

TRIAL CHAMBER I ("The Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Bankole Thompson, Presiding Judge, Hon. Justice Pierre Boutet and Hon. Justice Benjamin Mutanga Itoe;

MINDFUL of the "Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", filed by Hon. Justice Pierre Boutet and Hon. Justice Benjamin Mutanga Itoe on the 14th of June, 2006, comprising also the Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe;

MINDFUL also of the Dissenting Opinion to the aforementioned Decision filed on the same day by Hon. Justice Bankole Thompson;¹

SEIZED OF the "Application by First Accused for Leave to make Interlocutory Appeal against the Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", filed by Court Appointed Counsel for the First Accused, Sam Hinga Norman, ("Counsel for Norman") on the 19th of June, 2006 ("Norman Application");

SEIZED ALSO OF the "Urgent Fofana Application for Leave to Appeal the Subpoena Decision", filed by Court Appointed Counsel for the Second Accused, Moinina Fofana, ("Counsel for Fofana") on the same day ("Fofana Application");

MINDFUL of the "Order for Expedited Filing", filed on the 19th of June, 2006, wherein The Chamber imposed an expedited timetable for the filing of written submissions after finding that the fair and expeditious consideration of the Norman Application and the Fofana Application (collectively, "Applications") so required;

NOTING the "Prosecution Response to Applications by the First and Second Accused for Leave to Appeal the Subpoena Decision", filed on the 22nd of June, 2006 ("Prosecution Response");

NOTING the reply thereto filed by Counsel for Norman on the 26th of June, 2006 ("Norman Reply") and the reply thereto filed by Counsel for Fofana on the same day ("Fofana Reply");

PURSUANT TO Rule 73(B);

HEREBY ISSUES THE FOLLOWING DECISION:

¹ For the purposes of the present Decision, the "Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone" will be referred to as the "Majority Decision". The Majority Decision, the Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe and the Dissenting Opinion of Hon. Justice Bankole Thompson will be referred to jointly as the "Impugned Decision". The Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe and the Dissenting Opinion of Hon. Justice Bankole Thompson will be referred to as the "Separate Opinion" and "Dissenting Opinion", respectively.

I. PARTIES' SUBMISSIONS

A. Relief requested

1. Counsel for Norman and Counsel for Fofana (collectively, "Applicants") seek leave to file, pursuant to Rule 73(B), an interlocutory appeal against the Impugned Decision² wherein The Chamber, Judge Thompson dissenting, denied their request for the issuance of a subpoena to H. E. Alhaji Dr. Tejan Kabbah, the President of the Republic of Sierra Leone ("President Kabbah"), for a pre-testimony interview and for testimony at trial.³ They maintain that the Applications satisfy the requirements of Rule 73(B). The Prosecution opposes the Applications on the basis that those requirements have not been met and submits that for this reason the Applications should be dismissed.⁴

B. Submissions of Counsel for Norman

2. Counsel for Norman submit that the "serious differences between the Judges over the interpretation of the [Rules]" amount to exceptional circumstances.⁵ These differences are, in their submission, "fundamental and require authoritative resolution for the sake of trial".⁶

3. Furthermore, Counsel for Norman submit that the First Accused would suffer irreparable prejudice as a result of leave to appeal being denied, for President Kabbah is in possession of information relating to the charges against him "which would be crucial and indispensable to the defence of the First Accused".⁷ According to them, this testimony could not be obtained elsewhere.⁸ Thus, depriving the First Accused of "the opportunity of calling this witness" would result in irreparable prejudice to his case, while it also "admit[s] of [...] exceptional circumstances".⁹

4. Finally, Counsel for Norman submit that the aforementioned issues and other questions to be raised on appeal are questions of fact, law and procedure "which go to the very root of the integrity of the entire trial process and the operations of the Special Court [...] as an International Court".¹⁰ Amongst these questions they mention the distinction between issuing a subpoena to a Head of State to appear before an international court as opposed to before a domestic court.¹¹

² Norman Application, para. 14.

³ Impugned Decision, para. 56.

⁴ Prosecution Response, para. 18.

⁵ Norman Application, para. 6. See also Norman Reply, paras 3-4. "[T]he Defence has made a proper showing by pinpointing factual errors which led to the difference of legal opinion expressed by the Judges on the [Impugned Decision] and that issues of such fundamental importance constitute exceptional circumstances": *ibid.*, para. 3.

⁶ Norman Application, para. 6.

⁷ Norman Application, para. 8. See also Norman Reply, paras 7-8.

⁸ Norman Application, para. 10.

⁹ Norman Application, para. 11.

¹⁰ Norman Application, para. 13.

¹¹ Norman Application, para. 13. In their submission this is not a peripheral issue; instead, according to them, the fact that President Kabbah is a sitting Head of State substantially influenced the Impugned Decision: Norman Reply, para. 6.

C. Submissions of Counsel for Fofana

5. Counsel for Fofana submit that exceptional circumstances exist for granting leave to appeal, in so far as the Impugned Decision:

(i) implicates a fundamental right enshrined in the Statute of the Special Court, namely, the right of the accused to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her, a right which in the instant case has been unduly or unnecessarily limited in respect of a witness whose testimony, they submit, "is of unique importance to a full and fair hearing of the CDF proceedings;"¹²

(ii) concerns novel and substantial aspects of international criminal law, namely, the standard for the issuance of a subpoena before the Special Court and the compellability of a sitting Head of State as a witness before an international criminal tribunal, which require definitive interpretation by the Appeals Chamber given the significantly divergent legal views expressed with respect to both of these questions in the Impugned Decision and given the "considerable likelihood" of these questions arising again before the Special Court;¹³

(iii) contains several legal and factual errors, which cumulatively, and in conjunction with additional factors such as the foregoing, satisfy the requirement for exceptional circumstances.¹⁴

6. Furthermore, they submit that "the Defence will suffer irreparable prejudice in so far as the deprivation of unique, relevant, and potentially crucial evidence cannot be remedied on a final appeal".¹⁵

7. Finally, since according to Counsel for Fofana they may be required to make significant modifications to their case strategy as a result of the Impugned Decision, they have styled their Application as urgent.¹⁶

D. Submissions of the Prosecution

8. The Prosecution submits that the applications fail to satisfy the 'exceptional circumstances' limb of the test pursuant to Rule 73(B), for the following reasons:

(i) there is nothing inherently novel or complex about a subpoena application pursuant to Rule 54, so that the interpretation of that Rule in that context does not rise to the level of a novel issue of general principle;¹⁷

¹² Counsel for Fofana submit that this reason alone also implies the danger of irreparable prejudice: Fofana Application, paras 11-12. See also *ibid.*, paras 9-10. See also Fofana Reply, paras 2-4. "[W]here it can be shown that an Article 17(4) entitlement may have been unduly or unnecessarily limited, then leave to appeal becomes summarily appropriate": *ibid.*, para. 4.

¹³ Fofana Application, paras 14-15. See also *ibid.*, paras 9, 13. See also Fofana Reply, paras 6-7: "[t]he compellability as a witness of a sitting Head of State is not a peripheral issue, because as "it is apparent that [the author of the Separate Opinion] and author of the Majority Decision would not have granted the Motion *under any circumstances*, [...] the Majority Decision is tainted" (emphasis in the original).

¹⁴ Fofana Application, para. 21. See also *ibid.*, para.8: "the Defence submits that [...] *cumulative* allegations of error may satisfy the test of exceptional circumstances". See also Fofana Reply, paras 8-10.

¹⁵ Fofana Application, para. 2. See also Fofana Reply, para. 11.

¹⁶ Fofana Application, paras 3, 7.

(ii) likewise, divergence of views over the interpretation of Rule 54 do not amount to exceptional circumstances, "especially in a situation where the majority was guided by the jurisprudence of the Appeals Chamber of the ICTY";¹⁸

(iii) the Applicants fail to pinpoint any error amounting to exceptional circumstances in terms of The Chamber's evaluation of the relevance of the proposed evidence of President Kabbah to the specific issues raised by the First and Second Accused, and the purported legal errors identified by one of the Applicants are not such;¹⁹

(iv) the question of the compellability of a sitting Head of State as a witness before an international criminal tribunal does not arise because it did not form part of the deliberations of the Majority, and a peripheral legal issue cannot form the basis for a showing of exceptional circumstances;²⁰

(v) the Applications do not raise any issue concerning the entitlement of the First and Second Accused to certain minimum guarantees in full equality, for that entitlement is preserved by access to the applicable procedures.²¹

9. In the Prosecution's submission, since the first part of the test has not been made out, there is no need to consider whether irreparable prejudice has been demonstrated. This notwithstanding, in its submission no irreparable prejudice would result from "the inability to call a witness with respect of whom, after a detailed consideration of all the Defence arguments, a subpoena has not been found to be warranted".²²

II. DELIBERATIONS

Applicable law

10. Rule 73(B) provides as follows:

Decisions rendered on [motions other than preliminary motions] are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

¹⁷ Prosecution Response, para. 6.

¹⁸ Prosecution Response, para. 11. The Prosecution also asserts that the relevance of divergent opinions is limited to the Justices' views as to the interpretation of Rule 54, for the question of the compellability as a witness of a Head of State does not arise as a factor for the assessment of exceptional circumstances: *ibid.*, para. 8.

¹⁹ Prosecution Response, paras 7, 14-16. While the Prosecution does not agree that 'cumulative allegations of error' will necessarily satisfy the test of exceptional circumstances, it recognises that a case-by-case analysis is appropriate: Prosecution Response, para. 4.

²⁰ Prosecution Response, para. 8. The Prosecution submits that there can be no basis for the assertion by Counsel for Fofana that the positions expressed by the Separate Opinion likely formed part of the analysis leading to the majority Decision.

²¹ Prosecution Response, para. 9.

²² Prosecution Response, para. 17.

11. In a series of Decisions given by this Chamber on the subject of interlocutory appeals, we enunciated the principles of law governing the issue of granting leave to file an interlocutory appeal within the jurisdiction of the Special Court.²³ The said principles may be summarised as follows:

- (i) as a general rule, interlocutory decisions are not subject to appeal;²⁴
- (ii) Rule 73(B) involves a high threshold that must be met before The Chamber can exercise its discretion to grant leave to appeal;²⁵
- (iii) Rule 73(B) specifically requires that an application for leave to appeal must show 'exceptional circumstances' and 'irreparable prejudice';²⁶
- (iv) the two-pronged test under Rule 73(B) is conjunctive so that both prongs must be satisfied;²⁷
- (v) the legislative rationale behind the restrictive character of Rule 73(B) is to avoid international criminal trials becoming encumbered by a multiplicity of interlocutory appeals thereby causing protracted delays in such trials;²⁸
- (vi) the procedural assumption in the Special Court is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgement will be corrected in due course by the Appeals Chamber on appeal;²⁹
- (vii) the probability of an erroneous ruling by The Chamber does not, of itself, constitute 'exceptional circumstances' for the purpose of a Rule 73(B) application;³⁰
- (viii) the fact of judicial dissent amongst the Judges of The Chamber on the applicable law and procedure applied in the Impugned Decision does not in itself constitute an exceptional circumstance, although the nature and significance of the matters sought to be appealed, in conjunction with the fact of dissent, might be considered as factors relevant to this determination.³¹

²³ See e.g. *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on Application for Leave to Appeal the Ruling (2nd May 2005) on Sesay -Motion seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 15th of June, 2005, para. 17.

²⁴ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on Application by the Second Accused for Leave for Interlocutory Appeal against the Majority Decision of the Trial Chamber of 9th December 2004 on the Motion on Issues of Urgent Concern to the Accused Morris Kallon, 2nd of May, 2005, para. 17; *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-PT, Decision on Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13th of February, 2004, para. 10.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Prosecutor v. Sesay et al.*, *supra* n. 24, para. 17.

²⁹ *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment, para. 43.

³⁰ See e.g. *Prosecutor v. Sesay et al.*, *supra* n. 23, para. 20.

³¹ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on Request by First Accused for Leave to Appeal against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base, 23rd of May, 2005, p. 3; *Prosecutor v. Norman et al.*, *supra* n. 29, para. 43.

Merits of the Applications

12. In light of the previously summarised principles, as to the first prong of the test pursuant to Rule 73(B), The Chamber finds that the Impugned Decision addressed the standard for the issuance of a subpoena pursuant to Rule 54 for a pre-testimony interview and for testimony at trial for the first time in the jurisprudence of the Special Court.³² The 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 Decision, Separate 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.

13. As regards the second prong of the test, it requires a determination that the decision not only may result in prejudice to the accused but also that such prejudice is irreparable in that it may not be remediable by appropriate means within the final disposition of trial.³³ The Chamber is of the view that, in accordance with Rule 73(B), leave should be granted in this instance to file an interlocutory appeal against the Impugned Decision in order to avoid irreparable prejudice to the First and Second Accused. This is so because if The Chamber wrongly determined the novel question before the Special Court regarding the applicable standard for the issuance of the requested subpoena pursuant to Rule 54, it may have unduly impinged upon the right of the First and Second Accused to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. The Chamber thus finds that a resolution by the Appeals Chamber at this stage of the proceedings is indeed necessary to provide an appropriate judicial exposition on the criteria for the issuance of a subpoena for a pre-testimony interview and for testimony at trial laid down in the Impugned Decision. Moreover, in the circumstances of this particular case, the testimony which is being sought may, with the passage of time, no longer be obtainable, so that the First and Second Accused may be prevented from having it admitted as additional evidence on appeal.

IV. DISPOSITION

14. **ACCORDINGLY**, for the foregoing reasons, The Chamber **GRANTS** the Applications for leave to appeal.

Done in Freetown, Sierra Leone, this 28th day of June, 2006.

Hon. Justice Benjamin Muranga Itoe

Hon. Justice Bankole Thompson

Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]

³² As to Rule 54, see *Prosecutor v. Brima et al.*, Case No. SCSL04-16-PT, Kanu – Decision on Defence Motion in Respect of Santigie Borbor Kanu for an Order under Rule 54 with respect to Release of Exculpatory Evidence, 1st of June, 2006.

³³ *Prosecutor v. Norman et al.*, Case No. SCSL04-14-T, Decision on Joint Request for Leave to Appeal against Decision on Prosecution's Motion for Judicial Notice, 19th of October, 2004, para. 23.