SCSL-04-14-T
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SPECIAL COURT FOR SIERRA LEONE
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THE APPEALS CHAMBER

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

Registrar: Lovemore Munlo, SC

Date: 11 September 2006

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

DECISION ON INTERLOCUTORY APPEALS AGAINST TRIAL CHAMBER DECISION REFUSING TO SUBPOENA THE PRESIDENT OF SIERRA LEONE

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1. In its Decision of 13 June 2006 ("the Impugned Decision"), Trial Chamber I dismissed, by majority, the accused Sam Hinga Norman's and Moinina Fofana's motions to subpoena President Kabbah to attend a pre-testimony interview with the Defence and to testify on their behalf before the Special Court for Sierra Leone.[1] The Appeals Chamber is now seized of their appeals against the Impugned Decision.[2]

2. Both Appellants Fofana and Norman argue that the Trial Chamber erred in refusing to subpoena President Kabbah and seek to reverse the decision.[3] Since the two appeals relate to the same Impugned Decision and raise similar grounds of appeal, the Appeals Chamber will consider the two appeals in a consolidated decision. The grounds of appeal can be grouped into three categories:

    a. Allegations that the Trial Chamber erred in law by imposing too high a standard for the issuance of a subpoena;[4]

    b. Allegations that the Trial Chamber erred in the exercise of its discretion in refusing to issue the subpoena;[5]

    c. Allegations that Justice Itoe's Concurring Opinion contains an error of law or is based on an irrelevant consideration which undermines or invalidates the Impugned Decision.[6]

3. The Prosecution submits that all grounds of appeal of both Appellants should be denied.[7]

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[1] Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *ad testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, filed 14 June 2006 ("Impugned Decision"). *See also*, Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *ad testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone ("Concurring Opinion") and 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 ("Dissenting Opinion"), appended thereto.
[2] Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber's Decision on Their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone, filed 29 June 2006.
[3] Fofana Notice of Appeal of the Subpoena Decision and Submissions in Support Thereof, 6 July 2006 ("Fofana Appeal"), para. 43; Norman Notice of Appeal and Submissions Against the Trial Chamber's Decision on the Issuance of a Subpoena ad testificandum to H.E Alhaju Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, 6 July 2006 ("Norman Appeal"), para. 31.
[4] Fofana Appeal, para. 4(a) (First ground of appeal); Norman Appeal, paras. 26–30 (Third ground of appeal).
[5] Fofana Appeal, para. 4(b) (Second Ground of Appeal).
[6] Fofana Appeal, para. 4(c) (Third ground of appeal); Norman Appeal, para. 22–24 (First ground of appeal), para. 25 (Second ground of appeal).

I. STANDARD OF REVIEW

4. According to Rule 73(B) of the Rules of Procedure and Evidence ("the Rules"),[8] the purpose of granting leave to appeal from an interlocutory decision is to "avoid irreparable prejudice to a party."[9] Article 20(1) of the Statute of the Special Court for Sierra Leone ("the Statute") and Rule 106 of the Rules provide that the Appeals Chamber shall hear appeals on the following grounds: (a) A procedural error; (b) An error on a question of law invalidating the decision; or (c) An error of fact which has occasioned a miscarriage of justice.

5. Procedural errors may arise from the exercise of the discretionary powers of the Trial Chamber. It is well established that in reviewing the exercise of a discretionary power, an appellate tribunal does not necessarily have to agree with the Trial Chamber's decision as long as that Chamber's discretion was properly exercised in accordance with the relevant law in reaching that decision. As the ICTY Appeals Chamber has explained:

> Where an appeal is brought from a discretionary decision of a Trial Chamber, the issue in that appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently. That is fundamental to any discretionary decision. It is only where an error in the exercise of the discretion has been demonstrated that the Appeals Chamber may substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber. [10]

We approve of this approach. The issue on appeal is whether the Trial Chamber correctly exercised its discretion in reaching that decision. If so, we will not disturb the decision on appeal, even if this Chamber would have exercised the same discretion differently. Where, however, an appellant can demonstrate that the Trial Chamber made a discernible error in

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[7] Prosecution Response to Fofana Notice of Appeal of the Subpoena Decision and Submissions in Support Thereof, 13 July 2006 ("Prosecution Response to Fofana"); Prosecution Response to Norman Notice of Appeal and Submissions against the Trial Chamber's Decision on the Issuance of a Subpoena, 13 July 2006 ("Prosecution Response to Norman").

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

[9] Rule 73(B) of the Rules. *See also*, Prosecutor *Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa, Case No.SCSL-04-14-T*, Decision on Prosecution Appeal against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005, para. 29.

[10] *Prosecutor v. Slobodan Milosević*, ICTY Appeals Chamber, Case No. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4. *See also, Prosecutor v. Karemera et al.*, ICTR Appeals Chamber, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amened Indictment, 19 December 2003, para. 9.

the exercise of its discretion, the Appeals Chamber will intervene, correct the error, and then exercise and substitute its own discretion.[11]

6. In order to demonstrate a discernible error, an appellant must show that the Trial Chamber misdirected itself as to the legal principle or law to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give sufficient weight to relevant factors, or made an error as to the facts upon which it has exercised its discretion.[12]

7. To show that the discretion was based on an error of law, an appellant must give details of the alleged error and must state precisely how the legal error invalidates the decision. As the final authority on the correct interpretation of the governing law, the Appeals Chamber will review an alleged error and ensure that the Trial Chamber applied the correct legal standard. When an appellant seeks to prove that the Trial Chamber made an error as to the facts upon which it has exercised its discretion, he must show that the Trial Chamber reached an unreasonable conclusion of fact.

II. LEGAL STANDARD FOR ISSUING A SUBPOENA

8. Rule 54 of the Rules, which empowers the Trial Chamber the power to issue subpoenas, states:

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

The determination whether a subpoena should be issued is in the discretion of the Trial Chamber. This is emphasised in Rule 54 by the word "may"; a Trial Chamber *may* issue a subpoena as *may* be necessary. There is nothing in this rule that makes it mandatory on the Trial Chamber to issue a subpoena. Consequently, in adjudicating an interlocutory appeal from a discretionary decision resulting in the refusal to issue a subpoena, appellate

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[11] *Prosecutor v. Slobodan Milosević*, ICTY Appeals Chamber, Case No. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 6.

[12] *Prosecutor v. Slobodan Milosević*, ICTY Appeals Chamber, Case No. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5; *Prosecutor v. Karemera et al.*, ICTR Appeals Chamber, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 9.

intervention would only be justified in the limited circumstances when the Appellant can demonstrate a discernible error.

A. *The Impugned Decision: The Test for the Issuance of a Subpoena*

9. Rule 54 provides the machinery for a defendant to effectuate his right under Article 17(4)(e) of the Statute "to obtain the attendance and examination of witnesses on his or her behalf." The Court will grant a subpoena if it is "necessary" to bring to Court an unwilling, but important, witness. The phrase in Rule 54 "necessary for the purposes of ... preparation or conduct of the trial" requires the applicant to show that it is necessary to issue a subpoena or other order so as to bring relevant evidence before the Court. That is satisfied if the applicant shows that the subpoena is likely to elicit evidence material to an issue in the case which cannot be obtained without judicial intervention. The key question is whether the effect that the subpoena will have is necessary to try the case fairly.

10. After considering the relevant ICTY and ICTR jurisprudence interpreting identical general provisions in the ICTY and ICTR Rules, the Trial Chamber correctly set out the legal requirement for issuing a subpoena.[13] The Trial Chamber held that in order to satisfy Rule 54, the Chamber should consider whether the applicant has demonstrated a "legitimate forensic purpose" by showing:

> [A] reasonable basis for the belief that the information to be provided by a prospective witness is likely to be of material assistance to the applicant's case, or that there is at least a good chance that it would be of material assistance to the applicant's case, in relation to clearly identified issues relevant to the forthcoming trial.[14]

The Trial Chamber also properly noted that "since a subpoena is an instrument of judicial compulsion backed by the threat and the power of criminal sanctions for non-compliance, it is to be used sparingly."[15]

B. *Did the Trial Chamber err in following the ICTY approach?*

11. The first set of grounds of appeal alleges that the Trial Chamber misdirected itself as to the law to be applied. In Appellant Fofana's first ground of appeal, he argues that the Trial

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[13] *See, e.g., Prosecutor v. Halilović*, ICTY Appeals Chamber, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, paras. 6-7, 10; *Prosecutor v. Krstić*, ICTY Appeals Chamber, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, paras. 10-11.

[14] Impugned Decision, para. 29.

[15] Impugned Decision, paras. 30.

Chamber, in applying Rule 54 of the Rules, chose an unduly restrictive standard for the issuance of a subpoena. According to the Appellant, this standard, which was erroneously drawn from the jurisprudence of the ICTY, resulted in an infringement of his fundamental rights under Article 17(4)(c) of the Statute.[16] Appellant Norman makes a similar submission in his third ground of appeal, arguing that the threshold for issuing a subpoena was set too high, "trivialising" the rights of the accused.[17] The Prosecution submits that the Trial Chamber applied the correct test and that it was appropriate for the Trial Chamber to be guided by the jurisprudence of the ICTY Appeals Chamber.[18]

12. Both Appellants argue that it was inappropriate for the Trial Chamber to adopt the test articulated in the ICTY Appeals Chamber jurisprudence.[19] We disagree. In accordance with Article 20 of the Statute – which provides that the Appeals Chamber "shall be guided by the decisions of the Appeals Chamber of the international tribunals for the former Yugoslavia and for Rwanda" – the Trial Chamber was right in choosing to be guided by the decisions of the Appeals Chambers of these tribunals. While the Trial Chambers are not technically required by Article 20 to refer to the jurisprudence of the international tribunals, it is nevertheless prudent for the Trial Chamber to carefully consider relevant comparative jurisprudence. This is logical since Trial Chamber decisions may be reviewed by the Appeals Chamber, which is statutorily required to consider ICTR and ICTY "guidance".[20]

13. Article 20 of the Statute does not say that decisions of the ICTR and ICTY are binding on the Trial or Appeals Chambers of the Special Court for Sierra Leone – this Chamber is only required to refer to them as a guide. We, therefore, do not accept the Prosecutor's submission that the Appeals Chamber of the Special Court may not depart from the jurisprudence of the ICTY and ICTR Appeals Chambers unless there are "cogent reasons

[16] Fofana Appeal, paras. 7–15; Reply to Prosecution Response to Fofana Notice of Appeal of the Subpoena Decision and Submissions in Support Thereof, 17 July 2006 ("Fofana Reply"), paras. 10–15.
[17] Norman Appeal, para. 26.
[18] Prosecution Response to Fofana, paras. 17–34. Prosecution Response to Norman, paras. 16–31.
[19] Fofana Appeal, paras. 7–15; Norman Appeal, paras. 28–30; Norman Reply to the Prosecution Response to Norman Notice of Appeal and Submissions Against the Trial Chamber's Decision on the Issuance of a Subpoena, ("Norman Reply"), 17 July 2006, paras. 6–7. *See also*, Prosecution Response to Fofana, paras. 13–16, 20–24.
[20] *Cf.* Dissenting Opinion, paras. 11–12.

in the interests of justice for so doing, and only after the most careful consideration . . . ."[21] The Statute requires the Appeals Chamber to look to the jurisprudence of the ICTY and ICTR Appeals Chambers for guidance, but does not require the Appeals Chamber of the Special Court to follow this jurisprudence. This body of case law is persuasive, but it is not directly applicable or binding. While there is value in developing a coherent approach across international criminal tribunals on both substantive and procedural questions, it must be emphasised that the Special Court is a hybrid court. Useful guidance may be gleaned from the experience of the other international criminal tribunals, but this Special Court is not bound by their decisions. This Appeals Chamber will, however, follow relevant jurisprudence where it is appropriate to do so.

14. Moreover, the Appeals Chamber does not accept the Appellants' arguments that the Trial Chamber should have preferred the ICTR approach to issuing a subpoena over that of the ICTY.[22] A Trial Chamber does not commit an error of law when it opts to follow one line of persuasive jurisprudence rather than another or rather than breaking new ground.

15. As correctly determined by the Trial Chamber, appropriate guiding authority is found in the ICTY Appeals Chamber interlocutory appeals decisions in the *Halilović*[23] and *Krstić* cases.[24] Neither Appellant has satisfied the Appeals Chamber that the ICTR has taken a different approach or that the alleged ICTR approach should have been adopted. The Appellants rely on two ICTR Trial Chamber decisions to support their argument. Rather than showing a difference in approach, these two decisions tend to demonstrate that the ICTR Trial Chambers applied the same test as that of the ICTY Appeals Chamber.

16. In order to demonstrate the ICTR's divergent approach to the subpoena question, the Appellants first cite a decision of a single judge of ICTR Trial Chamber I in the *Bagosora et al.* case.[25] Although this decision does not directly refer to any authority, it nevertheless

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[21] Prosecution Response to Fofana, para. 13. *See also,* Prosecution Response to Fofana, paras. 14–16; Fofana Reply, paras. 7–9.
[22] Fofana Appeal, para. 10; Norman Appeal, paras. 28–30. *See also,* Prosecution Response to Fofana, paras.20–24; Prosecution Response to Norman, paras. 24–31.
[23] *Prosecutor v. Halilović*, ICTY Appeals Chamber, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004.
[24] *Prosecutor v. Krstić*, ICTY Appeals Chamber, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003.
[25] *Prosecutor v. Bagosora et al.*, ICTR Trial Chamber, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004.

focuses on components of both the necessity and purpose requirements that were relevant to the exercise of the judge's discretion in that particular case.[26] The second cited case, which is also a decision of ICTR Trial Chamber I, explicitly relies on the *Halilović* and *Krstić* ICTY Appeals Chamber decisions.[27] Neither of these examples can substantiate the Appellants' claim that the ICTR employs a different standard for issuing a subpoena. Moreover, neither of these decisions sets out the law in any detail. Instead, the decisions focus on the particular aspects of the well-settled standard that are operative in those cases. The Appellants' position is further undermined by the fact that other ICTR decisions explicitly cite the ICTY Appeals Chamber decisions in *Halilović* and *Krstić* as setting out the relevant legal standard.[28]

17. In the Impugned Decision, the Trial Chamber noted that the ICTR does not appear to require an applicant to clearly identify the issues in the forthcoming trial in relation to which the proposed testimony would be of material assistance.[29] While some ICTR Trial Chamber decisions do not refer to this aspect of the test, this practice is not consistent and, moreover, seems to depend on the particulars of the case. The Decision cited by the Trial Chamber for this proposition concerned a subpoena to compel the potential witness to meet with the Defence for the purposes of preparation, rather than a subpoena to compel the witness to testify. In this circumstance, the defence was asked to demonstrate "a reasonable belief that the prospective witness can materially assist in the preparation of its case." The ICTR Trial Chamber noted that the witness "had the opportunity to observe the events at issue" before it concluded that the requirements had been met.[30] This decision does not show a material divergence in the legal standards applied by the ICTR and ICTY. The Trial Chamber was correct to require an applicant to clearly identify the issues in the trial in relation to which the proposed testimony would be of material assistance.

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[26] *Prosecutor v. Bagosora et al.*, ICTR Trial Chamber, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004, para.4.
[27] *Prosecutor v. Simba*, ICTR Trial Chamber, Case No. ICTR-01-76-T, Decision on Defence Request for Subpoenas, 4 May 2005, fn. 2.
[28] *See, e.g., Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Interim Order on Defence Motion for Subpoena to meet with Defence Witness NZ1, 31 May 2006, fn 3; *Prosecutor v. Bagosora et al.*, ICTR Trial Chamber, Case No. ICTR-98-41-T, Decision on Disclosure of Identity of Prosecution Informant, 24 May 2006, fn 9; *Prosecutor v. Simba*, ICTR Trial Chamber, Case No. ICTR-01-76-T, Decision on the Defence Request for a Subpoena for witness SHB, 7 February 2005, fns. 2-3.
[29] Impugned Decision, fn. 78.
[30] *Prosecutor v. Bagosora et al.*, ICTR Trial Chamber, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004, para.4.

18. We do not accept Appellant Fofana's contention that the Trial Chamber's test rests on a misinterpretation of the relevant jurisprudence.[31] The legal standard set out in the Impugned Decision is firmly grounded in Rule 54 and the Appellant has failed to demonstrate that any error was introduced because of a misunderstanding of relevant sources.

C. *Did the Trial Chamber set the legal standard too high?*

19. Both Appellants argue that the Trial Chamber set the legal standard for the issuance of a subpoena too high and raise a series of alleged problems with the Trial Chamber's approach. The Appeals Chamber is not persuaded by their submissions that the Trial Chamber committed any error of law.

20. Appellant Fofana's contention that the Trial Chamber's standard is incompatible with the flexible approach to admissibility is not convincing.[32] Even if a witness may be able to give relevant and admissible evidence, the parties do not have an automatic right to compel the witness to testify. For a prospective witness to be compelled to testify by subpoena, the test set out above must be fulfilled. We do not accept Appellant Fofana's contention that this creates an erroneous "double standard of relevance" or places undue emphasis on the necessity of the evidence instead of the necessity of the subpoena.[33]

21. It is incumbent on the party seeking to compel a reluctant witness to testify to satisfy the Chamber that a subpoena should be issued. The Trial Chamber is entitled to look carefully at the proposed evidence and may decline to issue a subpoena if the proposed evidence fails to address a sufficiently material issue. In doing so, the Trial Chamber does not conduct a "premature evaluation" of the probative value of the evidence, as suggested by Appellant Fofana.[34] Rather, the Trial Chamber assesses whether issuing a subpoena to compel a reluctant witness to testify may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. With particular reference to the present case, the Trial Chamber correctly identified a series of factors that may be relevant to this inquiry:

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[31] Fofana Appeal, paras. 16–28; Fofana Reply, paras. 16–21. *See also,* Prosecution Response to Fofana, paras. 37–45.
[32] Fofana Appeal, paras. 11, 15; Fofana Reply, para. 12. *See also,* Prosecution Response to Fofana, paras.25–30, 34.
[33] Fofana Appeal, para. 12. *See also,* Prosecution Response to Fofana, paras.25–30.
[34] Fofana Appeal, para. 13. *See also,* Prosecution Response to Fofana, paras.32–33.

> 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.[35]

22. While it is possible, as the Dissenting Opinion observes,[36] that a witness may expand or elaborate his evidence while testifying, the onus remains on the applicant to demonstrate the necessity and purpose of the subpoena.[37] An applicant cannot rely on speculative hopes that a witness' evidence might expand during his testimony in order to justify a request for a subpoena.

23. While the Appeals Chamber appreciates Appellant Fofana's submission that the accused's right to secure information necessary for his defence must override other considerations,[38] the Trial Chamber's treatment of Rule 54 correctly recognised that a subpoena may be issued where a party demonstrates that it is necessary for an investigation or for the preparation or conduct of the trial. We agree with the Trial Chamber that when "the applicant has been unable to interview the prospective witness, the test will have to be applied in a reasonably liberal way . . . ."[39]

24. Appellant Norman raises four additional allegations of error aimed at showing that the standard for issuing a subpoena was set too high.[40] These submissions are vague and fail to specifically identify any particular error or errors in any specific paragraph of the Impugned Decision. The subsequent recital of a series of paragraphs from the Impugned Decision and Concurring Opinion without any connection to legal argument does not provide any further clarification or useful assistance.[41]

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[35] Impugned Decision, para. 29 (Footnote omitted).
[36] Dissenting Opinion, para. 26.
[37] *Cf.* Fofana Appeal, para. 13.
[38] Fofana Appeal, para. 14. *See also,* Prosecution Response to Fofana, para. 34. This argument is also reflected in Norman Reply, para. 8.
[39] Impugned Decision, para. 29.
[40] Norman Appeal, para. 26. *See also,* Prosecution Response to Norman, para. 17.
[41] Norman Appeal, Para. 27.

25. Appellant Norman argues that the necessity requirement was erroneously applied to the relevance of the testimony instead of focusing on the necessity for the subpoena.[42] On the contrary, we hold that it was correct for the Trial Chamber to look both at whether the information sought to be obtained through the subpoena was necessary, as part of the purpose requirement, and then to consider whether the subpoena was a necessary measure under the "necessity requirement."

26. Appellant Norman's second argument is that the Trial Chamber employed a "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."[43] We reject this complaint because we are of the view that the Trial Chamber was correct in law in requiring the Appellants to show that the subpoena was necessary for the purposes of investigation or the preparation or conduct of the trial as set out in Rule 54. The Trial Chamber correctly noted that when the applicant has been unable to interview the witness, "the test will have to be applied in a reasonably liberal way," but that ought not to be taken to mean that the subpoena can be used as a "fishing expedition."[44]

27. Third, Appellant Norman also argues that the Trial Chamber erred by applying the same threshold irrespective of "the type of material or kind of evidence that is the subject of the subpoena."[45] The examples given by the Appellant – a request for documents generally, a specific document, specified evidence, or "unspecified testimony unrevealed to the applicant" – do little to explain the Appellant's concern.[46] The test for issuing a subpoena is set out in Rule 54 and has been correctly applied by the Trial Chamber, which specifically held that the test will be applied reasonably liberally when the applicant has been unable to interview the witness. There is, therefore, no substance in this appellant's argument to the contrary.

28. Finally, Appellant Norman submits that the Trial Chamber erred by imposing a last resort requirement to determine whether the relevant testimony could be otherwise obtained.[47]

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[42] Norman Appeal, para. 26(a). *See also,* Prosecution Response to Norman, para. 18.
[43] Norman Appeal, para. 26(b); Norman Reply, para. 9. *See also,* Prosecution Response to Norman, para. 19.
[44] Impugned Decision para. 29.
[45] Norman Appeal, para. 26(c). *See also,* Prosecution Response to Norman, para. 20.
[46] Norman Appeal, para. 26(c).
[47] Norman Appeal, para. 26(d). *See also,* Prosecution Response to Norman, paras. 21–23.

The Appellant's contention that the Trial Chamber imposed this requirement in a "rigid and indiscriminate" manner is without substance.[48] We hold that the availability of the evidence from other sources is a relevant inquiry in the exercise of the Trial Chamber's discretion, where the other sources may be available without resort to the coercive powers of the Court.

29. The Appellants have failed to demonstrate that the Trial Chamber committed any error of law in setting out the relevant legal standard for issuing a subpoena. The Trial Chamber was correct to point out that a subpoena, an instrument of judicial compulsion, should be used sparingly and should not become a routine tool of trial tactics.[49] The standard set out in the Impugned Decision is consistent with the approach developed by the ICTY Appeals Chamber.

III. DID THE TRIAL CHAMBER ERR IN THE EXERCISE OF ITS DISCRETION?

30. The burden rests on an appellant to demonstrate that the Trial Chamber committed a discernible error in the exercise of its discretion. Appellant Fofana presents three arguments to show that the Trial Chamber committed an error by considering irrelevant factors, by failing to consider relevant factors, or by making an error as to the facts upon which it has exercised its discretion.[50] Appellant Norman has not raised any grounds of appeal that fall within this category.

A. *Greatest responsibility*

31. Appellant Fofana first argues that the Trial Chamber erred in finding that the proposed evidence of President Kabbah, with regard to the determination of greatest responsibility, was available through other means.[51] The Appellant submits that he is interested in the personal observation of the President concerning this issue, and thus the information is not available from other sources.[52]

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[48] Norman Appeal, para. 26(d).
[49] Impugned Decision, para. 30.
[50] Fofana Appeal, paras. 29–39; Fofana Reply, paras. 16–21. *See also,* Prosecution Response to Fofana, paras.35–57.
[51] Fofana Appeal, paras. 30–33. *See also,* Prosecution Response to Fofana, paras. 46–50.
[52] Fofana Appeal, para. 31. *See also,* Prosecution Response to Fofana, para. 48.

32. The Trial Chamber reached the conclusion that the information sought from the President was "available through other means" on the basis of the Appellant's own submission at trial that the greatest responsibility lies with President Kabbah and with "Vice-President Joe Demby, former members of the CDF National Coordinating Committee, former members of the War Council, the First Accused and other CDF commanders."[53] The Appellant's claim that the President's potential testimony is of "singular value" does nothing more than restate their unsubstantiated claim at trial that "the information he may provide cannot be obtained by other means."[54] The Appellant has not shown why the President's personal observations about the relative culpability of Fofana are unique. The Appellant has failed to convince us that the Trial Chamber erred in the exercise of its discretion.

33. At trial, Fofana argued that in order to determine who bears the greatest responsibility pursuant to Article 1(1) of the Statute it is necessary to conduct a comparative assessment of the responsibility of "every other actor to the conflict—individuals and organizations alike."[55] Appellant Fofana reiterates on appeal that "President Kabbah is likely in possession of material information with respect to his own activity as well as that of various CDF, ECOMOG, and SLPP government officials" and argues that this information may shed light on the Prosecution's theory that Fofana is one of those bearing the greatest responsibility for the crimes charged in the indictment.[56] The Trial Chamber addressed this point in the Impugned Decision.[57] In addition to finding that this information is available through other means, the Trial Chamber also considered that this line of argument was not material to the trial: "even if it were to be demonstrated that President Kabbah is or could be said to be one of the persons who bear the greatest responsibility, this would not affect the allegation that the Second Accused could also be one of the persons who bears the greatest responsibility."[58] This conclusion does not, as suggested by Appellant Fofana,

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[53] Impugned Decision, para. 37, citing to Fofana Motion for Judgement of Acquittal, 4 August 2005, SCSL-04-14-T-457, para. 24.
[54] Fofana Appeal, para. 31; Fofana Motion for Isssuance of a Subpoena *ad testificandum* to President Ahmed Tejan Kabbah, 15 December 2005, para. 12. *See also*, Fofana Reply, para. 21.
[55] Reply to Prosecution Response to Fofana Motion for Issuance of a Subpoena *ad testificandum* to President Ahmed Tejan Kabbah, 18 January 2006, para. 15.
[56] Fofana Appeal, para. 33. *See also*, Prosecution Response to Fofana, para. 50.
[57] Impugned Decision, paras. 37–38.
[58] Impugned Decision, para. 38.

contradict the Trial Chamber's earlier ruling that the question of greatest responsibility is an evidentiary matter.[59]

34. Appellant Fofana's supplementary policy argument that the Trial Chamber's statements might create a "chilling effect on the cooperation of high-level witnesses, encouraging any targets to avoid assisting the Defence simply by claiming that someone is in a better position to provide requested evidence" is not convincing.[60] The law requires the moving party to demonstrate that a subpoena is necessary for a legitimate purpose. The fact that one high-level person is not subpoenaed because the defence failed to meet the legal test for a subpoena will not prevent subpoenas from being issued when another case meets the legal test. Each application for a subpoena must be considered on its own merits.

B. Individual responsibility

35. Appellant Fofana alleges that the Trial Chamber erred in concluding that there was no legitimate forensic purpose in calling President Kabbah to testify about what happened "on the ground."[61] According to the Appellant, since the President was informed of events by telephone and personal messenger, he could give evidence about the events in Sierra Leone.[62] The Trial Chamber considered Fofana's arguments concerning Kabbah's potential evidence relating to individual criminal responsibility and found that the Defence "fail[ed] to identify with sufficient specificity either the particular indictment-related issue to which the proposed testimony goes to or, indeed, how this testimony would materially assist the case of the Second Accused."[63] The Appellant has failed to demonstrate on appeal that the Trial Chamber made any discernible error in reaching this conclusion.

36. The Trial Chamber also found that Fofana failed to show a reasonable basis for the belief that President Kabbah could provide evidence relevant to the joint criminal enterprise charges.[64] The Trial Chamber noted that Kabbah was not alleged to be a party to the

[59] Fofana Appeal, para. 32 *citing* Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdcition Filed on Behalf of Accused Fofana, 3 March 2004, para. 44. *See also,* Prosecution Response to Fofana, para.49.
[60] Fofana Appeal, para. 31; Fofana Reply, fn. 66. *See also,* Prosecution Response to Fofana, paras. 48.
[61] Fofana Appeal, para. 34. *See also,* Prosecution Response to Fofana, paras.51-53.
[62] Fofana Appeal, para. 34. *See also,* Prosecution Response to Fofana, paras.51-53.
[63] Impugned Decision, para. 41.
[64] Impugned Decision, paras. 42-43.

common purpose.[65] On appeal, the Appellant argues that the Trial Chamber failed to appreciate that evidence of meetings between the President and his subordinates could cast doubt on the existence of a criminal plan and that the President's testimony may show that the President and others were part of a criminal enterprise that excluded the accused.[66] Neither of these arguments is persuasive. Since the President is not alleged to be a member of the common purpose involving the accused, it is entirely unclear how and why the Appellant considers his testimony to be relevant to this issue.

C. *Superior Responsibility*

37. The Appellant contends that the Trial Chamber erred in failing to consider the unique ability of President Kabbah to explain his personal views on Fofana's role in the CDF and his alleged effective control over CDF subordinates.[67] This submission merely reiterates the Defence's arguments at trial and does not identify any perceived error.[68] The Trial Chamber recognised that the role of the accused is an indictment related issue, but it considered that this information was available through other means.[69] The allegation that President Kabbah was the top official coordinating the efforts of the CDF did not convince the Trial Chamber that there was a reasonable basis for the belief that he could give information that would materially assist the case of the Second Accused with regards to "whether or not those committing the crimes alleged in the Consolidated Indictment were indeed the Second Accused's subordinates."[70] This conclusion was open to the Trial Chamber and the Appellant has not demonstrated any discernible error.

D. *Lack of Specificity*

38. The Trial Chamber also dismissed the Defence assertion that the relevance of the proposed testimony was "self-evident" and recalled that an applicant cannot use a subpoena to

[65] Impugned Decision, para. 42.
[66] Fofana Appeal, para. 35.
[67] Fofana Appeal, paras. 36-37. *See also,* Prosecution Response to Fofana, paras. 54-57.
[68] *See, e.g.* Reply to Prosecution Response to Fofana Motion for Issuance of a Subpoena *ad testificandum* to President Ahmed Tejan Kabbah, 18 January 2006, paras. 18-20.
[69] Impugned Decision, para. 45.
[70] Impugned Decision, para. 46.

embark on a fishing expedition.[71] The Appellant has failed to demonstrate that the Trial Chamber committed any error.

39. The Appeals Chamber will not intervene to substitute its own discretion where no error has been established.

IV. ADMISSIBILITY OF APPEALS AGAINST MINORITY OPINIONS

40. Certain grounds of appeal challenge the legal foundations of the Concurring Opinion of Justice Itoe. Justice Itoe joined with Justice Boutet to form the majority in the Impugned Decision, which held that the legal test for issuing a subpoena had not been met in this case.[72] In his Concurring Opinion, Justice Itoe explained his additional view that President Kabbah, by virtue of his office, enjoys immunity from legal process such as a subpoena.[73]

41. We must, however, point out that Article 18 of the Statute provides that a judgement shall be rendered by a majority of the judges and that separate or dissenting opinions may be appended. The practice of rendering a majority opinion, to which concurring or dissenting opinions are appended, is common in interlocutory decisions.[74] It must be emphasised, however, that the operative portion of a judgement or decision is that of the majority. No appeal may arise from a concurring or dissenting opinion.

42. An interlocutory appeal may only challenge the decision of the Trial Chamber, whether that decision is unanimous or by a majority.[75] It is, therefore, futile to purport to challenge on appeal a separate concurring opinion. The grounds of appeal challenging the Concurring Opinion of Justice Itoe are, accordingly, inadmissible.[76]

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[71] Fofana Appeal, para. 38

[72] Impugned Decision, paras 55–56.

[73] Concurring Opinion, paras. 94–164.

[74] *Prosecutor Against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu* , Case No.SCSL-2004-16-AR73, Decision on Brima-Kamara Defence Appeal Motion against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, 8 December 2005, para. 20

[75] *Prosecutor Against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu* , Case No.SCSL-2004-16-AR73, Separate and Concurring Opinion of Justice Robertson on the Decision on Brima-Kamara Defence Appeal Motion against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, 8 December 2005, para. 7.

[76] Fofana Appeal, paras. 40–42 (Third ground of appeal); Prosecution Response to Fofana, paras. 58–63; Fofana Reply, paras. 22–24; Norman Appeal, para. 22-24 (First ground of appeal), para. 25 (Second Ground of Appeal); Prosecution Response to Norman, paras. 9–12.

43. The question of whether a subpoena can be issued against a head of state was not considered in the majority decision. The majority held that the failure of the Defence to satisfy the criteria of Rule 54 "constitutes a sufficient basis to dispose of this Application"[77] and dismissed the application for the issuance of the subpoena on that ground alone. Consequently, they quite rightly refrained from adjudicating on the question whether or not an incumbent head of state had immunity in respect of the issuance of a subpoena. While both the Concurring Opinion and the Dissenting Opinion address this issue at some length,[78] we reemphasize that the operative part of the Impugned Decision is that of the majority.

44. Appellant Fofana's submission that the Appeals Chamber should, nevertheless, consider this issue because it is "of general significance to this Court's jurisprudence" [79] is untenable because the Appeals Chamber has already rejected this proposed expansion of the scope of appellate review.[80]

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[77] Impugned Decision, para. 55.
[78] Concurring Opinion, paras. 94-164; Dissenting Opinion, paras. 14-21.
[79] Fofana Reply, para. 6. *See also*, Fofana Reply, para. 3.
[80] *Prosecutor Against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu* , Case No.SCSL-2004-16-AR73, Decision on Brima-Kamara Defence Appeal Motion against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, 8 December 2005, para. 49.

FOR THE FOREGOING REASONS,

THE APPEALS CHAMBER

DISMISSES the Appeal,

There will be a dissenting opinion by Hon. Justice Robertson.

Done in Freetown this 11th day of September 2006.

Justice George Gelaga King
Presiding

Justice Emmanuel Ayoola

Justice Renate Winter

Justice Raja Fernando

[Seal of the Special Court for Sierra Leone]