 20. This Chamber has acknowledged that a Trial Chamber's exercise of discretion may be overturned if the challenged decision was "(i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion". *Ibid.*, (*citing Prosecutor v. Milosevic*, IT-02-54-AR73.7, Appeals Chamber, 'Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel', 1 November 2004, ¶ 10.)
[8] *See* Response, ¶¶ 8–11.

from this Chamber's existing jurisprudence[9]. Additionally[10], the Defence submits that this Chamber may also consider on appeal—as an exceptional matter—legal issues of "general significance to the Tribunal's jurisprudence"[11]. In such instance, it is submitted, the Appeals Chamber is free to evaluate the issue *de novo*[12].

4. The Defence's first ground of appeal contends that the Trial Chamber applied an unduly restrictive standard for the issuance of a subpoena pursuant to Rule 54[13]. While the Defence does not dispute that "the power of a Trial Chamber to *issue* a subpoena is a discretionary"[14] one, the determination as to the correct standard to be applied to the exercise is a question of law. Interpreting the language of the Rules and formulating tests based thereon are legal determinations. Indeed, the Prosecution concedes that the "question of the limits of the power of the Trial Chamber to issue a subpoena is a question of law", subject to the *de novo* standard of review[15]. Accordingly, this Chamber is free to make its own independent determination as to both the proper standard to be applied in the context of an application pursuant to Rule 54 as well as the extent to which the alleged error affected the outcome of the Subpoena Decision.

5. The second ground of appeal asserted by the Defence is that, assuming the recognition of the proper standard, the Trial Chamber erred in the application of that standard to the Motion, which any reasonable trier of fact would have granted[16]. Such argument admittedly limits the appellate analysis to the exercise of the Trial Chamber's discretion. Therefore, this Chamber must determine "whether the Trial Chamber 'has misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion'"[17].

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[9] *See Prosecutor v. Norman et al.*, SCSL-2004-14-AR73-397, Appeals Chamber, 'Decision on Amendment of the Consolidated Indictment', 18 May 2005 (the "Indictment Decision"), ¶ 87; *see also* Bail Decision, ¶¶ 20, 42. Accordingly, extensive reference to the decisions of the Appellate Chambers of the International Criminal Tribunal for the former Yugoslavia (the "ICTY") and the International Criminal Tribunal for Rwanda (the "ICTR") is unnecessary.
[10] That is, in addition to entertaining arguments that allege (i) legal errors invalidating a decision, (ii) factual errors occasioning a miscarriage of justice, or (iii) procedural errors. *See* Statute of the Special Court for Sierra Leone (the "Statute"), Article 20 and Rule 106 of the Rules of Procedure and Evidence (the "Rules").
[11] *See, e.g., Prosecutor v. Kupreskic*, IT-95-16-A, Appeals Chamber, 'Appeal Judgement', 23 October 2001, ¶ 22.
[12] This is consistent with the Appeals Chamber's role as "the final arbiter of the law of the Court". Response, ¶ 9.
[13] *See* Appeal, ¶ 4(a).
[14] Response, ¶ 12 (emphasis added).
[15] *Ibid.*
[16] *See* Appeal, ¶ 4(b).
[17] Response, ¶ 11 (*citing Prosecutor v. Milosevic*, IT-99-37-AR73, Appeals Chamber, 'Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder', 18 April 2002, ¶ 5.)

6. Finally, it is submitted that the Defence's third ground of appeal[18] articulates an exceptional issue of general significance to this Court's jurisprudence. Accordingly, this Chamber is free to evaluate the issue *de novo*[19].

Principles of Precedent

7. The Prosecution submits that, while not strictly binding on this Chamber, appellate decisions of the ICTY and ICTR should be accorded significant deference where they address identical issues[20], and that departure from a "directly applicable" ICTY or ICTR Appeals Chamber decision "should only occur where there are cogent reasons in the interests of justice"[21]. Yet, the Defence submits that such a rule would place unnecessary restraints on the development of this Court's jurisprudence, which must always take account of the unique nature of this Court as well as the "reality on the ground" in Sierra Leone[22]. As a practical matter, the issues addressed by the *ad hoc* tribunals are never identical to those that concern this Court[23].

8. Abstract considerations such as institutional consistency or the prestige of international criminal justice are necessarily subordinate to more immediate concerns impacting the rights of the Accused as well as the recognition of the *sui generis* nature of this Tribunal[24]. Without commenting on the value of "linking the jurisprudence of the Special Court to that of the International Tribunals"[25], the idea of using a single Appeals Chamber was ultimately considered "legally unsound"[26], no doubt for the very reasons articulated by this Chamber[27].
9. While certain substantive aspects of international criminal law may amount to "a body of law of universal international application"[28], the practical differences of the Special Court must be recognised and accorded due deference[29]. There is nothing inherently unjust[30] about applying similarly or identically formulated rules differently in different

[18] *See* Appeal, ¶ 4(c).
[19] *See* ¶ 3, *supra*.
[20] Response, ¶ 14.
[21] *Ibid.*
[22] *See* Bail Decision, ¶ 31.
[23] It is jurisprudentially erroneous to suggest that Article 20(3) amounts to anything more than an injunction to merely consider decisions of the ICTY and ICTR for guidance, their value being limited to an advisory rather than mandatory nature.
[24] *See* Indictment Decision, ¶ 46.
[25] Response, ¶ 14(2).
[26] *Ibid.*
[27] *See* Indictment Decision, ¶ 46 ("It follows that procedures and practices that have grown up in the ICTR and the International Criminal Tribunal for the former Yugoslavia ("ICTY") should not be slavishly followed—they often reflect the different or difficult circumstances in which these courts have to operate—bilingually, sitting far from the scene of the crime, and so on. ... 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".)
[28] Response, ¶ 14(3).
[29] Particularly with regard to the Motion, (i) Article 1(1)'s unique focus on "persons who bear the greatest responsibility" and the Defence's need to respond to such charges in a meaningful manner and (ii) the limited timeframe in which the Court is expected to operate and its impact on defence investigations.
[30] *See* Response, ¶ 14(3).

institutional contexts, especially if such diverse application reflects the particular factual realities of a particular tribunal[31]. However, endorsing an erroneous rule[32] simply for the sake of consistency would truly amount to an injustice, not to say a travesty.

The First Ground of Appeal

10. The Prosecution submits that because the wording of Rule 54 "is essentially identical"[33] to that of its analogues of the ICTY and ICTR, the Trail Chamber was properly "guided by the jurisprudence of the Appeals Chamber of the ICTY"[34]. However, the Defence contends that the decision to apply the ICTY standard rather than an approach reflecting the "reality on the ground"[35] in Sierra Leone amounts to an error of law invalidating the Subpoena Decision. While the Trial Chamber admittedly enjoys discretion in its application of an established rule to a particular set of facts, the more fundamental question as to the manner of interpretation given to a particular rule is mandatory. This Chamber has long ago instructed Trial Chambers that the language of the Rules "should be given its ordinary meaning but they must be applied in their context and according to their purpose in progressing the relevant stage of the trial process fairly and effectively"[36]. Accordingly, the Defence submits that by reading into Rule 54 rigid requirements as well as a heightened threshold of admissibility the Trial Chamber erred in law[37]. The error invalidates the Subpoena Decision: Had the Trial Chamber applied the correct approach, the subpoena would have no doubt issued. Instead, the Defence's legitimate investigative efforts have been unfairly and unnecessarily frustrated.

11. As explained in the Appeal and acknowledged by the Trial Chamber[38], the ICTR approach is decidedly less strict than the approach employed by the ICTY[39]. The Prosecution acknowledges that Trial Chambers of the ICTR have required only reasonable attempts to obtain voluntary compliance without necessarily inquiring whether

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[31] *See* Indictment Decision, ¶ 45 (The language of the Rules "should be given its ordinary meaning but they must be applied in their context and according to their purpose in progressing the relevant stage of the trial process fairly and effectively".)

[32] The Defence has argued that the ICTY approach to its own Rule 54 is far unfair to *all* parties.

[33] Response, ¶ 20.

[34] *Ibid.*

[35] "In Sierra Leone ... attention must be paid by both the tribunal and the parties to the reality on the ground ...". Bail Decision, ¶ 31. *See, e.g.*, the suggested approach of the Dissenting Opinion.

[36] Indictment Decision, ¶ 45 ("The purpose of [the Rules] is to enable trials to proceed fairly, expeditiously and effectively and they are to be interpreted according to that purpose".)

[37] "[S]trict rules of evidence are inherently inappropriate to a court which must decide whether there are substantial grounds for believing something". Bail Decision, ¶ 21.

[38] *See* Appeal, ¶ 10 and Majority Decision at n 78.

[39] As noted above, this Chamber is not bound to follow the decisions of the Appeals Chamber of either the ICTY or the ICTR. As all jurisprudence from other tribunals is ultimately persuasive at best, the Defence submits that, contrary to the Prosecution's position at ¶ 22 of the Response, this Chamber or a Trial Chamber of this Court could be equally persuaded by the reasoning of a decision of an ICTR Trial Chamber, especially given the fact that it was the ICTR Rules of Procedure and Evidence that were initially imposed upon the Special Court.

the evidence could have been obtained by other means[40]. While the *Simba*[41] decision indeed cited *Halilovic*[42] and *Krstic*[43] with approval for certain general propositions[44], the former took due account of the *ratio decidendi* of the ICTY decisions and allowed the subpoena. Unlike the Subpoena Decision, the *Simba* court appeared to appreciate the true precedential value of the ICTY jurisprudence, thereby avoiding the harsh result of the Subpoena Decision. This point, although taken up by the Prosecution with respect to the Defence's first ground of appeal, is equally applicable to the second[45].

12. The Prosecution's attempt to distinguish admissibility and compellability in this context is flawed[46]. As noted in the Appeal, the Trial Chamber's compellability standard implicitly requires an unnecessarily heightened showing of admissibility with respect to the targets of subpoenas. A singular standard of admissibility with respect to all potential witnesses would in no way limit the Trial Chamber's exercise of its discretion in the performance of its trial management functions pursuant to Rules 73*ter* or 90[47]. Rather than arguing that it "is entitled to call as much evidence as it wishes, subject only to the requirement that the evidence is admissible"[48], the Defence is simply vying for a fair application of Rule 54, one that does not impose unnecessary and burdensome requirements on the parties. There is nothing fallacious about the Defence argument in this regard[49].

13. In the Response as in the Subpoena Decision, concern is voiced about the potential for the abuse of process[50]. Yet there is nothing in the Motion or the proceedings to warrant such apprehension. Vague assertions of institutional concern should not be permitted to trump the rights of the accused to call the witnesses of his choice[51]. The Defence does not treat

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[40] Response, ¶ 24.
[41] *Prosecutor v. Simba*, ICTR-01-76-T, Trial Chamber I, 'Decision on Defence Request for Subpoenas', 4 May 2005.
[42] *Prosecutor v. Halilovic*, IT-91-48-AR73, Appeals Chamber, 'Decision on the Issuance of Subpoenas', 21 June 2004.
[43] *Prosecutor v. Krstic*, IT-98-33-A, Appeals Chamber, 'Decision on Application for Subpoenas', 1 July 2003.
[44] *See* Response, ¶ 24.
[45] The Defence has argued that the Trial Chamber failed to recognise that, under general principles of *stare decisis*, only the *ratio decidendi* of a particular decision is binding as precedent while all other comments are simply *obiter dictum*. The general principles stated in the *Krstic* and *Halilovic* decisions were developed in particular factual contexts. Accordingly, their precedential value is only apparent by reference to the underlying facts which gave rise to the decisions. This is where, it is submitted, the Trial Chamber erred—in choosing to give an overly harsh reading and application to those cases in the context of the Special Court, where precisely the opposite should have occurred.
[46] *See* Response, ¶ 25.
[47] *See* Response, ¶ 26.
[48] Response, ¶ 26.
[49] *See* Response, ¶ 25.
[50] *See* Response, ¶ 28 and Majority Decision, ¶ 30.
[51] Undoubtedly, a court of law should take great pains to respect the rights of all individuals who happened to come into contact with its processes. *See* Response, ¶ 27. However, it is submitted that when balancing the rights of one individual against another—as courts are often called upon to do—due regard must be given to the factual reality of the situation. Mr Fofana is facing criminal charges of the most serious nature which could result in the deprivation of his liberty for the rest of his life. President Kabbah, on the other hand, is being asked to submit to the minor inconvenience of making himself available for an interview and possible a few days of testimony.

seriously claims that the Motion was made for any other purpose than the collection of legitimate evidence.

14. Despite opinions as to what a Trial Chamber "would normally" do at the stage of issuing a subpoena[52], it is clear from the Subpoena Decision that determinations of relevancy in fact formed part of Trial Chamber I's analysis[53]. The Prosecution's submissions in this regard[54] fail to appreciate what the Defence submits is obvious: Only relevant and thus admissible evidence could possibly be "of material assistance to the applicant's case, in relation to clearly identified issues relevant to the forthcoming trial"[55]. The Defence does not submit that, under any reasonable test, it should not be called upon to make a *prima facie* showing of relevance. However, as clearly stated in the Appeal, the test applied by the Trial Chamber was not the one contemplated by Rule 54[56].

15. Finally, the Defence does not presume to be the "sole arbiter of whether a subpoena is necessary"[57]. Like the Prosecution, the Defence is entitled to argue for a particular application of Rule 54, specifically that it truly be applied in a reasonably liberal manner. The Defence did not engage in a "fishing expedition" by seeking relevant information from the highest placed official of the CDF[58]. As noted in the Appeal, the Defence did indeed demonstrate to the Trial Chamber how the anticipated evidence would materially assist its case by identifying the issues to which the anticipated evidence would be of material assistance. The Trial Chamber, however, refused to accept the proffered explanation based on an overly harsh application of an inappropriate rule.

The Second Ground of Appeal

16. The Prosecution submits that the Defence analysis with respect to its second ground of appeal "misconceives the role of the Appeals Chamber in an appeal against a decision of a Trial Chamber not to issue a subpoena"[59]. While the Defence concedes that, at this level

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[52] *See* Response, ¶ 29.
[53] *See* Majority Decision, ¶¶ 35–48. Contrary to the Prosecution's submissions at ¶ 33 of the Response, there is nothing "illogical" about suggesting that the Subpoena Decision is at odds with the principle of orality, when the Trial Chamber engaged in premature assessments of the probative value of *potential* evidence. There is a significant divergence between what the Prosecution submits the impugned decision required, and how the Trial Chamber actually disposed of the Motion.
[54] *See* Response, ¶ 30.
[55] Subpoena Decision, ¶ 29.
[56] While the Prosecution clearly approves of the result of the Subpoena Decision, it is disingenuous to say that the Trial Chamber did not make assessments of relevance in deciding the Motion. *See* Response, ¶ 31. Again, the Prosecution's theoretical submissions are not indicative of what actually transpired. *See* Response, ¶ 32.
[57] Response, ¶ 34.
[58] The analogy drawn by the Prosecution between President Kabbah and a witness who would testify as to the existence of an armed conflict in Sierra Leone is inappropriate. *See* Response, ¶ 34. As stated in the Appeal, the potential evidence of President Kabbah goes to the heart of Mr Fofana's alleged criminal liability, whereas judicial notice has already been taken of the existence of an armed conflict in Sierra Leone.
[59] Response, ¶ 39.

of argument, the Appeals Chamber must assess whether the Trial Chamber exceeded the margins of its discretion, a Trial Chamber may abuse such discretion in a variety of ways, including by failing to appreciate the *ratio decidendi* of a precedent applied in the disposition of a particular issue[60].

17. The Defence does not dispute that either *Halilovic* or *Krstic* set forth certain principles "in broad and general terms"[61]. However, while many other decisions of the ICTY contain similar statements of these general principles, the Defence presumes the Trial Chamber deliberately chose the *Halilovic* and *Krstic* decisions for the applicability of their *ratio decidendi* to the issues raised by the Motion. Yet there was no attempt by the Trial Chamber to make the necessary analogies. Indeed the Defence has submitted—in accordance with the appropriate standard of review—that any reasonable trier of fact, relying on the *ratio decidendi* of *Halilovic* and *Krstic*, would have granted the Motion. As stated in the Appeal, both of those cases stand for a more flexible approach to the issuance of subpoenas than the one adopted by the Trial Chamber.

18. The Defence is not suggesting that the general principles set out in a decision "are intended to be understood only in the context of the precise factual situations as they presented [themselves] in those cases"[62]. However, such general principles are supported by factual assessments, so that with each new case, the underlying facts develop the principles further. Merely applying the generic rule to a different set of facts, without reference to the previous factual application, takes the principle out of the context that gives the case its full meaning as *precedent* and can lead to an abuse of discretion. This is precisely what happened in the Subpoena Decision: the Trial Chamber relied upon decisions essentially endorsing the issuance of subpoenas to deny the Motion without making any factual distinctions between the cases[63].

19. Further, the Trial Chamber's "other means" analysis fails to take proper account of the reality on the ground in Sierra Leone. Contrary to Prosecution assertions, the Trial Chamber's finding in this regard was not "reasonably open to" it[64], given the fact that the Defence reasonably believes President Kabbah is the individual most likely in possession of the desired information. The Defence has limited investigative resources and must judiciously

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[60] That is to say, the misapplication of a precedent can amount to an abuse of discretion. As noted by the Prosecution in its submissions on the appropriate standard of review, a Trial Chamber may exceed its discretion by, *inter alia*, misdirecting itself as to the principle to be applied to the decision. *See* Response, ¶ 11.
[61] Response, ¶ 40.
[62] Response, ¶ 44.
[63] At ¶ 45 of the Response, the Prosecution claims that the Defence attempts to distinguish the ICTY case law "merely" to show that it does "not support the approach taken by the Impugned Decision". Yet this is not a minor point. The Trial Chamber specifically relied on those decisions and the Defence is bound to draw attention to any error in this regard.
[64] Response, ¶ 47.

seek targets that are likely to produce relevant information. Unlike the Prosecution, the Defence is not in a position to pursue every possible investigative alternative. In any event, the Defence does dispute that the requested "evidence might be obtainable by other means"[65]. As indicated several times, there is simply no reasonable substitute for the personal observations of President Kabbah, the putative leader of the CDF[66].

20. Additionally, the Prosecution claims that "nothing in the Impugned Decision prevents the Defence from" pursuing the issue of greatest responsibility "as fully as possible", suggesting that the Defence "can obtain subpoenas if necessary"[67]. Yet it is apparent from the Subpoena Decision that, as a practical matter, the Defence cannot obtain subpoenas on the issue of greatest responsibility. The Trial Chamber appears to be of the opinion that the relative culpability of other actors to the conflict is irrelevant to assessments of Mr Fofana's own liability[68]. However, as stated in the Appeal, the Defence should be given the opportunity to present evidence with respect to figures of potentially greater responsibility. Otherwise, the Trial Chamber's ruling that the question was an evidentiary one for determination at the trial stage looses all considered meaning. As noted in the Appeal, the Trial Chamber's factual conclusions in this regard are patently erroneous[69].

21. Finally, President Kabbah's assessment of Mr Fofana's control of alleged subordinate Kamajors, more than simply "interesting to the Defence"[70], could be crucial to its case. The Defence is committed to investigating the crimes alleged as fully and as fairly as possible and takes exception to the Prosecution's insinuations to the contrary[71]. That it was not "immediately apparent" to the Trial Chamber that the putative leader of the CDF might very well have important information with regard to the allegations against Mr Fofana, himself alleged to be one of the top leaders of that organization, is further proof that the Trial Chamber abused its discretion in deciding the Motion[72].

The Third Ground of Appeal

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[65] *Ibid.* The Appeal states at ¶ 31 that "the claim that such information is available through other means is erroneous".
[66] The Prosecution claims that the Defence argument with regard to the chilling effect of the Decision "misses the point". Response, ¶ 48. Yet it is the Prosecution's assessment that is off the mark: The Defence does not argue that others are indeed better placed, but rather that high level officials, like President Kabbah, could avoid cooperating by *simply claiming* that others are better placed to provide the information.
[67] Response, ¶ 49.
[68] *See* Majority Decision, ¶¶ 35–38.
[69] Equally erroneous was the determination that "there was no suggestion that [President Kabbah] had personal knowledge about what happened on the ground". Response, ¶ 52. Such finding was manifestly unreasonable and amounts to an abuse of discretion. Further, it is simply not within the discretion of a Trial Chamber to disregard a clear basis for the probability that President Kabbah had knowledge of CDF events transpiring on the ground and that as putative commander in chief he may likely have knowledge relevant to Mr Fofana's liability under various provisions of the statute and indictment. *See* Response, ¶ 53.
[70] Response, ¶ 56.
[71] *Ibid.*
[72] *See* Majority Decision, ¶ 46.

22. With respect to the third ground of appeal, the Defence is indeed "suggesting something stronger than" simple error[73]. Specifically, it is submitted that when a judge reveals—in a concurring opinion or otherwise[74]—that his putative legal conclusions are in fact based upon patently improper political considerations, then the entire decision to which he has contributed is called into question[75]. In such situation, the Defence submits that the tainted decision is subject to exceptional appellate review[76].

23. The Concurring Opinion reaches the conclusion that a subpoena could *never* issue to the President under *any* circumstances. Apart from its reliance upon improper political considerations in reaching this conclusion, the error of the Concurring Opinion is further compounded by its undue reliance on domestic law, its failure to take proper cognisance of applicable international jurisprudence, and its insistence on applying outmoded standards of interpretation for which the author has been admonished previously by this Chamber[77].

24. Mindful of this Chamber's warning not to "use exaggerated language"[78] with respect to an impugned decision, the Defence submits that the Concurring Opinion amounts to an outrageous abuse of discretion. Accordingly, this Chamber should exceptionally exercise its appellate power to revise the Subpoena Decision to ensure that it clearly comports with standards of justice becoming an international criminal tribunal.

CONCLUSION

25. For the foregoing reasons as well as those contained in the Appeal, the Defence respectfully urges this Chamber to reverse the Subpoena Decision and grant the Motion without delay.

COUNSEL FOR MOININA FOFANA

Victor Koppe

[73] Response, ¶ 63.
[74] The Defence is well aware that a concurring opinion can agree with the result and yet endorse a different reasoning. It may even be the case that a concurring opinion merely adds new reasoning that speaks to different issues. It quite often happens that a concurring opinion takes a clear position on a point not addressed in the judgement.
[75] Especially where, as in the instant case, the contribution accounts for one half of the Trial Chamber's decision.
[76] *See* ¶ 3, *supra*.
[77] *See* Bail Decision, ¶ 24 and Indictment Decision, ¶ 45.
[78] Indictment Decision, ¶ 48.

APPENDIX A
Defence List of Authorities

Constitutive Documents of the Special Court

1. Statute of the Special Court for Sierra Leone: Articles 1(1), 20(1), and 20(3)

2. Rules of Procedure and Evidence: Rule 106

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-371, Appeals Chamber, 'Fofana – Appeal Against Decision Denying Bail', 11 March 2005

Jurisprudence of the *Ad Hoc* Tribunals

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

6. *Prosecutor v. Milosevic*, IT-02-54-AR73.7, Appeals Chamber, 'Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel', 1 November 2004

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

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

9. *Prosecutor v. Kupreskic*, IT-95-16-A, Appeals Chamber, 'Appeal Judgement', 23 October 2001