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**TRIAL CHAMBER I**

**Before:** Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

**Registrar:** Mr. Herman von Hebel, Registrar

**Date:** 30th of June 2008

**PROSECUTOR** **Against** **ISSA HASSAN SESAY**
**MORRIS KALLON**
**AUGUSTINE GBAO**
(Case No. SCSL-04-15-T)

**Public Document**

# A SEPARATE CONCURRING OPINION OF HON. JUSTICE BENJAMIN MUTANGA ITOE ON THE CHAMBER'S UNANIMOUS WRITTEN REASONED DECISION ON THE MOTION FOR ISSUANCE OF A SUBPOENA TO H.E. DR. AHMED TEJAN KABBAH, FORMER PRESIDENT OF THE REPUBLIC OF SIERRA LEONE

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1. This is not a Dissenting Opinion. It is a Separate Concurring Opinion which I append to Our Chamber's Unanimous Decision.
2. The facts of this Subpoena Motion are detailed in the Unanimous Decision of The Chamber. I will, therefore not need to go into them excepting where I consider it necessary.

THE OPINION

3. It is the practice in judicial proceedings that it is the responsibility of the Party seeking to rely on the evidence of a witness to establish its case to call the said witness. In normal and classical situations, those witnesses would appear to testify on the prompting or at the request of the party seeking to rely on his evidence.
4. The other extreme is where a witness, as is this case, and in a criminal proceeding, has been prompted and invited by the party seeking to rely on his evidence, and he either fails or refuses to appear to testify on his behalf. The course of action that is open to that party is, as we have seen it, to apply to The Chamber under Rule 54 of the Rules of Procedure and Evidence, for the issuance of a subpoena to compel him to appear and to testify.
5. I would like to reiterate here, that a subpoena is a due process compelling alternative, which The Chamber has recourse to as a last resort, and only after the traditional methods of securing the attendance of witnesses have been exhausted.
6. As the ultimate remedy, a subpoena is, by its nature and form, a coercive and compelling remedy. In the light of its grim and sinister characteristic, The Chamber should issue it very cautiously and only in extreme cases because non-compliance with this compelling process necessarily entails a punitive and criminal sanction.
7. The Prosecution in this motion is opposing the issuance of the said subpoena on the grounds that it did not fulfil the "Purpose" and "Necessity" requirements and that in any event, the requesting party has not shown how and why the evidence, if adduced,

would assist the Party's case and why the anticipated evidence could not be obtained without a subpoena.

8. As we opined and held in our Chamber Majority Decision in the Norman/Fofana Subpoena Motion,[1] the Applicant must show that the measure requested is necessary (the "Necessary" requirement) and that it is for the purposes (the "Purpose" requirement) of an investigation or for the preparation or conduct of the trial.[2]

9. The Prosecution further touches on the issue of immunity of the President under Section 48(4), which was also canvassed by the Defence in the Motion. The Prosecution seeks the leave of The Chamber to address the issue. The Chamber, in reaction to this, is of the opinion that immunity of Ex-President Kabbah is not an issue in this Motion and that it would be superfluous to address it in this decision.

10. In making a determination on this Motion, I rely on and will apply the fundamental tenet in International Criminal Justice and Procedure which derives from universally accepted municipal legal norms, namely, the primacy accorded to the rights of the Accused and of the Defence, including the presumption of his innocence, in the course of Judicial proceedings, and even before they are instituted.

11. I say this because these statutory prescriptions oblige The Chamber to protect these guaranteed and sacred due process rights such as those enshrined not only in the provisions of Article 17 of the Statute of This Court in Our Rules, but also in the Statutes, Rules, and Instruments fixing and regulating the functioning of International Criminal Tribunals.

[1] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, 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 13 June 2006, para 38

[2] *Ibid.*

THE STATUTORY RIGHT IN THIS CASE

12. In this regard, Article 17(4)(e) provides that **the Accused shall be entitled to examine, or have examined the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.** (Emphasis added). In fact, the purport of this Motion is to move The Chamber to ensure that the 1st Accused Sesay, secures the attendance of a witness, namely, Ex-President Kabbah, to appear before This Chamber, and to testify on his behalf.

13. In the context of this case and on a controversial subject of this nature that keeps surfacing in International Criminal proceedings and jurisprudence, I would like to factor into the determination of this motion, in addition to those already propounded in the Unanimous Decision of This Chamber as well as in the jurisprudence of other International Criminal Tribunals, a test on which an application for the issuance of a subpoena should be grounded if it is to be granted.

THE "COMPELLING STATUTORY OR LEGAL PURPOSE" TEST

14. The test which I factor into this ongoing jurisprudential exploration is, whether the issuance of a subpoena should, amongst other criteria, be determined by whether it would or is destined to serve a "Compelling Statutory or Legal Purpose." This test finds its justification in the institutional, statutory, regulatory, or other mandatory legal and Human Rights prescriptions which define and are intended to protect the rights of the Accused, such as those enshrined in the provisions of Article 17 of our Statute and in the Statutes of other International Criminal Tribunals, as well as in other International Covenants and Human Rights Instruments.

15. I recall here, the International Covenant on Civil and Political Rights (ICCPR), in its Article 14(e) on the rights of an Accused in relation to this subject under review. It stipulates as follows:

> "To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"[3]

16. The provisions of these Statutes and Instruments share a common characteristic of compelling or constraining a Chamber to act in accordance with, at times to the letter, and sometimes, without at all, or with a very limited latitude, option, or recourse to exercising a discretion or the inherent or residual powers that constitute the main source of the jurisdictional strength and force of the Courts in the exercise of their judicial functions.

17. Indeed, the provisions of Article 17(4)(c) of the Statute of this Court on which the merits of this motion are being decided, and even though it may not be contested that the discretion of The Chamber in this regard is not entirely fettered, is one of those "Compelling Statutory" provisions that I am alluding to in this discourse.

18. In order however, to base an application for the issuance of a subpoena against Ex-President Kabbah on the grounds of a "Compelling Statutory or Legal Purpose," I am of the view that the following conditions should be fulfilled:

i) That the evidence is exclusively in the possession or within the reach of this witness, and cannot be obtained from other sources;

ii) That it is relevant to supporting his case on all or any of the counts of the Indictment;

iii) That all efforts to secure his attendance for the pre-testimony interview and for testimony in the Court have proved abortive despite several attempts to achieve this;

iv) That the evidence is of a nature to vindicate the Accused on any or on all the Counts of the Indictment;

[3] OCHR International Covenant on Civil and Political Rights, 23 March 1976, Art. 14(e) [ICCPR].

v) That the witness is available in the jurisdiction and is able and capable of appearing before the Court to testify on these issues, and;

vi) That the issuance of the subpoena is not sought by the Accused with a view of either subjecting the witness to embarrassment, ridicule, or to expose his criminal conduct.

19. The situation and facts in this case are as I have indicated, distinguishable from the facts that were presented in the CDF case on the same issue.

20. In the CDF case, the 2nd Accused, Moinina Fofana, whose application was backed by the 1st Accused Late Samuel Hinga Norman, applied to The Chamber for the issuance of a subpoena against Ex-President Kabbah, the then Head of State of this Country and who, despite repeated contacts from the Accused Persons' representatives, was not responding positively to pleas from them to appear and testify on their behalf.

21. The Defence which the two Accused Persons raised all along was that President Kabbah was their CDF Boss and that they had been indicted for offences which they committed in the course of fighting against the rebel RUF/AFRC forces with a view to restoring his democratically elected Government that had been ousted by the rebel forces.

22. In this process, the two Accused Persons, who have introduced the Subpoena Motion, did not conceal their intentions. The objective of their application was for Ex-President Kabbah to appear in Court to testify on their behalf to the effect that they did not, as stipulated in the Agreement and in the Statute of this Court, bear the greatest responsibility for the crimes committed during the conflict to have warranted their prosecution.

23. A further allegation that they made in a veiled manner in their submissions was that Ex-President Kabbah himself, who was commanding and materially supporting and communicating with the leadership of the CDF which comprised the two Accused Persons/Applicants, bore the greatest responsibility for the crimes which they were alleged to have committed in the process and in the context of this symbolic politico military relationship.

24. In fact, in his Fofana submissions filed with the Motion on the 15th of December 2005, which were supported by Samuel Hinga Norman's, also filed on the 15th of December 2005, Moinina Fofana has this to say:

> The Defence submits that Mr Kabbah is in a position to provide evidence relevant to the charges contained in the Prosecution's indictment against Mr Fofana and his co-defendants. It is submitted that, at times relevant to the indictment against Mr Fofana and his co-defendants. It is submitted that, at times relevant to the indictment, Mr Kabbah was commanding, materially supporting, and communicating with various members of the alleged CDF leadership, both from his exile in Conakry and later from his presidential offices in Freetown. As further indicated by the Prosecution's evidence, the Kamajors claimed to be fighting, in part, on behalf of Mr Kabbah with a view to affecting his restoration as the democratically-elected president of the nation. **With respect to the question of who bears the greatest responsibility [citation omitted] for the alleged violations of the CDF during the conflict, the Defence submits that Mr Kabbah may himself be among such a group, or, at the very least, that he is in a position to give evidence regarding the relative culpability of the three accused persons.** As noted in previous submissions, it is the Defence position that such assessments of **comparative responsibility** are absolutely crucial to the Article 1(I) issue [citation omitted][emphasis added]. [4]

25. In its Majority Decision on the earlier motion, This Chamber had this to say on the arguments articulated on the allegation of Kabbah's "greatest responsibility":

> Furthermore, **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**. In addition, it would not mean that the Second Accused would be absolved of any criminal responsibility that he would otherwise have. This evidence is not relevant for the purposes for which it is being sought at this stage. Thus, in The Chamber's opinion, Counsel for Fofana have failed to show that the proposed testimony would materially assist the case of the Second Accused [emphasis added].[5]

26. In effect, The Chamber, in its Majority Decision, confirmed in this analysis and concluded, that the application had failed to meet the "Purpose" requirement which is required to back it and to provide support for the issuance of a subpoena under the provisions of Rule 54 of the Rules of Procedure and Evidence.

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[4] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Fofana Motion for Issuance of a Subpoena *Ad Testificandum* to President Ahmed Tejan Kabbah. 15 December 2005, para 13.

[5] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, 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 13 June 2006, para 38.

27. Putting these facts in the context of Slobodan Milosević's bid to secure the attendance of Tony Blair and Gerard Shroeder, respectively, the former British Prime Minister and German Chancellor, to testify on the crimes for which he was indicted, his move was denied and dismissed by the Appeals Chamber of the ICTY, applying a 2 prong test namely, the "Purpose" and the "Necessity" Requirements and this, on the grounds that the evidence sought to be solicited from them was not relevant to any of the facts in issue in the case, nor is it of a nature or material to disculpate the Accused from responsibility for the offences for which he is indicted. .

28. In the CDF case, it is our view, given the reasons which were sufficiently canvassed in the first "Kabbah Subpoena Decision," that Late Samuel Hinga Norman and Moinina Fofana in their submissions, failed to reach the threshold of establishing the "Purpose" and "Necessity' requirements to back the issuance by The Chamber, of a subpoena for President Kabbah to appear before it and to testify on their behalf.

29. In fact, the justification for refusing the Norman/Fofana application as We stated in Our Chamber Majority Decision, was that it was not clearly demonstrated in their submissions that its purpose, as stipulated in Rule 54 of the Rules of Procedure and Evidence, was dictated by a necessity and for purposes of pursuing an investigation or for the preparation of a trial.

30. I do not have any doubt in my mind, nor am I wavery in my conclusion, that the real purpose for which the Fofana/Norman application was made was to vent their anger directly, and in Open Court, against the so-called witness, Kabbah, the sitting Head of State, for sacrificing them to Prosecution, notwithstanding their efforts and the casualties they incurred in the bloody struggle to reinstate him, and in the process, to ridicule him like Milosević sought to do with Blair and Shroeder.

31. In fact, it would appear, from their submissions, that the principal purpose which the Accused targeted to achieve was to subject Ex-President Kabbah to embarrassment, to ridicule him, and to expose the fact that his involvement and conduct in the conflict as the CDF Boss, like theirs, was also criminal.

32. In such a context, and with such intentions, they were certainly very much out of target in fulfilling the Purpose Requirement that is required under Rule 54 of the Rules as

their objective was far from meeting the standards set by the "Purpose" and "Necessity" requirements, or the "Compelling Statutory or Legal Purpose" that should have advanced and buttressed the case they were making.

13. There is, to my mind, an issue which should be addressed in the determination of this motion. It is that the Prosecution, just as the Defence in their submissions and citations of the passages and dicta in the earlier Kabbah subpoena case,[6] have sought to refer diversely to the instant subpoena application and the earlier one which was disposed of in our Chamber Majority Decision.[7]

14. Even though the earlier motion was denied on the basis of the same criteria on which this one is granted, it is my finding that these two applications, even though identical in their subject matter and in the objective they seek to achieve, are distinguishable and that the verdict or stand adopted by This Chamber, in the earlier one, does not necessarily bind it to come to a similar conclusion based on similar reasons, in the later case given the configuration and divergences of the facts on which the two applications were made and canvassed.

15. In this regard and according to the Norman/Fofana application, President Kabbah who was then the sitting Head of State, was in a position to give evidence regarding the relative culpability of the two Accused for purposes of determining who bears the "greatest responsibility" for the crimes they were alleged to have committed.

16. The Chamber in the earlier case, and following a submission by the Prosecution in this regard, took the view that the facts on which the application was canvassed, provided no evidence that the information sought from President Kabbah, impacts on any issue that is relevant to the determination of the guilt or innocence of the Accused Persons, or to any of the charges in the Consolidated Indictment, and that in the absence of any such evidence, the mere desire expressed by the Norman/Fofana Defence Teams to

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[6] *Prosecutor v. Hinga, Fofana and Kondewa*, SCSL-04-14-T, 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, 13 June, 2006.

[7] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, 30th June, 2008.

examine President Kabbah does not constitute a legitimate forensic purpose on which applications for subpoenas may be granted by The Chamber.

37. On the contrary, and in relation to this Subpoena Application, the Sesay Defence Team submits that Ex-President Kabbah will give evidence that would assist the defence interests of the Accused Sesay with regards to the allegations against him in Counts 15-18 of the Indictment.

38. In examining this submission, I have been conscious and aware of the Decision of the Appeals Chamber of the ICTY in the Milosević case[8] which we cited and relied on, *inter alia*, in determining the earlier Norman/Fofana case, and where we also held that it is not enough that the information requested may be helpful or convenient for one of the Parties; it must be of substantial or considerable assistance to the Accused in relation to a clearly identified issue that is relevant to the trial.

39. It is to be noted that in the instant Sesay Application, it is the Applicant's contention that the evidence of Ex-President Kabbah is relevant in confirming his Defence on Counts 15-18 which indict him for the killing, abduction, and mistreatment of UNAMSIL Peace Keepers.

40. It is noted from the Indictment on which Sesay and Others are charged, the Prosecution allegation that by Order of Foday Saybana Sankoh, from about May 2000, all acrivities of the RUF in the Republic of Sierra Leone shall be under the direction of the 1st Accused Issa Hassan Sesay.

41. Sesay alleges that the Ex-President Kabbah knows that he Sesay did not participate in the hostage taking which had been ordered by Sankoh. Rather, as he alleges, Ex-President Kabbah is able to provide evidence to the effect that it was only after the hostage taking episode that he intervened and made a decision to remove the troops to Kono to ensure their safety and that in so doing, he was acting unilaterally and against the orders of Foday Sankoh. Sesay says that in this regard, he intentionally mislead

[8] *The Prosecutor v. Milosević, IT-02-54-T*, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder. 9 December 2005. In this decision, the "purpose" requirement is referred to as the "legal forensic purpose" requirement.

Foday Sankoh concerning the whereabouts of the hostages so as to avoid receiving any instructions to the contrary from Foday Sankoh.

42. Sesay says that around January to April 2002, Foday Sankoh was in detention but was taken to Cheithram Hospital for medical attention and that President Kabbah originated the strategy to imprison Foday Sankoh so as to disable the RUF and create the conditions for the release of the detained UNAMSIL troops.

43. Furthermore, Sesay affirms that Ex-President Kabbah knows that the leadership of ECOWAS including the then President Kabbah, was responsible for Sesay taking over the leadership of the RUF.

44. To sum it up, the Sesay Defence concludes and submits that Ex-President Kabbah is uniquely placed to testify about these issues which are integral to Sesay's defence and which will show, contrary to what is pleaded in the Indictment, that he was not ordered to attack or coordinate attacks against UNAMSIL troops, but that he acted alone to protect and secure the detained UNAMSIL troops.

45. These factual enumerations and justifications are in my opinion, sufficiently convincing and explicit to justify a decision by The Chamber that the "Compelling Statutory or Legal Purpose," Test for the issuance of this subpoena has been met and that The Chamber can proceed to issuing it on the strength of this doctrine.

## IMMUNITY OF PRESIDENT KABBAH

46. As I indicated earlier, both the Defence and the Prosecution raised the issue of the immunity of the then President Kabbah in the arguments that they have presented to support the positions they have taken.

47. Learned Counsel for Sesay, Mr Wayne Jordash, went into it in some detail. Learned Counsel for the Prosecution, Mr Peter Harrison, did not. He indicated that if he had the leave of The Chamber, he would.

48. The Chamber has, in its Unanimous Decision on this Motion, rightfully not addressed it. I will address it briefly because it is an issue that was neither settled by the Majority

Decision of the Chamber[9] nor was it determined by the Appeals Chamber in its Decision of the 11th of September, 2006.

49. I also, at this point in time, address this issue in addition to that of the issuance of a subpoena under Rule 54 of the Rules because of the context of the Dissenting and Minority opinion of Hon. Justice Geoffrey Robertson in the Appeals Chamber Majority Decision on this issue.

## ON THE IMMUNITY OF PRESIDENT KABBAH

50. On this issue Hon. Justice Robertson had this to say in his Minority Dissenting Opinion:

> There is now such overwhelming authority that incumbent Heads of State are amenable to International Law that the very proposition that they have immunity from the process of International Criminal Courts must be viewed as the jurisprudential equivalent of the proposition that the Earth is flat.[10]

51. Hon. Justice Robertson cites Article 7 of the Nuremberg Charter which he rightfully says, expressly rejected sovereign immunity for military and Political leaders. That section of the Charter reads:

> The official position of the Defendants whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.[11]

52. Hon. Justice Robertson also cites Principle 3 of the 1950 International Law Commission authorities who stated the following principle:

> The fact that a person who committed an act which constitutes a crime under International Law acted as Head of State or responsible government official does not relieve him of responsibility under International Law.[12]

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[9] *Prosecutor v. Norman, Fofana, and Kondewa*, SCSL-2004-14-T, 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, 13th June, 2006

[10] *Prosecutor v. Norman, Fofana, and Kondewa*, SCSL-2004-14-T, Hon. Justice Robertson's Dissent on Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena The President of Sierra Leone, 11th September, 2006 at para. 41.

[11] *Ibid.*

[12] *Ibid.*

53. Hon. Justice Robertson finally cites Article 6(2) of the Statute of this Court which virtually reproduces the provisions of the Nuremberg Charter. What I would observe, with Due Respect to Hon. Justice Robertson, is that those provisions offer no protection for Heads of States but only, and only so far as it concerns crimes committed by them that fall under the regime of International Law.

54. If Kabbah had committed crimes or were charged for crimes under International Law, War Crimes, or Crimes Against Humanity, I would not have, given provisions of Article 6(2) of the Statute of this Court which Hon. Justice Robertson is fully aware of, gone into the length I went in defending the applicability of the immunity thesis as I did in my Separate Concurring Opinion in that case.

55. The offence for which Kabbah would have been liable for refusing to attend our subpoena if we issued it, was contempt. Does Hon Justice Robertson in this context consider Contempt as a Crime against international Law? Is the offence of contempt a War Crime or a Crime Against Humanity?

56. I do not think. Hon. Justice Robertson would characterize the ordinary offence of contempt as such because in any event, it is clear that it is not, even if it were committed and is prosecutable, according to Hon. Justice Robertson, in an International Criminal Jurisdiction.

## THE INTERVENTIONIST THESIS AND PROPOSITION OF HON. JUSTICE ROBERTSON

57. I note that Hon Justice Robertson faults This Chamber Majority Decision for not inviting the Applicants to specify the defence which President Kabbah's evidence was likely to be material and that it was only then that we should have decided whether the defence as specified was good law and whether it was likely that President Kabbah's evidence would assist.

58. To this criticism, I would, with Due Respect, like to draw Hon Justice Robertson's attention to the fact that for a Court to properly and fairly hold the balance and play

noting but the role of a neutral empire, it should not, when it is not necessary, be interventionist in its approach to cure the defects in any Parties' Case or Submissions.

59. The Fofana/Norman Motions were fully, extensively and exhaustively canvassed in written submissions by all the Parties. The Applicants clearly, stated their position for the issuance of a Subpoena against Kabbah. In those written submissions. This was followed by oral submissions in Court on this very important motion, which was an exceptional application of the provisions of Rule 73(A) of the Rules. The Applicants, in that process, fully canvassed all arguments and even more, that were necessary to support their case for the issuance of a Subpoena.

60. In those circumstances, was the Chamber, is at the risk and peril of violating principle that for a Court to properly and fairly hold the balance, it should not, when it is not necessary, be interventionist in its approach to cure the defects in any Parties' Case or Submissions.

61. The Fofana/Norman Motions were fully and exhaustively canvassed in written submissions by all the Parties. The Applicants clearly stated their case for the issuance of a Subpoena against Kabbah. In those written submissions as well as in the oral submissions in Court, the Applicants fully canvassed all arguments necessary to support their case for the issuance of a Subpoena to Kabbah.

62. In those circumstances, was the Chamber again, at the risk and peril of violating the principle of equality of arms, have descended into the battle grounds of the Parties to rescue the case of one Party, the Applicants in this case, as Hon. Justice Robertson suggests, to the detriment of the Prosecution's case and that of President Kabbah who in those Proceedings, was represented by his Attorney General?

63. I do not think that Hon. Justice Robertson, sitting on appeal on a case where The Chamber behaved the way he is suggesting, in his Minority Dissent Opinion, would hesitate to fault The Chamber for unwarranted, unnecessary, and partial interferences with the due process.

64. It is a pleasure however to note with satisfaction, the fact that Hon Justice Roberson boldly wrestled with and addressed the Presidential Immunity issue, and to have his

thoughts in the records, not only of this Court, but also in those of International Criminal Justice.

65. This last Comment concludes the purport of this Separate Concurring Opinion.

Dated this 30th Day of June, 2008

Hon. Justice Benjamin Mutanga Itoe, Presiding Judge