

Case No. SCSL-2004-14-T  
THE PROSECUTOR OF  
THE SPECIAL COURT  
V.  
SAM HINGA NORMAN  
MOININA FOFANA  
ALLIEU KONDEWA

TUESDAY, 14 FEBRUARY 2006  
9.49 A.M.  
TRIAL

TRIAL CHAMBER I

Before the Judges:	Pierre Boutet, Presiding Bankole Thompson Benjamin Mutanga Itoe
For Chambers:	Ms Roza Salibekova Ms Anna Matas
For the Registry:	Mr Geoff Walker Ms Maureen Edmonds
For the Prosecution:	Mr Kevin Tavener Mr Desmond De Silva Mr Joseph Kamara Ms Lynn Hintz Ms Bianca Suciu (Case Manager)
For the Principal Defender:	Mr Lansana Dumbuya
For the accused Sam Hinga Norman:	Dr Bu-Buakei Jabbi Mr Alusine Sesay Ms Claire da Silva (legal assistant) Mr Kingsley Belle (legal assistant)
For the accused Moinina Fofana:	Mr Arrow Bockarie Mr Andrew Ianuzzi
For the accused Allieu Kondewa:	Mr Ansu Lansana

1 [CDF14FEB06A - SGH]

2 Tuesday, 14 February 2006

3 [The accused present]

4 [Open session]

5 [Upon commencing at 9.49 a.m.]

6 PRESIDING JUDGE: Good morning. Good morning, counsel. As  
7 we proceed this morning on the oral argument on the motion that  
8 has been filed by the first accused and the second accused, I  
9 will ask representation first as to that particular motion. If  
10 can start with the first accused.

11 MR JABBI: Good morning, My Lord.

12 PRESIDING JUDGE: Good morning.

13 MR JABBI: My Lords, for the first accused Dr Bu-Buakei  
14 Jabbi and Mr Alusine Sesay.

15 PRESIDING JUDGE: Thank you. Second accused.

16 MR BOCKARIE: My Lord, for the second accused is Arrow John  
17 Bockarie and Andrew Ianuzzi.

18 PRESIDING JUDGE: Thank you. For the Prosecution?

19 MR De SILVA: My Lords, that is myself, the Prosecutor. I  
20 think Your Lordship is aware of that, and my learned friends who  
21 are constant companions of Your Lordships in this Court whose  
22 names Your Lordships are familiar with.

23 PRESIDING JUDGE: You mean Mr Tavener?

24 MR De SILVA: Indeed, Mr Tavener and Mr Kamara.

25 PRESIDING JUDGE: Good morning, Mr Attorney General.

26 MR CAREW: Good morning, My Lord.

27 PRESIDING JUDGE: May I ask for your indication of  
28 representation this morning.

29 MR CAREW: Thank you, My Lord. FM Carew.



1           PRESIDING JUDGE: Yes.

2           MR CAREW: Attorney General. AA Roberts, Corporal LM  
3 Farmah, sorry. AA Roberts and OI Kanu. Thank you.

4           PRESIDING JUDGE: Thank you very much. The way we intend  
5 to proceed this morning is to ask yourself, Dr Jabbi, to start  
6 first with your submission and then we will proceed with the  
7 second accused. There are two similar motions but I just want to  
8 hear -- I know the first motion was filed by the second accused,  
9 unless you insist that he be heard first. I mean, I'm well at  
10 ease one way or the other. Mr Bockarie?

11          MR BOCKARIE: Well, Your Honour, may I confer with  
12 Dr Jabbi?

13          PRESIDING JUDGE: Indeed.

14          MR BOCKARIE: Thank you.

15                       [Defence counsel conferred]

16          PRESIDING JUDGE: Mr Lansana, I did not ask you for  
17 representation as I take it you are merely an observer on this  
18 motion because you have not filed any documentation on it. So  
19 just for the records, we are not ignoring you, it is just as part  
20 of procedure.

21          MR LANSANA: Your Honour, I expected that. I have no  
22 reservations about that.

23          PRESIDING JUDGE: Thank you.

24          MR BOCKARIE: Yes, Your Honour. I have conferred with my  
25 senior, Dr Jabbi, and we have agreed that I should move the  
26 motion.

27          PRESIDING JUDGE: Very well. As I say, you are the one  
28 that, on behalf of the second accused, first filed this motion  
29 and so we will hear your arguments in support of your



1 application. Then we will go to Dr Jabbi because the response  
2 and the response by the Prosecution are essentially the same in  
3 both cases. So rather than go back and forth, we will just hear  
4 the applicant and then go to the Prosecution and then the  
5 Attorney General.

6 MR BOCKARIE: Thank you, very much.

7 PRESIDING JUDGE: Are you ready to proceed?

8 MR BOCKARIE: I am, Your Honour.

9 PRESIDING JUDGE: Thank you. I would appreciate,  
10 Mr Bockarie, if you would not necessarily repeat verbatim what  
11 you have in your written submission, but expand on it. If we  
12 feel it is not sufficient, we will likely intervene. Thank you.

13 MR BOCKARIE: Thank you very much, Your Honour.

14 Your Honours, this is an application made pursuant to  
15 Rule 54 of the Rules of Procedure and Evidence requesting this  
16 Trial Chamber to issue a subpoena ad testificandum to  
17 His Excellency the President Alhaji Dr Ahmad Tejan Kabbah,  
18 President of the Republic of Sierra Leone, Minister of Defence  
19 and Commander-in-Chief of the armed forces of the Republic of  
20 Sierra Leone.

21 Your Honours, the President has refused to voluntarily  
22 co-operate with our said request to submit to questioning and to  
23 further appear as a witness in the CDF trial.

24 PRESIDING JUDGE: Why are you saying this? I know this is  
25 one of your arguments.

26 MR BOCKARIE: Yes, because of the attempts we have made,  
27 Your Honour.

28 PRESIDING JUDGE: Yes. You have made attempts with him?  
29 You have met with him?



1 MR BOCKARIE: Yes, with a team.

2 PRESIDING JUDGE: As a team?

3 MR BOCKARIE: Yes, Your Honour.

4 PRESIDING JUDGE: You have discussed with him?

5 MR BOCKARIE: Yes, Your Honour.

6 PRESIDING JUDGE: And?

7 MR BOCKARIE: He has told us categorically that he is not  
8 willing to submit himself as a witness on behalf of the second  
9 accused, Your Honour.

10 PRESIDING JUDGE: Thank you.

11 MR BOCKARIE: Accordingly, Your Honour, the defence team  
12 for the second accused now seeks to compel his co-operation and  
13 attendance by force of law.

14 Your Honour, this application is borne of the simple fact  
15 that His Excellency the President is reasonably believed to be in  
16 possession of information highly relevant to the charges  
17 contained in the indictment against Mr Fofana.

18 Your Honours, this motion presents two questions for your  
19 determination. The first question is: Is the President  
20 compellable as a factual witness before this Tribunal? The  
21 second question is: Has the defence team satisfied the relevant  
22 legal test for the issuance of a subpoena? Your Honours, we  
23 submit that both questions are answered in the affirmative. I  
24 submit that the President is compellable as a factual witness  
25 before this Special Court.

26 My Lords, the learned Attorney General contends that the  
27 President is not compellable as President and head of state by  
28 reason of the fact that a subpoena requires a judicial penalty to  
29 enforce --





1 JUDGE THOMPSON: Would you take it as you already started  
2 in a very moderate way in terms of your pace.

3 MR BOCKARIE: Thank you, sir. Your Honour, I will submit  
4 that the President is compellable as a factual witness before  
5 this Tribunal. The learned Attorney General and Minister of  
6 Justice contend that the President is not compellable as  
7 President and head of state by reason of the fact that a subpoena  
8 requires a judicial penalty to enforce it were it to be  
9 disobeyed. Your Honours, I will submit that this Trial Chamber  
10 has the necessary power by virtue of the Rules of Procedure and  
11 Evidence and the Ratification Act to issue an enforceable  
12 subpoena to any individual within the Special Court's  
13 jurisdiction.

14 Your Honours, I will now draw your attention to Rule 54 of  
15 the Rules of Procedure and Evidence. Your Honour, with your  
16 leave I will read. Rule 54 states:

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

22 This provision I submit, Your Honour, gives the Court the  
23 discretionary power to issue its subpoena to any individual, and  
24 I will say in order to ascertain the truth.

25 Section 20, further, of the Special Court Agreement  
26 Ratification Act also provides -- section 40 -- I'm sorry.  
27 Section 20 of the Special Court Agreement Ratification Act  
28 further provides, Your Honour, with your leave I will quote:

29 [As read] For the purposes of execution, an order issued by



1 a Judge or a Chamber shall have the same force or effect as  
2 if issued by a Judge, a Magistrate or a Justice of the  
3 Peace of the Sierra Leone court.

4 My Lord, section 20 was what I reinforce by Rule 8, which  
5 provides that:

6 "The Government of Sierra Leone shall cooperate with all  
7 organs of the Special Court at all stages of the  
8 proceedings. Request by any organ of the Special Court  
9 shall be complied with in accordance with Article 17 of the  
10 Agreement. An order issued by a Chamber or by a Judge  
11 shall have the same force or effect as if issued by a  
12 Judge, Magistrate or Justice of the Peace of a Sierra Leone  
13 court."

14 Accordingly, Your Honours, as a general matter, this  
15 Chamber is empowered to enforce its orders through the very  
16 mechanism available to officials of our national courts. Namely,  
17 by directing the inspector general of police to issue a warrant  
18 for the arrest of any individual who fails to comply with the  
19 Chamber's order pursuant to Rule 54 quoted above.

20 PRESIDING JUDGE: So your suggestion is that under the  
21 national system once an order is issued by the court, if issued,  
22 as such, would be enforceable by a directive by the inspector  
23 general --

24 MR BOCKARIE: Of police.

25 PRESIDING JUDGE: -- of police to issue a warrant to any  
26 individual?

27 MR BOCKARIE: Yes, Your Honour.

28 PRESIDING JUDGE: What is the reference and what is the  
29 support for that proposition?



1 MR BOCKARIE:: I am referring to the Rule 8.

2 PRESIDING JUDGE: I know Rule 8 of the Rules of Procedure  
3 and Evidence.

4 MR BOCKARIE: Yes, Your Honour.

5 PRESIDING JUDGE: But Rule 8 does not speak about the  
6 inspector general's authority to issue a warrant. What is the  
7 authority for that?

8 MR BOCKARIE: Well, Your Honour, as long as it is an order,  
9 the order is being directed to the inspector general of police,  
10 as was done in the case where the order for the arrest of the  
11 accused was duly executed by the general inspector of police.

12 JUDGE ITOE: Can you address us more, you know, on the  
13 particularity of this case?

14 MR BOCKARIE: In terms of what?

15 JUDGE ITOE: In terms of the fact that the person against  
16 whom the subpoena is being directed to is sitting in head of  
17 state. To what extent -- you know, we would like to have your  
18 submissions on this.

19 MR BOCKARIE: Your Honour, I am coming to that.

20 JUDGE ITOE: As far as, you know, the issue of directing  
21 the inspector general of police to arrest him.

22 MR BOCKARIE: Yes, Your Honour. I am coming to that,  
23 Your Honour.

24 JUDGE ITOE: It is important.

25 MR BOCKARIE: Thank you, Your Honour.

26 Your Honour, the learned Attorney General contends that  
27 President Tejan Kabbah as Head of State and President of the  
28 Republic of Sierra Leone would be somehow shielded from the  
29 validly issued subpoena of this Court by virtue of the



1 Constitution as well as jurisprudence of other international  
2 tribunals.

3 JUDGE ITOE: That is not what I understand the argument on  
4 the paper to be. The argument on the paper is that even if --  
5 even if, I mean, the issuance -- even if the subpoena is issued,  
6 it might not be coupled with a threat to execute it because of  
7 the constitutional provisions. That is what I would like you  
8 to --

9 MR BOCKARIE: Yes, probably if the President availed  
10 himself with section 48(4) of our national Constitution, which  
11 clearly states that as a sitting head of state he enjoys  
12 immunity.

13 Your Honour, that proposition is trite if its application  
14 is only limited to the national court. It is a trite  
15 proposition, Your Honour, I concede, but I further submit that  
16 its application is only limited in the national court where the  
17 President can avail himself of the provisions of section 48(4) of  
18 our national constitution. That is, the President enjoys  
19 immunity from Prosecution.

20 The question is: Can he available himself under those  
21 claims under a international criminal tribunal? I submit,  
22 Your Honours, the answer is no. The President enjoys no function  
23 and immunity in international criminal jurisprudence. The  
24 Special Court being no exception, Your Honour.

25 Your Honour, in fact, this point was canvassed in the  
26 Charles Taylor matter decided by this Appeal Chamber. And,  
27 My Lord, in the submission of the amicus curia, one Professor  
28 Philip Sands --

29 JUDGE THOMPSON: Learned counsel, could you give us a





1 citation of the decision you are referring to?

2 MR BOCKARIE: Sorry, Your Honour. Charles Ghankay Taylor  
3 case number SCSL-2003-01-0.

4 JUDGE THOMPSON: When was the decision delivered?

5 MR BOCKARIE: It was on 31 May 2004.

6 JUDGE THOMPSON: By the Appeals Chamber of this Court?

7 MR BOCKARIE: Yes, by the Appeals Chamber of this Court.

8 JUDGE ITOE: On the?

9 MR BOCKARIE: 31 May 2004. This is what Professor Philip  
10 Sands made submissions - amicus - say when --

11 JUDGE ITOE: Are you citing the professor as the decision  
12 of the Court?

13 MR BOCKARIE: No. I mean, it was -- it formed part of it  
14 because the conclusion -- actually aided the Court in arriving at  
15 the conclusion.

16 JUDGE ITOE: And I suppose you understand the distinction  
17 between this case and the Charles Taylor case?

18 MR BOCKARIE: I do, Your Honour.

19 JUDGE ITOE: All right.

20 MR BOCKARIE: And Your Honour, this is what it says: "In  
21 respect of international court" --

22 JUDGE THOMPSON: Wouldn't it be proper to cite just the  
23 ratio of the Court's decision, rather than the submissions of the  
24 learned professor.

25 MR BOCKARIE: Yes. The ratio being that as a sitting head  
26 of state, a sitting head of state enjoys no function of immunity  
27 under international criminal law, the Special Court of Sierra  
28 Leone being no exception.

29 JUDGE ITOE: And the ratio you say it is in the Taylor



1 case?

2 MR BOCKARIE: Yes, Your Honour.

3 JUDGE ITOE: Okay. Thank you.

4 JUDGE THOMPSON: Is there a particular paragraph that you  
5 want to cite?

6 MR BOCKARIE: No, Your Honour.

7 JUDGE THOMPSON: All right. Thanks.

8 MR BOCKARIE: Your Honours, the other question for your  
9 consideration is: Has the Defence made the necessary showing for  
10 the issuance of the subpoena?

11 Your Honours, before I even get to that point, this  
12 question of whether the sitting head of state enjoys immunity was  
13 properly canvassed in our local decision decided by the Supreme  
14 Court. This is unreported, Your Honour, and is SC1/2003,  
15 judgment of the Supreme Court in the matter of Issa Hassan Sesay  
16 and Others against the President of the Special Court, the  
17 Registrar of the Special Court, the Prosecutor of the Special  
18 Court and the Attorney General of the Special Court [sic].

19 The question of immunity was dealt with and the  
20 Chief Justice in addressing that particular issue, whether a  
21 sitting head of state enjoys immunity or whether section 48(4) --  
22 the President can avail himself of that provision so that he can  
23 be immune from appearing as a witness or he can be immune from  
24 prosecution, this is what he said, which I will just read  
25 briefly.

26 JUDGE THOMPSON: At page?

27 MR BOCKARIE: Page 14.

28 JUDGE THOMPSON: Page 14 or 13?

29 MR BOCKARIE: Well, I have got it -- sorry. Well, it



1 started at page 13; thank you, Your Honour.

2 PRESIDING JUDGE: Page 13?

3 MR BOCKARIE: Yes, Your Honour.

4 JUDGE THOMPSON: Paragraph?

5 MR BOCKARIE: The second paragraph.

6 "A serving head of state is entitled to absolute immunity  
7 from process brought before national courts, as well as  
8 before the national courts of third states, except it has  
9 been waived by the state concerned. This principle was  
10 applied by the House of Lords in the Pinochet proceedings.  
11 See R v Bow Street Metropolitan Stipendiary Magistrate and  
12 Others ex parte Pinochet."

13 Then it says:

14 "In contrast, where the immunity is claimed by a head of  
15 state before an international court, the position to be  
16 inferred from decisions of various national courts and  
17 international tribunals, and the writings of international  
18 jurists, is that there exists no a priori entitlement of  
19 claim to claim immunity" --

20 THE INTERPRETER: Your Honours, that seems very fast for  
21 the interpreter to follow.

22 PRESIDING JUDGE: Mr Bockarie, the interpreter is unable to  
23 follow your presentation at this time. So if you wouldn't mind  
24 repeating this last part, in the international court, and please  
25 go slow.

26 MR BOCKARIE: "In contrast, where the immunity is claimed  
27 by a head of state before an international court, the  
28 position to be inferred from decisions of various national  
29 courts and international tribunals, and the writings of



1 international jurists, is that there exists no a priori  
2 entitlement to claim immunity particularly from criminal  
3 process involving international crimes."

4 And its goes further on page 14, second to last paragraph,  
5 and this is what he said:

6 "The third question is whether Section 29 of the  
7 Ratification Act, providing that the official status of an  
8 accused could be a bar to criminal processes" --

9 JUDGE THOMPSON: "Could not", I think it says.

10 MR BOCKARIE: "Could not be a bar." Sorry. Thank you,  
11 sir.

12 "Could not be a bar to criminal process before the Special  
13 Court is in contravention of section 48(4) of the  
14 Constitution, which makes the head of state of Sierra Leone  
15 immune from both civil and criminal process.

16 "The answer lies in the distinction I had earlier sought to  
17 make between immunity from process before a municipal court  
18 and immunity from process before an international court.  
19 Indeed, the wording of section 29 of the Ratification Act  
20 is not dissimilar from that dealing with the same subject  
21 matter found in the statutes of other international courts  
22 and tribunals set up."

23 And 15, the second paragraph:

24 "In addition, a majority of academic commentary supports  
25 the view that an international criminal tribunal or court  
26 may exercise jurisdiction over a serving head of state and  
27 that such person is not entitled to claim immunity under  
28 customary international law in respect of international  
29 crimes."





1           PRESIDING JUDGE: But how do you make any linkage with this  
2       decision that you are citing? Because obviously this decision  
3       deals with the immunity to be prosecuted for international war  
4       crimes or war crimes in international tribunals. So what is the  
5       relationship between that and the issuance of a subpoena? I am  
6       just asking you to --

7           MR BOCKARIE: Yes, Your Honour. The question that may  
8       happen, what happens if His Excellency decides to ignore the  
9       order of appearing before this Court? This Court will be called  
10      upon -- because if there is an order requesting the President to  
11      appear before this Court and the President ignores that order,  
12      then he is in violation of an order of this Court. He is in  
13      contempt of an order of this Court.

14          JUDGE ITOE: If I ask you, Mr Bockarie, what distinction do  
15      you make out of the President's -- if I were to go with your  
16      argument, what distinction would you make between the President  
17      breaching provisions of substantive international law and merely  
18      refusing to answer to a subpoena?

19          MR BOCKARIE: Yes, My Lord --

20          JUDGE ITOE: Would refusing to answer to a subpoena amount  
21      to a breach of the principle of international law even though  
22      that subpoena is issued by an international criminal  
23      jurisdiction?

24          MR BOCKARIE: Yes, Your Honour.

25          JUDGE ITOE: Can you address us on that?

26          MR BOCKARIE: Yes, Your Honour. The answer can be found  
27      in Rule 8(B). This is what it provides:

28                "Except in cases to which Rule 11, 13, 59 or 60 applies,  
29                where a Chamber or a Judge is satisfied that the Government



1 of Sierra Leone has failed to comply with a request made in  
2 relation to any proceedings before that Chamber or Judge,  
3 the Chamber or Judge may refer the matter to the President  
4 to take appropriate action."

5 JUDGE ITOE: I will not go any further. I have made my  
6 inquiry.

7 MR BOCKARIE: As My Lord pleases.

8 PRESIDING JUDGE: Mr Bockarie, will you make this court  
9 decision that you refer to available to the Court? I don't think  
10 it has been filed as any authority yet.

11 MR BOCKARIE: I will, Your Honour.

12 PRESIDING JUDGE: Thank you. And make it available to all  
13 concerned as well.

14 MR BOCKARIE: I will, Your Honour.

15 PRESIDING JUDGE: Thank you. So in your submission on this  
16 issue, and just to follow up on what my brother Justice Itoe has  
17 just raised, you are making no differences between immunity in  
18 the international tribunals for crimes committed, war crimes and  
19 these type of crimes, and non-compliance with a subpoena. You  
20 are saying, well, it's the same principle.

21 MR BOCKARIE: Yes, Your Honour.

22 PRESIDING JUDGE: So there is no difference whether it's  
23 non-compliance with a subpoena and a war crime?

24 MR BOCKARIE: No, there is a distinction, you understand,  
25 and that distinction was made clear in the Krstic case. I will  
26 give you the quotation, Your Honour.

27 PRESIDING JUDGE: This is the Appeals Chamber decision at  
28 ICTY, is it?

29 MR BOCKARIE: Yes, it is the Appeals Chamber, case



1 IT-98-33-A. In that case, Your Honour:

2 "The Appeals Chamber did not say that the functional  
3 immunity enjoyed by State officials includes an immunity  
4 against being compelled to give evidence of what the  
5 official saw or heard in the course of exercising his  
6 official functions. Nothing which was said by the Appeals  
7 Chambers in the Blaskic Subpoena Decision should be  
8 interpreted as giving such an immunity to officials of the  
9 nature whose testimony is sought to present. No authority  
10 for such a proposition has been produced by the  
11 Prosecution, and none has been found. Such immunity does  
12 not exist."

13 It makes that distinction, Your Honour. Your Honour, the  
14 second limb is --

15 JUDGE THOMPSON: When was that decision?

16 MR BOCKARIE: Your Honour, this was --

17 JUDGE THOMPSON: 1st July 2003?

18 MR BOCKARIE: 1st July 2003.

19 PRESIDING JUDGE: And that last part, you were quoting from  
20 that decision or you were paraphrasing?

21 MR BOCKARIE: I was quoting from that decision.

22 PRESIDING JUDGE: What's the quote -- what is the page and  
23 paragraph?

24 JUDGE THOMPSON: The section begins, what -- the paragraph  
25 beginning with reference to the Blaskic Appeals Chamber decision,  
26 wasn't it?

27 MR BOCKARIE: Yes, indeed, Your Honour.

28 JUDGE THOMPSON: I think in that case there was a reference  
29 to an Appeals Chamber decision in another case where the



1 functional immunity had been canvassed.

2 MR BOCKARIE: Sorry, Your Honour, it commences at  
3 paragraph 27, beginning at line 5 from the bottom.

4 JUDGE THOMPSON: There it was saying that -- the Court was  
5 seeking to interpret the decision of another Appeals Chamber,  
6 that that decision did not confer functional immunity.

7 MR BOCKARIE: Yes, in respect of --

8 JUDGE THOMPSON: In other words.

9 MR BOCKARIE: Yes, Your Honour.

10 JUDGE THOMPSON: Quite right. It was actually guiding.

11 MR BOCKARIE: Yes, Your Honour.

12 JUDGE THOMPSON: That, in fact, it may well have been a  
13 misreading of a ratio in that particular case.

14 MR BOCKARIE: In the Blaskic case, Your Honour, yes. Thank  
15 you, Your Honour.

16 Your Honour, the next question for your consideration is:  
17 Has the Defence made the necessary showing for the issuance of a  
18 subpoena?

19 PRESIDING JUDGE: It may be the next question in your  
20 presentation and your submission but I would suggest to you that  
21 it should be the first question. Because if you answer in the  
22 negative to that, then there is no need to go to the second limb  
23 of the submission.

24 MR BOCKARIE: I take your correction, Your Honour.

25 PRESIDING JUDGE: But make it as your next question for  
26 now.

27 MR BOCKARIE: Yes, probably can be read in the reverse.  
28 Sorry.

29 JUDGE ITOE: Have your submissions not addressed that





1 sufficiently in addition to what you have added this morning?

2 MR BOCKARIE: Yes, everything is contained in the written  
3 submissions here, Your Honour. This particular leaf, whether the  
4 necessary showing has been established.

5 JUDGE ITOE: But if you want to emphasise certain issues on  
6 it --

7 MR BOCKARIE: Everything is contained in the written  
8 submissions, Your Honour. On this point, I refer Your Honours to  
9 the written submissions made by ourselves. Thank you.

10 PRESIDING JUDGE: In your written submission, if I may, you  
11 appear to be relying essentially on criteria that have been  
12 applied by other international tribunals. My understanding is  
13 that the tribunal in Rwanda applies not necessarily the same  
14 standard or threshold as the one in ICTY. So what is your  
15 position on this?

16 MR BOCKARIE: In respect of --

17 PRESIDING JUDGE: As to what needs to be established to  
18 answer that question.

19 MR BOCKARIE: As you rightly said, there are divergent  
20 views according to the respective tribunals.

21 PRESIDING JUDGE: What is your position? What is the  
22 position that this Tribunal should adopt, in your submission?

23 MR BOCKARIE: The answers can be found -- like, one, the  
24 position of His Excellency. One, his position as President,  
25 Minister of Defence and Commander-in-Chief of the armed forces of  
26 the Republic of Sierra Leone. Now that we have evidence that he  
27 positively identified himself with the CDF in the restoration of  
28 his --

29 JUDGE ITOE: Which evidence?



1 MR BOCKARIE: Sorry?

2 JUDGE ITOE: Which evidence do we have as far as this  
3 motion is concerned?

4 MR BOCKARIE: Okay, I will take your point, My Lord, as far  
5 as the motion is concerned.

6 JUDGE ITOE: Yes.

7 MR BOCKARIE: Yes, My Lord. Well, My Lord, it is  
8 reasonably --

9 JUDGE ITOE: Which evidence are you referring to?

10 MR BOCKARIE: Well, My Lord, as far as the motion is  
11 concerned, that is what we are saying. It is reasonably believed  
12 that in his position as President and as Commander-in-Chief, he  
13 may be in possession of information which may be of tremendous  
14 assistance in the defence of the second accused.

15 The Defence submits that the President should provide  
16 material assistance as to, one, Mr Fofana's alleged culpability  
17 as one who bears the greatest responsibility.

18 JUDGE ITOE: Can you take that again, please?

19 MR BOCKARIE: Yes, Your Honour. The President is in a  
20 position to provide material assistance to issues like  
21 Mr Fofana's alleged culpability as one who bears the greatest  
22 responsibility or violations of humanitarian law. Secondly, he  
23 is in a position to throw light more specifically to Mr Fofana's  
24 alleged command responsibility. Thirdly, the President could  
25 provide or would throw more light on the duties associated with  
26 the position of director of war. Further, he may well be able to  
27 explain how orders passed through the chain of command as well as  
28 how certain members of the alleged CDF leadership interacted with  
29 one another.



1           My Lord, the Defence further submits that it is believed  
2           that President Kabbah may be in possession of such information is  
3           a reasonable one based on the current state of evidence.

4           Your Honours, by virtue of his position as President, it is  
5           believed he will have much to say about the CDF command structure  
6           or the fact that the CDF was fighting to restore him to power.

7           In furtherance of that goal, Your Honour, we will want to  
8           be seized of the flow of communication between President Kabbah  
9           whilst in Guinea and the leadership of the CDF. It is the state  
10          of the evidence, Your Honour, that personnel from the CDF  
11          travelled to Guinea and periodically held consultation meeting  
12          with His Excellency.

13          JUDGE ITOE: I am worried by a reference to that evidence.  
14          There is evidence, you know, before this Court. The Court has  
15          not yet evaluated this evidence for you to ground your  
16          application on it.

17          MR BOCKARIE: I am not grounding --

18          JUDGE ITOE: That is my worry.

19          MR BOCKARIE: Yes, Your Honour, is --

20          JUDGE ITOE: Because you are inviting the Tribunal, you  
21          know, to say that that evidence is correct, is true.

22          MR BOCKARIE: No, Your Honour.

23          JUDGE ITOE: Is that what you are attempting to do?

24          MR BOCKARIE: No, Your Honour.

25          JUDGE ITOE: Because to be fair to this, and I put the  
26          question to you some time ago as to what evidence you were  
27          referring to.

28          MR BOCKARIE: You see, Your Honour, this will further help  
29          us in our investigation. This is in aid of our investigation,



1 Your Honour.

2 JUDGE ITOE: I would like to remind you that the Tribunal  
3 has not made an evaluation of all the evidence that has been  
4 adduced by all the witness, be they for the Prosecution or for  
5 the Defence as at now. And you understand the reason. That it  
6 could comport, if we have to refer to or rely on evidence which  
7 has not yet been assessed for purposes of determining credibility  
8 and weight.

9 MR BOCKARIE: Yes, Your Honour, that makes it more  
10 necessary for us to have the President. Because he will be in a  
11 position, I submit, to throw light on these pertinent issues that  
12 are of such relevance to the defence of our case, Your Honour. I  
13 thank you very much.

14 PRESIDING JUDGE: Mr Bockarie, I still have no answer to my  
15 question as to what is the test that should be applicable. I  
16 note in your reply to the response presented by the Prosecution  
17 you are suggesting that the ICTY test -- you use the words  
18 "should be applied with modifications" as to whether or not there  
19 is sufficient showing. I am just reading from your own reply at  
20 page 3, "The ICTY test should be modified." So presumably this  
21 is your position: That the test to be applied by this Tribunal  
22 is, in essence, the ICTY test as developed in some cases,  
23 including Milosevic, with some modifications.

24 MR BOCKARIE: Yes. You see, Your Honour, what in essence  
25 we are saying, we are not disputing the application of the ICTY  
26 test at all, you see. We stand by what we presented in our  
27 submissions, Your Honour.

28 PRESIDING JUDGE: But you are suggesting that there should  
29 be modifications. What modifications are being suggested to the





1 ICTY test? "The Defence submit that the Chamber should adopt the  
2 same flexible approach to the instant motion, at least with  
3 respect to the question of whether the Defence has met a  
4 sufficient showing as to the legitimate forensic purpose of the  
5 proposed evidence." What do you mean by this? I am just reading  
6 here from paragraph 13 of your reply.

7 MR BOCKARIE: You see, My Lord, this application is made in  
8 respect of a witness who we have not had the opportunity of fully  
9 interviewing him, and we are of the firm belief that he can be of  
10 tremendous assistance in the defence of our clients.

11 PRESIDING JUDGE: Because my understanding of your reply is  
12 you are relying on this description and concept of greatest  
13 responsibility as being the foundation of your application in  
14 saying, in this respect, the President may have evidence that  
15 could be of assistance. Is it essentially what you are saying as  
16 how --

17 MR BOCKARIE: Exactly.

18 PRESIDING JUDGE: I am just trying to -- and if that is the  
19 case, is it a question that goes to jurisdiction rather than  
20 charges? I mean, how is this relating to the charges and the  
21 crimes and the counts that are in the indictment as such? So  
22 what is the greatest responsibility? Does that relate now with  
23 what this Court has to deal with?

24 MR BOCKARIE: I mean, if the President is in a position to  
25 tell us the hierarchical structure of the CDF, and what we what  
26 intend saying is our client isn't one of those who bear the  
27 greatest responsibility, because he may throw light and in the  
28 process of throwing light he will be in a position to tell us  
29 exactly what was the role of our client. We do acknowledge the



1 fact that this Chamber itself has ruled that greatest  
2 responsibility is not that of any evidential value. We do accept  
3 that fact and we concede to the Chamber's decision in respect of  
4 that. But all what we are saying is is he in a position to be of  
5 material assistance to us in negating the role played by our  
6 client in respect of the charges contained in the indictment? We  
7 are saying he is.

8 PRESIDING JUDGE: Now, to take you to the last resort  
9 requirement, which you appear to suggest is part of the test -  
10 and I am again referring to your submission in reply - you see  
11 there are essentially no other means - and I am quoting from  
12 paragraph 22 of your reply - "No other means of obtaining the  
13 information would be as convenient." You do not say you are  
14 talking here of convenience as a practical matter, as credible  
15 from an evidentiary stand-point or transferring from the public  
16 policy point of view. So you are now giving, I would suggest,  
17 quite a different meaning to the last resort requirement, which  
18 is normally understood - at least that is my understanding - as  
19 there are no other means available to obtain the information.

20 MR BOCKARIE: Yes, My Lord, because all the means available  
21 to us to have been exhausted. We have made contact with  
22 His Excellency and he has told us in no uncertain terms --

23 PRESIDING JUDGE: No, I am not talking of the President  
24 here. I am talking of other means of trying to establish what  
25 you are trying to establish. Not establish whether the President  
26 should come or not come, to establish what you are trying to  
27 establish with the venue of the President as a witness. So what  
28 are -- that is what I am saying. You say this is the most  
29 convenient, but the question is not whether it is the most



1 convenient. Are there other means of ascertaining this evidence  
2 in court rather than calling the President?

3 MR BOCKARIE: I submit it is only the President because the  
4 President knows the conversation, if any, that took place between  
5 himself and the CDF leadership.

6 [CDF14FEB06B - EKD]

7 Others will not be privy to that conversation, Your Honour,  
8 I submit. He is the only one. Yes, conversation that occurred  
9 between himself --

10 PRESIDING JUDGE: Yeah, but did the -- evidence you are  
11 seeking to elicit from His Excellency is not whether he had a  
12 conversation or not. You are saying that this evidence is  
13 related to some of the contents of some paragraphs in the  
14 indictment. If am not mistaken 15, 16, 17 and so on, which have  
15 to do with the structure of the CDF, the responsibility and so  
16 on. So that is basically what you are suggesting. Not whether  
17 he had a conversation with one or two of the accused.

18 MR BOCKARIE: No, Your Honour. As to question whether he  
19 gave orders, direct orders; whether he knew of the perpetration  
20 of these alleged acts in the places specified in the indictment,  
21 these are issues we would like to know.

22 PRESIDING JUDGE: And you are suggesting that there are no  
23 other ways or means of obtaining that information than by calling  
24 him?

25 MR BOCKARIE: No, Your Honour. Regrettably, Your Honour.

26 PRESIDING JUDGE: Thank you.

27 MR BOCKARIE: Thank you.

28 PRESIDING JUDGE: Dr Jabbi, you wish to address the Court?

29 MR JABBI: Yes, My Lord.



1           PRESIDING JUDGE: In respect of the first accused, as I  
2 say, I take it that your submission is not substantially  
3 different than the one by the second accused. But having said  
4 that, you may expand from that or you may indicate what  
5 differences, if any, you have in your submission to that  
6 presented by the second accused.

7           MR JABBI: Thank you, My Lord. My Lord, broadly, on behalf  
8 of the first accused, we rely on the submissions in the various  
9 documents filed on behalf of the first accused.

10           Secondly, My Lords, we broadly adopt the submissions made  
11 by my learned friend Bockarie on behalf of the third accused  
12 insofar as --

13           JUDGE THOMPSON: You mean the second.

14           MR JABBI: The second, I'm sorry, My Lord. On behalf of  
15 the second accused. Insofar as they are also applicable to the  
16 first accused.

17           My Lords, I would like to just make a few comments on some  
18 aspects of the presentation both in the documents filed and in  
19 the submissions made this morning. If, with your leave, I may  
20 start from the rear, and that is to say the consequence of a  
21 refusal to obey an order of subpoena that may be issued by this  
22 Court.

23           My Lord, the first point I would like to make there is that  
24 it should not be presumed that this necessity will arise.  
25 Notwithstanding that His Excellency has not immediately  
26 considered the need to appear and give evidence to testify in  
27 this Court, it should not nonetheless be presumed that if this  
28 Court were to issue a subpoena to that effect that His Excellency  
29 will nonetheless refuse to come.





1           In all the circumstances of the setting up of this Court,  
2           more particularly with the role that he personally played in  
3           requesting the setting up of this Court; in making agreement with  
4           the secretary of the United Nations for same; and in ensuring  
5           legislative ratification of the said agreement by the Parliament  
6           of Sierra Leone; and in particular, reference to some of the  
7           provisions, especially with regard to co-operation between the  
8           authorities of the Sierra Leone state and the Special Court,  
9           there should be no doubt that in all those circumstances, the  
10          President would feel duty-bound to comply with an order by this  
11          Court in regard to testifying before it.

12          My Lords, the relevant provisions have already been cited  
13          insofar as what I have just mentioned are concerned.

14          But, nonetheless, the Court obviously would also want to  
15          hear any submissions as to what it can do or will do if,  
16          notwithstanding the point I've already made, the President,  
17          nonetheless, refuses to come and testify. My Lords, a few  
18          options are open to the Court in that event. My learned friend  
19          Mr Bockarie cited Rule 8(B) of the Rules of Procedure and  
20          Evidence of the Special Court for Sierra Leone, and that is one  
21          option. My Lords, another option is also available in  
22          Rule 77(A)(iii).

23          PRESIDING JUDGE: Which is the contempt proceedings?

24          MR JABBI: Yes, My Lord. Rule 77(A)(iii) and 77(C).  
25          My Lord, I then proceed --

26          JUDGE THOMPSON: Learned counsel, did you say Rule 77?

27          MR JABBI: (A).

28          JUDGE THOMPSON: (iii).

29          MR JABBI: (iii).



1 JUDGE THOMPSON: And (C).

2 MR JABBI: 77(C).

3 JUDGE THOMPSON: (C) what? Is that a section?

4 MR JABBI: My Lord, again (C) gives a range of options.

5 JUDGE THOMPSON: I see. So it is just (C).

6 MR JABBI: (C)(i) can be chosen by the Court.

7 JUDGE THOMPSON: That's okay. Thanks.

8 MR JABBI: (C)(ii) --

9 JUDGE THOMPSON: That's fine.

10 MR JABBI: -- can also be chosen.

11 JUDGE THOMPSON: I'm content with that reference.

12 MR JABBI: Thank you, My Lord. My Lords, I just would want  
13 now to comment very briefly on whether the Defence in this matter  
14 has made sufficient showing for the issuance of a subpoena.  
15 My Lord, it is submitted that the relevance and materiality of  
16 the evidence expected from the witness will be the main criterion  
17 for determining whether sufficient showing has been made by the  
18 Defence.

19 PRESIDING JUDGE: Can you repeat that? I am not sure I  
20 follow you on this last submission.

21 MR JABBI: My Lord, I said the main criterion here will be  
22 the relevance and materiality of the evidence to be given by this  
23 prospective witness, if we may call him that, in relation to the  
24 indictment before the Court.

25 My Lords, if I may refer Your Lordships to paragraphs -- to  
26 the normal reply to the AG's response. That is document number  
27 547, dated 30 January 2006.

28 JUDGE ITOE: Dated?

29 MR JABBI: 30 January 2006. To paragraphs 6 to 13



1 inclusive, under the subheading "The President as a material  
2 witness." And more especially, paragraph 7 thereof. My Lords,  
3 if I may just read, with your leave --

4 PRESIDING JUDGE: Yes.

5 MR JABBI: -- the first sentence of that paragraph.

6 "As outlined in our reply to the Prosecution's response,  
7 the anticipated evidence of the President goes to the core  
8 of issues set out in the indictment, particularly with  
9 respect to paragraphs 13, 14" -- My Lords, although the  
10 passage reads 15, it should be 17 -- "paragraphs 13, 14,  
11 17, 18, 20 and 21 of the indictment."

12 My Lords, if I may read paragraph 13 of the indictment.

13 PRESIDING JUDGE: Go ahead.

14 MR JABBI: It reads:

15 "At all times relevant to this indictment,  
16 Samuel Hinga Norman was the National Co-ordinator of the  
17 CDF. As such he was the principal force in establishing,  
18 organising, supporting, providing logistical support and  
19 promoting the CDF. He was also the leader and commander of  
20 the Kamajors and, as such, had de jure and de facto command  
21 and control over the activities and operations of the  
22 Kamajors."

23 My Lords, we submit that all those allegations in paragraph  
24 13 are issues as to which the best possible evidence can only  
25 come from the President, who was President of Sierra Leone at all  
26 times relevant to this indictment. That is to say, from 30th  
27 November 1996 to December 1999, during which he served as  
28 President in office and also as temporarily ousted president in  
29 exile. His ousting and exile having necessitated the creation of



1 the position of National Co-ordinator of the CDF and also the  
2 continuing need for the establishing, organising, supporting,  
3 providing logistical support and promoting the CDF, to use the  
4 language of paragraph 13. Such evidence as can be anticipated  
5 from him as his position of President, Commander-in-Chief,  
6 Minister of Defence would be virtually indispensable.

7 My Lords, if I may also read paragraph 14 of the  
8 indictment. With your leave again, it reads:

9 "At all times relevant to this indictment, Moinina Fofana  
10 was the National Director of War of the CDF and  
11 Allieu Kondewa was the High Priest of the CDF. As such,  
12 together with Samuel Hinga Norman, Moinina Fofana and  
13 Allieu Kondewa were seen and known as the top leaders of  
14 the CDF. Moinina Fofana and Allieu Kondewa took directions  
15 from and were directly answerable to Samuel Hinga Norman.  
16 They took part in policy, planning and operational  
17 decisions of the CDF."

18 My Lord, with particular reference to that portion, which  
19 calls the three indictees -- or which alleges that the three  
20 indictees were seen and known as the top leaders of the CDF, My  
21 Lords, on that as well, we submit that the anticipated evidence  
22 from the President in those capacities already outlined and, more  
23 particularly, his knowledge of and connection with the structure  
24 called the CDF, his evidence would be most material and we submit  
25 indispensable. The truth that this Court is charged with  
26 unearthing in the process of ensuring justice, one way or the  
27 other, will hardly be clearly unveiled and revealed without the  
28 evidence from the President.

29 My Lords, if I may also read paragraph 17 of the





1 indictment. It reads, My Lords, with your leave:

2 "Samuel Hinga Norman, as National Co-ordinator of the CDF  
3 and commander of the Kamajors, knew and approved the  
4 recruiting, enlisting, conscription, initiation and  
5 training of Kamajors, including children below the age of  
6 15 years. Samuel Hinga Norman; Moinina Fofana, as the  
7 Director of War of the CDF; and Allieu Kondewa, as the  
8 High Priest of the CDF, knew and approved the use of  
9 children to participate actively in hostilities."

10 My Lords, the characterising of the first accused as  
11 National Co-ordinator of the CDF, and also as commander of the  
12 Kamajors, and his alleged role in recruiting, enlisting,  
13 conscripting, initiating and training Kamajors, are all  
14 allegations on which the President can give very valuable and  
15 indispensable material evidence if he were to testify before this  
16 Court.

17 Once more, whether in fact those allegations are true; the  
18 degree to which they may be true, if at all; and the modes of  
19 activity that evidence such allegations, if indeed the named  
20 indictees participated in such modes of activity, we submit that  
21 valuable material evidence in respect thereof is in the bosom and  
22 breast of His Excellency the President, and that this Court  
23 should endeavour not to be deprived of that valuable material  
24 evidence.

25 Furthermore, My Lords, paragraph 18, which also reads, with  
26 your leave: "In the positions referred to in the aforementioned  
27 paragraphs" --

28 JUDGE ITOE: Paragraph 18 of what?

29 MR JABBI: Of the indictment, My Lords, I'm sorry. The



1 indictment, My Lord.

2 "In the positions referred to in the aforementioned  
3 paragraphs, Samuel Hinga Norman, Moinina Fofana and Allieu  
4 Kondewa, individually or in concert, exercised authority,  
5 command and control over all subordinate members of the  
6 CDF."

7 My Lords, the Minister of Defence of Sierra Leone, during  
8 all those material times relevant to the indictment, the chief in  
9 command of the armed forces of Sierra Leone during the self same  
10 time, and the President and head of government was His Excellency  
11 Alhaji Ahmad Tejan Kabbah, whose evidence in respect of these  
12 allegations we submit is most material and will help clarify, and  
13 perhaps most indispensably, those allegations of exercise of  
14 authority, command and control over all subordinate members of  
15 the CDF, couched in paragraph 18.

16 My Lords, without boring the Court further, I submit --

17 JUDGE ITOE: Are you suggesting you have been boring us?

18 MR JABBI: Well, it may be a perception of some people that  
19 sustained submissions are inherently boring.

20 JUDGE THOMPSON: For me that perception does not define  
21 reality.

22 MR JABBI: Thank you very much, My Lord. I hope that  
23 His Lordship's statement is generally applicable to the rest of  
24 the Court and, I would say, even perhaps to the public in the  
25 gallery.

26 Nonetheless, My Lords, I believe enough has been said in  
27 respect of the paragraphs cited from the indictment to be  
28 applicable to the rest of the paragraphs I originally  
29 highlighted. That is to say, even paragraphs 20 and 21, which I



1 do not need to say anything more about.

2 Now, My Lords --

3 PRESIDING JUDGE: I would like, Dr Jabbi, to hear some  
4 comments on your part about two aspects of your submission. One  
5 you have argued now, the materiality of that evidence, but what  
6 is the support? I mean, you have referred to some allegations in  
7 the indictment, but what is the support? How is this evidence  
8 and how -- where is this Court to find the support for your  
9 submissions in this respect?

10 And my second question, if I may, is you have adopted the  
11 position of the second accused and he has clearly stated in his  
12 replies that they apply -- they suggest the test of ICTY should  
13 be applicable with some flexibility. And in that test they apply  
14 the last resort criteria, as such. Which means that there is no  
15 other means of obtaining this evidence. So I would like to hear  
16 your comments in this respect.

17 MR JABBI: If I may deal with the second one first.

18 My Lords, this Court is entitled to utilise jurisprudence  
19 from other international tribunals. It is also entirely within  
20 not only the power or jurisdiction of this Court, but also  
21 entirely within its discretion to adopt its own criteria in  
22 determining issues of this nature.

23 PRESIDING JUDGE: Dr Jabbi, if you understood my comments  
24 to be that we have made a decision on that, it is not the case.  
25 I was only making reference to the fact that in the second  
26 accused's reply, if that is part of their submission that the  
27 test to be applied was that one, whether or not this Court will  
28 apply this test is to be decided later as such. I mean, just  
29 because you have adopted all of the arguments and that is why I



1 am putting it to you.

2 MR JABBI: Yes, well, My Lord, my --

3 PRESIDING JUDGE: This Court is well-known to have stated  
4 clearly that we do not follow slavishly what other tribunals have  
5 decided.

6 MR JABBI: My own position on that, My Lord, is that this  
7 Court should determine its own criteria. And when issues of  
8 materiality are sufficiently shown to the satisfaction of this  
9 Court, they may choose to issue a subpoena to a witness to  
10 testify before the Court.

11 JUDGE THOMPSON: Perhaps I should interject here. Does  
12 Rule 54 provide such criteria or criterion, or test to guide the  
13 Court in deciding whether or not to exercise its discretion in  
14 issuing a subpoena? In other words, taking the plain meaning of  
15 Rule 54, does it provide any criteria?

16 MR JABBI: Yes, indeed, My Lord.

17 JUDGE THOMPSON: What is that?

18 MR JABBI: The criterion -- I see one dominant criterion.  
19 The dominant criterion is necessity for the --

20 JUDGE THOMPSON: Right, I would rest on that. I wouldn't  
21 ask you to go further than that. I just wanted to be enlightened  
22 on that.

23 MR JABBI: Thank you, My Lord. So, My Lords, the  
24 indictment and the showing of anticipated evidence from a  
25 witness, and of course the criterion of necessity for the purpose  
26 of conducting a trial, as just illustrated from Rule 54, are  
27 sufficient guides for the Court to adopt its own criteria in  
28 issuing subpoenas.

29 My Lords, having said that, I also would want to refer to a





1 few matters that have arisen in the process of the filing of  
2 papers and the submissions made this morning. If I may begin  
3 with the relevance or otherwise, one should add, of the provision  
4 in subsection 48(4) of the Constitution of Sierra Leone.

5 My Lords, the first point that should be made right away  
6 about Section 48(4), about the Constitution of Sierra Leone, is  
7 that indeed it is not dealing with the issue of subpoenas. That  
8 provision does not deal with the issue of subpoenas. It deals  
9 instead with issuing substantive actions against a sitting head  
10 of state, or, to be more accurate, to any person holding or  
11 performing the functions of the office of President. To any  
12 person holding or performing the functions of the office of  
13 President. So what it says is that no civil or criminal  
14 proceedings shall be instituted or continued against such a  
15 person. So the provision is not dealing with the issuance of  
16 subpoena. That is the first point I want to make about it.

17 JUDGE ITOE: Nobody argued that anyway.

18 MR JABBI: Yes, My Lord.

19 JUDGE ITOE: There was no argument, not even from the  
20 Attorney General to this effect.

21 MR JABBI: Well, My Lord --

22 JUDGE ITOE: Put your submissions very carefully. Very,  
23 very carefully.

24 MR JABBI: My Lord, I am not going to deal with the  
25 question of whether the Attorney General specifically made  
26 submissions to that effect, except that of course that provision  
27 was used in the papers filed by that office. But, My Lord, if I  
28 may proceed, that is the first point I want to make about  
29 section 48(4).



1           My Lord, the next point I want to make about 48(4) is its  
2           status in a court of this nature, which is an international court  
3           or a court of international criminal law.

4           My Lords, the point has also been made, and I don't want to  
5           belabour it, but it should be emphasised, that section 29 of the  
6           Attorney General's own parliamentary legislation, the  
7           Ratification Act, reverses the import, implication, relevance and  
8           significance of section 48(4) of the national Constitution of  
9           Sierra Leone for the purposes of proceedings and processes of the  
10          Special Court for Sierra Leone. So even on the level of the  
11          substantive significance of section 48(4), its relevance is  
12          nullified insofar as the proceedings before the Special Court are  
13          concerned. And thirdly --

14          JUDGE THOMPSON: Is it nullified or waived? Because I am  
15          not sure whether you can say that that particular subsequent  
16          statute or the provision of the statute nullifies a previous one.

17          MR JABBI: For the purposes of proceedings before the  
18          Special Court for Sierra Leone --

19          JUDGE THOMPSON: Is it nullification or waiver?

20          MR JABBI: My Lord, in this particular case, waiver.  
21          Making it absolutely irrelevant and non-applicable is in effect  
22          nullifying its force.

23          JUDGE THOMPSON: The legal connotation of nullification  
24          more or less is similar to what we say null and void. I am not  
25          sure whether we can say that. The concept of waiver would be  
26          different.

27          MR JABBI: I do not need to argue that point at all. I  
28          concede the point to Your Lordship.

29          JUDGE ITOE: Can the Special Court really legally,



1     statutorily determine or pronounce -- make pronouncements on the  
2     legality of the provisions of the Constitution? Does that fall  
3     within the mandate of this Court really? You are making  
4     arguments. I mean, this is just as a relay to what my learned  
5     brother has mentioned.

6             MR JABBI: My Lord, I would not want to provoke any  
7     argument relating to constitutionality and I'm prepared to  
8     concede the point --

9             JUDGE THOMPSON: But you raised it. You touched on it and  
10    you brought it out. All I am saying, and as my learned brother  
11    is concurring in this, is that we cannot validly speak of  
12    nullification in the context in which you are canvassing. The  
13    concept of waiver would seem more applicable.

14            MR JABBI: Yes, indeed. My Lord, I withdraw the use of  
15    "nullify". I am content with the use of "waiver" for this  
16    particular purpose and I am grateful to Your Lordship for  
17    bringing the point out to me. Thank you.

18            My Lord, following up on that, I would want to refer once  
19    more -- as a third point I want to make about section 48(4), I  
20    would want to refer to certain portions of a recent Supreme Court  
21    decision, which has actually already been cited to  
22    Your Lordships. That is the decision in the matter of Sesay,  
23    Kondewa and Fofana versus the Special Court and Others in the  
24    Supreme Court of Sierra Leone. And just to read some portions  
25    concerning section 48(4).

26            PRESIDING JUDGE: Can you give a better reference to the  
27    case you are just quoting?

28            MR JABBI: My Lord, it is unreported. It is a decision of  
29    31st October 2005 in the matter numbered SC1/2003.



1 JUDGE THOMPSON: Perhaps would you accept a correction that  
2 it was on the 14th day of October 2005?

3 MR JABBI: 14th, My Lord?

4 JUDGE THOMPSON: Yes. Are we referring to the same one?

5 MR JABBI: My copy actually says 14th. But, My Lord, I  
6 believe it was on the 31st.

7 JUDGE THOMPSON: The judgment was delivered on the 31st?

8 MR JABBI: I believe so, My Lord. The copy I have in my  
9 hand now is 14th.

10 JUDGE THOMPSON: 14th day of October 2005.

11 MR JABBI: As Your Lordship pleases. If need be I will  
12 correct this later, but I will adopt 14th for the moment.

13 JUDGE ITOE: You were giving us the number of this case.

14 MR JABBI: Yes, SC1/ --

15 JUDGE ITOE: I know we have had it before from --

16 MR JABBI: 1/2003.

17 JUDGE ITOE: 1/2003?

18 MR JABBI: Yes, My Lord. On page 13 the following is  
19 said: "The next provision of the" -- by the way, My Lords, it is  
20 a unanimous decision of the Court.

21 JUDGE ITOE: What would it matter if there were dissenting  
22 opinion?

23 MR JABBI: My Lord, just as information.

24 JUDGE ITOE: It will still remain the decision of the  
25 Court, wouldn't it?

26 MR JABBI: Indeed, My Lord.

27 "The next provision of the Constitution to be interpreted  
28 is that contained in section 48(4) of the Constitution. It  
29 deals with the immunity from civil and criminal process





1           enjoyed by the President for anything done or omitted to be  
2           done by him either in his official or private capacity.

3           Let me hasten to state that a distinction ought to be made  
4           between immunity" --

5           THE INTERPRETER: Learned counsel is going very fast for  
6           the interpreter to keep pace with him.

7           PRESIDING JUDGE: Mr Jabbi, you are going too fast.

8           MR JABBI: If I may begin, thank you.

9           "The next provision of the Constitution to be interpreted  
10          is that contained in section 48(4) of the Constitution."

11          That is subsection 4 of section 48. "It deals with the  
12          immunity from civil and criminal process enjoyed by the  
13          President for anything done or omitted to be done by him  
14          either in his official or private capacity. Let me hasten  
15          to state that a distinction ought to be made between  
16          immunity from suit under domestic law on the one hand and  
17          under international law on the other hand.

18          "A serving head of state is entitled to absolute immunity  
19          from process brought before national courts as well as  
20          before the national courts of third states except it has  
21          been waived by the state concerned."

22          Then the set of authorities follow for that proposition.

23          And thereafter it says:

24          "In contrast, where the immunity is claimed by a head of  
25          state before an international court, the position to be  
26          inferred from decisions of various national courts and  
27          international tribunals, and the writings of international  
28          jurists, is that there exists no a priori entitlement to  
29          claim immunity particularly from criminal process involving



1 international crimes."

2 This endorses the point I have already made, that  
3 subsection 4 of section 48 of the national Constitution is not  
4 applicable for the purposes of proceedings before this Court,  
5 being an international criminal tribunal. But as a --

6 JUDGE THOMPSON: And you say in relation to section 29 of  
7 the Ratification Act, what is the effect of section 48(4)  
8 vis-a-vis 29 of the Ratification Act?

9 MR JABBI: The effect of 48(4) in proceedings before the  
10 Special Court, My Lord?

11 JUDGE THOMPSON: Quite right, yes. I mean, the  
12 Chief Justice didn't just leave it there. I think he went on --

13 MR JABBI: No, there are other --

14 JUDGE THOMPSON: No, in that particular context, what is  
15 the relationship?

16 MR JABBI: The relationship, My Lord, is what he states in  
17 the contrast that I ended with. That in fact section 29 of the  
18 Ratification Act --

19 JUDGE THOMPSON: Is not inconsistent with section 48(4).  
20 That is the point. I mean, one is in the national system --

21 MR JABBI: That's right.

22 JUDGE THOMPSON: -- and the other is in the international  
23 system, so there cannot be any inconsistency.

24 MR JABBI: And that means that it is only --

25 JUDGE THOMPSON: One operates on a different level, the  
26 municipal level. The other operates on the international level.

27 MR JABBI: That is the point, My Lord.

28 JUDGE THOMPSON: So there is no inconsistency at all as a  
29 matter of law.



1           MR JABBI: I am not talking about inconsistency at all,  
2           My Lord, but the applicability of a provision in a certain  
3           context. Because this context is the international context, the  
4           provision which operates only in the municipal context does not  
5           apply.

6           JUDGE THOMPSON: Precisely. It is by force of logic. By  
7           force of logic and by common sense.

8           MR JABBI: Indeed, My Lord. It is, however, a point that  
9           is not necessarily always clearly perceived. And one only refers  
10          to it to be quite sure that that point is appreciated.

11          PRESIDING JUDGE: But on that issue, Dr Jabbi, I would like  
12          to be enlightened of the applicability of section 29 to our  
13          factual scenario, because you will agree with me that 29  
14          essentially deals with immunity "attaching to the official  
15          capacity of any person shall not be a bar to the arrest and  
16          delivery of that person into the custody of the Special Court."  
17          So how do you make the -- again, are you using that by analogy?  
18          I would like to know because we are not dealing here with the  
19          arrest of anybody. We are dealing with the issuance of a  
20          subpoena.

21          MR JABBI: Thank you, My Lord. My Lord, I will make two  
22          points to answer the question. One is a point I have already  
23          made. That was indeed my first point I made about section 48(4),  
24          that it is not applicable in the case of issuance of subpoena,  
25          whether it is immunity in respect of substantive actions, civil  
26          or criminal. That was my first point, My Lord. So 48(4) does  
27          not apply in the issuance of subpoenas, whether at the domestic  
28          level or the international level.

29          Now, 29, My Lord. My Lord, the substance of 29, or the



1 main force of section 29 seems to be directed also to a denial of  
2 immunity for substantive charges or crimes.

3 [CDF14FEB06C - CR]

4 That's the first point to make about section 29.

5 My Lord, I think the formulation of section 29 would make  
6 it applicable if, for example, Rule 77 of the Rules of Evidence  
7 of the Special Court were to be invoked. Since it includes the  
8 issue of an arrest, if an arrest situation were to arise in the  
9 context of the implementation of Rule 77 of the Rules of  
10 Procedure and Evidence of this Court, then 29 would become  
11 applicable at that stage.

12 PRESIDING JUDGE: Yes, but now you're speculating on a  
13 factual scenario that may or may never happen. We're willing  
14 here with the authority of issuing a subpoena at this stage.  
15 You're saying --

16 MR JABBI: At this stage, My Lord, 29 is equally  
17 inapplicable.

18 PRESIDING JUDGE: Would you repeat that?

19 MR JABBI: That, at this stage, section 29 of the  
20 Ratification Act is equally inapplicable with the caveat, of  
21 course, that it could be applicable at a future stage.

22 PRESIDING JUDGE: This is a different issue?

23 MR JABBI: Yes, My Lord. My Lords, I was just trying to  
24 make a few clarifications. I don't want to recite everything  
25 that has been said or, indeed, filed. I believe I have made the  
26 essential points of amplification and clarification. I believe  
27 the case has been made for urging Your Lordships in your  
28 judicious exercise of your discretion to appreciate the  
29 materiality of the anticipated evidence that His Excellency





1 President Alhaji Dr Ahmad Tejan Kabbah is expected to give in  
2 respect of the charges against the first accused in the  
3 indictment before the Court. Your Lordships are accordingly  
4 urged to issue the subpoena to that effect. Thank you very much.

5 PRESIDING JUDGE: Thank you, Dr Jabbi. We will pause at  
6 this moment for a short recess.

7 [Break taken at 11.53 a.m.]

8 [CDF14FEB06D - CR]

9 [Upon resuming at 12.27 p.m.]

10 PRESIDING JUDGE: Mr Prosecutor, as you know, we normally  
11 break for lunch at 1 o'clock and we still intend to do that. I  
12 say this with conditions. If you are not finished -- it gives  
13 you half an hour to do your submission. I don't know if it is  
14 enough or if you intend to make it a concise submission.

15 MR De SILVA: My Lords, I hope I shall be concise. I don't  
16 always keep my promises, but I will try to be concise.

17 JUDGE ITOE: Mr Prosecutor, it has just occurred to me, you  
18 know, that your capacity to appear or submit in this case is  
19 challenged somewhere in the papers, the papers which have been  
20 filed by the Court. I think both the submissions of the second  
21 and of the first accused have challenged the locus standi of the  
22 Prosecutor to submit in this particular case. I want us to get  
23 that very clear on the records and see how we deal with that. I  
24 think it's -- unless those who raised it are abandoning it, then  
25 we may well proceed. But what I noticed this morning was that  
26 neither counsel for the second accused nor that of the first  
27 accused raised that issue which features in their submissions  
28 before this Court.

29 MR De SILVA: Yes. My Lords, no doubt if there was



1 objection being taken this morning, it would have been taken. I  
2 think I can assist in this way, because it is the duty of the  
3 Prosecution to be neutral in a matter of this kind and I propose  
4 to take what I hope will be a totally principled position. By  
5 that I mean it is not the duty of the Prosecution to seek to  
6 control who the Defence wishes to call as their witness by way of  
7 a subpoena, so long as that evidence is relevant. So I hope I  
8 have made the position of the Prosecution totally and utterly  
9 clear. Whether it's a president or anybody else that is sought  
10 to be called by the Defence by way of subpoena, the Prosecution  
11 will not seek to impede that so long as the evidence is relevant.

12 My Lords, having said that, the Prosecution always has an  
13 interest in an application of this kind, and the interest of the  
14 Prosecution is to ensure that the law and the Rules of Procedure  
15 and Evidence are observed. That is an interest that the  
16 Prosecution always has and, in our respectful submission, to  
17 answer My Lord Itoe's question, that would be the interest we  
18 would have and, in our respectful submission, we cannot be shut  
19 out.

20 My Lords, having said that, can I be as --

21 MR JABBI: My Lords, sorry to interpose at this stage.

22 PRESIDING JUDGE: Yes, Dr Jabbi.

23 MR JABBI: My Lord, the first point is a procedural  
24 question. In the circumstances, would it not be more appropriate  
25 that the Attorney General be called upon at this stage to make  
26 his submissions?

27 PRESIDING JUDGE: No, the Attorney General is an intervener  
28 as such. Either the Prosecution is a party or he's not.

29 MR JABBI: Secondly, My Lords, with the submission made



1 just now by the learned Prosecutor, that interest, which he has  
2 defined as an interest of the Prosecution in an application of  
3 this nature, is well taken care of by the Court itself without  
4 need of the submissions by the Prosecutor. It could be said not  
5 to be necessary in the circumstances, and, in any case, the  
6 saving of time if it were waived or not allowed to go on --

7 JUDGE ITOE: Are you basing your arguments on saving time  
8 or on the legality of the submissions by the Prosecution which  
9 you raise in your submissions? If you are withdrawing those  
10 objections there, we can proceed.

11 MR JABBI: My Lord, it is both.

12 JUDGE ITOE: Because I think we have all the time to listen  
13 to the Prosecutor on all the issues. Even if it is taking up  
14 time, it is not wasted time anyway.

15 MR JABBI: It is both, My Lord. More particularly the  
16 earlier one in light of the very submission that the Prosecutor  
17 himself has made this afternoon.

18 JUDGE THOMPSON: Perhaps I should -- let me factor this in,  
19 purely on the grounds of legality. You did respond to the  
20 Prosecution's -- you did reply to the Prosecution's response.

21 MR JABBI: Indeed, My Lord.

22 JUDGE THOMPSON: One would assume that you did so on the  
23 basis that the Prosecution are, quite correctly, a party to these  
24 proceedings, the motion. Otherwise, why would it have been  
25 necessary to file a reply to their response if it wasn't  
26 contemplated by the Rules that in motions of this nature,  
27 interlocutory though they may be, it's the parties who are the  
28 ones before the Court.

29 MR JABBI: My Lord --



1 JUDGE THOMPSON: Am I on the same wavelength as you? Are  
2 you following me?

3 MR JABBI: I am following you, My Lord.

4 JUDGE THOMPSON: Because I'm saying that notwithstanding  
5 what the learned Prosecutor has said, isn't it contemplated by  
6 the Rules that they are a legitimate party to motions which  
7 relate to proceedings that are ongoing before the Court?

8 MR JABBI: Generally, that is the situation -- the position  
9 in the Rules.

10 JUDGE THOMPSON: Yes.

11 MR JABBI: Generally.

12 JUDGE THOMPSON: Yes. I would have thought the definition  
13 section says, Party: The Prosecutor or the Defence.

14 MR JABBI: Indeed, My Lord. That is the general provision  
15 in relation to proceedings, generally. But, as he himself has  
16 said just now, he does not particularly consider that the  
17 Prosecutor need participate in an application in respect of  
18 subpoena for witnesses.

19 JUDGE THOMPSON: They haven't withdrawn their response to  
20 the submissions. Remember this oral proceeding is essentially  
21 based on the written submissions that were filed by the parties.  
22 So why do you seek now, so to speak, to hijack them?

23 PRESIDING JUDGE: And your statement of the position of the  
24 Prosecutor is not what I have heard them to say. They said that  
25 they have a neutral role, but they feel that in this issue they  
26 have a principle position to offer to the Court. And, their  
27 being a party to the Court, why should the Court be deprived of  
28 hearing this kind of submission? It is not for or against  
29 anybody; this is only for the benefit of the Court.





1           To follow on what my brother Justice Thompson has just  
2   said, how can you envisage a motion without any other party? So,  
3   in other words, you could do a motion without any reply by  
4   anybody simply because you say this is a defence motion, and  
5   therefore, there is no other party to that motion. If I follow  
6   your reasoning, because this is a motion dealing with a witness  
7   for the Defence, the Prosecution is not entitled to respond to  
8   this, or they should not be a party to it. Furthermore, when you  
9   file your motion, you file it with copies to the Prosecution --

10       MR JABBI: Indeed.

11       PRESIDING JUDGE: -- as prescribed by the procedure.

12       MR JABBI: Indeed, My Lord.

13       JUDGE THOMPSON: And indeed it wasn't ex parte.

14       MR JABBI: It wasn't ex parte.

15       JUDGE THOMPSON: Are you prepared to concede this and treat  
16   the Court with candour rather than -- as I say, using imagery  
17   borrowed from elsewhere, it doesn't seem right that you should  
18   conduct a legal hijack of your colleagues. I think they are  
19   entitled to be heard and I'm sure that, on reflection, you want  
20   to concede quickly and get us moving ahead.

21       JUDGE ITOE: And maybe that is why you did not address your  
22   minds to this issue when you lengthily addressed the Court this  
23   morning. That should be the reasonable conclusion we would want  
24   to draw. Wouldn't you think so, Dr Jabbi?

25       MR JABBI: My Lord, it was not a hijack that I intended,  
26   and if it was perceived as such, then the Prosecution itself  
27   provided the launching pad. Nonetheless, having made the point I  
28   have made, I will allow the proceedings to go on without further  
29   objection.



1 JUDGE THOMPSON: I'm sure, with your kind of candour and  
2 experience, you're withdrawing the objection.

3 MR JABBI: Indeed, My Lord. Thank you very much.

4 PRESIDING JUDGE: Thank you, Dr Jabbi.

5 MR De SILVA: My Lord, I'm grateful for that clarification  
6 because in any proceedings of this kind the meticulous  
7 observation of the law and the Rules of Procedure are a matter of  
8 interest to the Prosecution and it is therefore incumbent upon  
9 the Prosecution to lay before the Court the law as we see it for  
10 the consideration of the Court.

11 We have, of course, responded to the second accused's  
12 motion and the Prosecution has responded at length. I don't  
13 propose to take Your Lordships through the Prosecution response,  
14 which I submit accurately reflects the law that ought to be  
15 considered by Your Lordships in dealing with this not unimportant  
16 issue.

17 We say that the issue of compellability is not one that  
18 this Court needs to decide. The issue of compellability of an  
19 incumbent head of state is not one that I propose to address.  
20 The reason for my not doing so will become perfectly clear.

21 The applications made on behalf of the first and second  
22 accused for subpoenas to compel the head of state in the way in  
23 which it is sought, in our respectful submission, fails to pass  
24 the relevant and necessary tests which have got to be passed  
25 before the issue of compellability is decided. In other words,  
26 the subpoenas fail on their merits -- the applications fail on  
27 their merits, I'm so sorry.

28 The most recent case, of course, Your Lordships are  
29 somewhat familiar with, and that is, of course, the Milosevic



1 case. I don't know if Your Lordships have copies of that case,  
2 because there are aspects of that case I need to take  
3 Your Lordships to in order to illustrate the points I propose to  
4 make. I see that Your Lordships do have copies.

5 JUDGE ITOE: I don't have a copy. May I have one.

6 MR De SILVA: Indeed, immediately.

7 PRESIDING JUDGE: Mr Prosecutor, you're talking of the  
8 decision of 9 December 2005?

9 MR De SILVA: Yes. My Lord Thompson I think has a copy or  
10 doesn't have a copy?

11 JUDGE THOMPSON: I'm just making sure.

12 MR De SILVA: Because I can pass one up.

13 JUDGE THOMPSON: Blair and Schroeder.

14 MR De SILVA: Indeed, not unknown names. My Lords, looking  
15 at the very first -- if one looks at the very first page of that  
16 report - it is a Trial Chamber decision of ICTY dated 9 December  
17 2005 - one sees it was an application for interview and testimony  
18 of Tony Blair and Gerhard Schroeder. In fact, the same sort of  
19 application that is made in this case. If Your Lordships would  
20 be kind enough to go to paragraph 3, down at the bottom of the  
21 page. Your Lordships will there see set out the standard for  
22 issuing a subpoena to a prospective witness under Rule 54.

23 JUDGE ITOE: What paragraph is it?

24 MR De SILVA: 34, My Lord. I'm so sorry.

25 JUDGE ITOE: Thank you.

26 MR De SILVA: The standard for issuing a subpoena for a  
27 prospective witness under Rule 54. Paragraph 34, and I'm going  
28 to take this somewhat slowly.

29 "Having decided that the assigned counsel's request is



1           governed by the provision of Rule 54, it is next necessary  
2           to assess whether the requirements for a Rule 54 subpoena  
3           have been met."

4           And paragraph 35:

5           "A 'Trial Chamber is vested with discretion in determining  
6           whether an applicant has succeeded in making the required  
7           showing for a subpoena, this discretion being necessary to  
8           ensure that the compulsive mechanism of the subpoena is not  
9           abused'."

10          Now, I pause there for a moment and I pay particular  
11         attention to the words "not abused." Your Lordships, of course,  
12         will recall that the applicants here were trying to have a  
13         subpoena in relation to the Prime Minister of Britain and the  
14         Chancellor of Germany. What do the words "not abused" mean?  
15         This is for Your Lordships' consideration. War crimes tribunals,  
16         or war crimes tend to have a political aspect to them and I  
17         submit that the issuing of subpoenas should be done with care so  
18         that they're not abused, in order to prevent people like heads of  
19         state and heads of government being brought into a witness box in  
20         order to be humiliated for political purposes. That is one  
21         consideration I invite the Court --

22                 JUDGE THOMPSON: Would you like to repeat that?

23                 MR De SILVA: Yes, if I can. It would be my submission  
24         that, bearing in mind that war crimes --

25                 MR BOCKARIE: Objection, Your Honour. I just want  
26         clarification. Is he implying that is our contemplated line of  
27         action?

28                 JUDGE THOMPSON: No, I thought counsel was making a  
29         submission of law based on his understanding of the phraseology





1 "abused" -- "is not abused" in the Milosevic decision that he is  
2 citing from. I thought he is making a submission of law, not  
3 imputing any mala fides.

4 MR BOCKARIE: I just wanted that clarification.

5 JUDGE THOMPSON: I'm sure that's far from counsel's  
6 intention.

7 MR De SILVA: Your Lordship is completely right. The only  
8 point I was seeking to make is that war crimes tribunals tend to  
9 be political and, therefore --

10 JUDGE THOMPSON: You said tend to have a political aspect,  
11 not tend to be political. Because I could take issue with that.

12 MR De SILVA: Tend to have a political aspect.

13 JUDGE THOMPSON: In other words, the proceedings?

14 MR De SILVA: Yes, and therefore --

15 JUDGE ITOE: Are you also suggesting that they could also  
16 have political solutions?

17 MR De SILVA: My Lord, I don't really think it's a question  
18 I would be required to answer. In America, they'd say I would be  
19 taking the Fifth in that regard. I hope I shall be forgiven.

20 JUDGE ITOE: I respect your opinion on this. I just wanted  
21 to come back to you on your extended meaning of what you mean by  
22 the tribunals having a political aspect, that is it.

23 MR De SILVA: The cases tend to have --

24 JUDGE THOMPSON: To follow my brother, I think you need to  
25 be very careful in couching this particular submission, because  
26 you might create some misconceptions which might, in fact, leave  
27 the impression as if the judges here take some judicial notice of  
28 some executive perception of the rule which, of course, the oath  
29 prevents us from doing. It's not the tribunals that are



1 political.

2 MR De SILVA: No.

3 JUDGE THOMPSON: It's the nature of the offences. Perhaps  
4 you must help us here.

5 MR De SILVA: The political aspect. That is a political  
6 aspect often attached to the crimes that --

7 JUDGE THOMPSON: Correct. Quite, quite.

8 MR De SILVA: -- that emanate from conflict.

9 JUDGE THOMPSON: Not the process, not the judicial process,  
10 yes.

11 MR De SILVA: No, no. The crimes that emanate from the  
12 conflict have often a political aspect.

13 JUDGE THOMPSON: Thank you.

14 MR De SILVA: And the Court has got to protect itself and,  
15 indeed, protect the process by being vigilant to ensure that  
16 leaders, heads of state, heads of government, are not brought  
17 into the witness box for the simple purpose of embarrassing or  
18 humiliating. I'm not suggesting that in this case. What I am  
19 saying is that this is clearly what I would understand by the use  
20 of that particular phrase in the judgment.

21 Going on --

22 JUDGE THOMPSON: You said that leaders, you mean political  
23 leaders. State actors would be more neutral. That's why I think  
24 your methodology is getting you into this idea of political --  
25 I'm not in any way oblivious to the fact that there are political  
26 dimensions of these crimes, but my difficulty is that where you  
27 tend to --

28 MR De SILVA: I would be quite happy with using the phrase  
29 "state actors".



1 JUDGE THOMPSON: More or less so that you don't create the  
2 impression as if the Courts have some kind of political  
3 sensitivity here, because, remember, our oath does not really  
4 require us to do that.

5 MR De SILVA: My Lord, I was hoping that I was making  
6 myself clear.

7 JUDGE THOMPSON: State actors would probably be a better  
8 and neutral formula than heads of state and that kind of thing.

9 MR De SILVA: My Lord, I'm quite happy to use that  
10 phraseology. My Lord, looking at the judgment as it goes on,  
11 "Subpoenas should not be lightly issued".

12 JUDGE ITOE: Mr De Silva.

13 MR De SILVA: Yes, My Lord.

14 JUDGE ITOE: I want to make sure that the note I have here  
15 is correct. That is that, you know, the Court must ensure that  
16 heads of states, or, rather, with the correction you have made  
17 now --

18 MR De SILVA: State actors.

19 JUDGE ITOE: -- state actors are not brought to the box  
20 with the view to embarrassing them, and that you are not saying  
21 that was really the intention of this application?

22 MR De SILVA: Not for the simple purpose of embarrassing  
23 them or humiliating them, yes.

24 JUDGE ITOE: For the simple purpose of humiliating or  
25 embarrassing them.

26 MR De SILVA: Exactly. The judgment goes on:

27 "'Subpoenas should not be issued lightly', the Appeals  
28 Chamber has warned, 'for they involve the use of coercive  
29 powers'. Moreover, 'particular caution'" --



1 I again invite Your Lordships to underline the word  
2 "caution" there.

3 -- "'is needed where the party is seeking to interview a  
4 witness who has declined to be interviewed'."

5 Which of course is the case, as I understand it.

6 Then going on to paragraph 36:

7 "In entertaining an application for a subpoena, a trial  
8 chamber should consider two factors."

9 Now, My Lords, I'm going to consider each of these factors  
10 in turn.

11 "(1) whether the information in the possession of the  
12 prospective witness is necessary for the resolution of the  
13 specific issues in the trial [the 'legitimate forensic  
14 purpose' requirement]".

15 I consider that first part on its own:

16 "Whether the information in the possession of the  
17 prospective witness is necessary for the resolution of the  
18 specific issues in the trial."

19 Now, the specific issues in this trial have got to be  
20 considered in the light of the defence that has been raised to  
21 those specific issues. The defence raised by the first accused,  
22 in a nutshell, is this: One, he received no orders from  
23 President Kabbah of an illegal kind; and, secondly, he reported  
24 no crimes submitted by the CDF to President Kabbah, because  
25 Chief Norman's defence was that there were no crimes committed by  
26 the CDF. That's his defence to the specific issues in the  
27 indictment.

28 Now, looking at those words again in paragraph 36:

29 "Whether the information in the possession of the





1 prospective witness is necessary for the resolution of the  
2 specific issues in the trial."

3 The answer must be no because I hope I have accurately  
4 summarised in two sentences the heart and essence of the first  
5 accused's defence.

6 Then we look at the second part of paragraph 36:

7 "Whether the information in the possession of the  
8 prospective witness is obtainable by other means."

9 Which is sometimes called the last-resort requirement.

10 Well, given the defence raised by Chief Norman, which I have  
11 summarised in the way in which I've done, the answer is apparent  
12 again.

13 With regard to the second defendant, I understand - and I  
14 should be corrected if I am wrong - that he proposes not to go  
15 into the witness box. I think that has been made clear to the  
16 Court. The issue arises, can you, when you have the opportunity  
17 - of course there is no obligation upon a defendant to go into  
18 the witness box - but if you have the right to go into the  
19 witness box and tell your story, can you hide those facts and  
20 say, "No, no, I'm not going to give those facts. I'm going to  
21 subpoena somebody else to come and deal with it."

22 JUDGE ITOE: Should they refuse, though, learned  
23 Prosecutor, of an accused to go into the witness box be the  
24 subject matter of a comment by any party in the proceedings?

25 MR De SILVA: No, My Lord. Only to this -- My Lord, I see  
26 exactly what your Lordship is saying. But I only invited  
27 Your Lordship to consider whether, looking at the words "whether  
28 the information in the possession of the prospective witness is  
29 obtainable by other means." Well, if a defendant is in



1 possession of information which he is capable of putting before  
2 the Court if he wishes to, and chooses not to do so --

3 JUDGE THOMPSON: Isn't that sort of putting forward a  
4 conflict of values here? The defendant, under the law, has the  
5 right not to go into the witness box and, as my learned brother  
6 has said, that such a choice or an election not to go into the  
7 witness box should never be the subject of an adverse comment,  
8 either by the Prosecution or the Bench --

9 MR De SILVA: It is not subject to adverse comment.

10 JUDGE THOMPSON: Quite right. So, if he makes the choice  
11 not to go into the witness box, should that in any way be --  
12 should that foreclose him from calling upon somebody else whom he  
13 believes may be able to give some useful evidence on his behalf  
14 to testify? Why should that militate against him?

15 MR De SILVA: The answer is to Your Lordship's question, I  
16 hope, when we look at the judgment, the issues have got to be  
17 made absolutely clear to the Court as to what it is the defendant  
18 wants answered.

19 JUDGE THOMPSON: Yes.

20 MR De SILVA: If a defendant goes into the witness box,  
21 when he finishes his evidence, you know what his case is. You  
22 know what the issues are.

23 JUDGE THOMPSON: Suppose he thinks that somebody else may  
24 be able to articulate and clarify these issues better than he  
25 would? Would he therefore be prevented from calling somebody to  
26 come and do that for him?

27 MR De SILVA: I'm not submitting that. What I am  
28 submitting is, on the written document submitted by the second  
29 accused, they would fail this test, in any event. My Lord, if I



1 might just finish this.

2 JUDGE THOMPSON: Yes, quite right.

3 MR De SILVA: I see it is 1 o'clock and I clearly have  
4 perhaps quarter of an hour to go.

5 JUDGE THOMPSON: Well, I just meant to have you clarify  
6 these issue as we go along. These exchanges help us to  
7 understand more what the parties are --

8 JUDGE ITOE: Particularly where the question relates to the  
9 defence of the rights of the accused --

10 MR De SILVA: Yes.

11 JUDGE ITOE: -- which would include his opting not to take  
12 the witness stand.

13 MR De SILVA: Yes, which is his right.

14 JUDGE ITOE: And which should be the subject matter of no  
15 comments.

16 MR De SILVA: Of course, it is an absolute right. But then  
17 one doesn't have the benefit of knowing what the issues are.  
18 That's all I'm saying, perhaps rather inadequately. If  
19 Your Lordships would be kind enough to give me another quarter of  
20 an hour or so, I might be able to finish.

21 PRESIDING JUDGE: Yes, yes.

22 MR De SILVA: Then we go to the legitimate forensic purpose  
23 in paragraph 37:

24 "The issuance of a subpoena to a prospective witness for  
25 either an interview or testimony is subject to the  
26 condition set out in Rule 54 that it be 'necessary'".

27 Now, that was a word My Lord Thompson touched on, I know,  
28 when posing a question to my learned friend Mr Jabbi, for the  
29 preparation and conduct of the trial. Paragraph 38:



1 "The Appeals Chamber has explained that, in the context of  
2 pre-testimony interview, this means that: A subpoena  
3 pursuant to Rule 54 would become 'necessary' for the  
4 purposes of that Rule where a legitimate forensic purpose  
5 for having the interview has been shown."

6 Those are the important words, "Has been shown."

7 "An applicant for such an order or a subpoena before or  
8 during the trial would have to demonstrate a reasonable  
9 basis for his belief that there is a good chance that the  
10 prospective witness will be able to give information that  
11 will materially assist him in his case, in relation to  
12 clearly identified issues" - now, those are the operative  
13 words - "clearly identified issues relevant to the ...  
14 trial."

15 Of course, in the first accused's case, we know what the  
16 issues are.

17 "This requirement applies equally to a subpoena seeking to  
18 compel a witness to testify at trial."

19 Paragraph 39:

20 "The Chamber draws attention to the Appeals Chamber's  
21 holding that the information sought from the prospective  
22 witness must not only be of assistance; it must be of  
23 material assistance. Thus it is not enough that the  
24 information requested may be 'helpful or convenient' for  
25 one of the parties. It must be of substantial or  
26 considerable assistance to the accused in relation to a  
27 clearly identified issue" --

28 Once again, we see that word creep in - "a clearly defined  
29 issue that is relevant to the ... trial."





1 Paragraph 40:

2 "As a result, an applicant for a subpoena must be specific"

3 - "must be specific about the information sought."

4 Now, Your Lordships have a record of the way in which my  
5 learned friends were putting their arguments: He can be helpful;  
6 he will be able to assist; because he was Commander-in-Chief; he  
7 will be able to say this, that and the other. I'm afraid that is  
8 not good enough. If one goes through -- I know Your Lordships  
9 were making notes of the way in which both my learned friend  
10 Mr Bockarie and my learned friend Mr Jabbi were couching their  
11 arguments, far short of the specificity required by this case.

12 Then it goes on, sorry, going back:

13 "As a result, an applicant for a subpoena must be specific  
14 about the information sought from the prospective witness  
15 and must demonstrate a nexus between this information" --  
16 That is the specific information.

17 -- "and the case against the accused. Factors that may be  
18 relevant to establishing this nexus include the position  
19 held by the prospective witness in relation to the events  
20 in question; any relationship the witness may have had with  
21 the accused which is relevant to the charges" --

22 Those words that of course are again "Relevant to the  
23 charges", not anything else.

24 -- "any opportunity the witness may have had to observe or  
25 to learn about those events, and any statements the witness  
26 made to the Prosecution or others in relation to them."

27 Then paragraph 41, dealing with last resort.

28 "Even if a party satisfies a Chamber that a subpoena for a  
29 witness's testimony has a legitimate forensic purpose,



1           however, issuing a subpoena would still be inappropriate if  
2           the information sought through testimony is available  
3           through other means. As the Appeals Chamber has warned, a  
4           trial chamber's consideration of an application for  
5           subpoena 'must focus not only on the usefulness of the  
6           information to the applicant' but also on 'its overall  
7           necessity in ensuring that the trial is informed and  
8           fair'."

9           My Lords, it is instructive to look at the way in which the  
10          parties submitted why they wanted Mr Blair and Mr Schroeder in  
11          paragraph 42. This is when this application was refused. In  
12          their applications for the testimony of Mr Blair, assigned  
13          counsel provided a schedule outlining the following nine  
14          categories of proposed testimony:

15               One, communications between Mr Blair and the accused as  
16          well as other leading persons involved in issues relevant to the  
17          Kosovo indictment against the accused; two, NATO involvement in  
18          supplying arms and training the Kosovo Liberation Army - the KLA  
19          - to carry out attacks within Kosovo between 1997 and 1999; the  
20          UK government's involvement in the diplomatic initiatives and  
21          negotiations concerning Kosovo that took place with the Federal  
22          Republic of Yugoslavia and the Republic of Serbia between 1997  
23          and 1999; the UK government's participation in and acquisition of  
24          intelligence from Kosovo verification mission between 1997 and  
25          1999; the UK government's involvement in the negotiations  
26          concerning Kosovo that took place at Rambouillet in Paris, 1999;  
27          six, NATO's decision to arm and attack the FRY - Federal Republic  
28          of Yugoslav - in 1998 and 1999, and the explanation for the  
29          targets and purpose of the attacks; seven, co-operation between



1 NATO and the KLA in operations against FRY between 1998 and 1999;  
2 eight, the inaccurate information given by the UK government to  
3 the media concerning events in the FRY between 1997 and 1999 and;  
4 nine, cessation of the NATO campaign against FRY in June 1999 and  
5 implementation of the UN Security Council Resolution 1244.

6 My Lords, all I can say is this: Having heard what my  
7 learned friends have said as to their need for having  
8 His Excellency President Kabbah in the witness box, what they  
9 have identified is infinitely short - infinitely short - of the  
10 sort of detail that was even provided in the Blair and Schroeder  
11 case -- in the Milosevic case, which fails.

12 Again, My Lords, I'm not going to trouble Your Lordships  
13 with going on to paragraph 43, because that deals with the  
14 application why they wanted Chancellor Schroeder. My Lords, this  
15 application failed. We would submit that, looking at things as  
16 fairly as we can -- I have got another five minutes before I said  
17 I would close at quarter past one. All I say is this: We take  
18 no stand. It's entirely a matter for Your Lordships. We do take  
19 a stand on the law that is to be applied and the principles that  
20 have gained acceptance before international criminal tribunals  
21 and, indeed, in many instances before domestic tribunals. These  
22 principles are not very different. They are there because they  
23 stand to reason, quite apart from anything else.

24 We would invite Your Lordships to say, on behalf of the  
25 Prosecution, that the issue of compellability doesn't have to be  
26 decided because these applications fall at the first hurdle.  
27 That is the submission we make. I complete, I think, with four  
28 minutes to spare. I'm grateful.

29 PRESIDING JUDGE: Thank you very much, Mr De Silva.



1 JUDGE ITOE: Mr De Silva, you very kindly obliged the  
2 Tribunal with a recital of the raison d'etre of subpoenaing  
3 Honourable Prime Minister Blair, subpoenaing him to appear.

4 MR De SILVA: Yes.

5 JUDGE ITOE: The reasons are stated here. What do you make  
6 of the distinction between Blair and Schroeder in this case and  
7 His Excellency Kabbah? And what do you make of the reasons which  
8 the Defence adduced or referred to as warranting the issue of the  
9 subpoena which, I think, if I do understand them very well, are  
10 grounded on paragraphs 13, 14, 17, 18, 20 and 21 of the  
11 indictment?

12 MR De SILVA: My Lord, I'll just get the indictment. I'm  
13 inviting Your Lordships to see those particular paragraphs of the  
14 indictment in the light of the defence advanced by the first  
15 accused. If he says, "I never told the President anything. The  
16 President never gave me any illegal orders," this whole  
17 indictment is about illegality and crime. That is what the  
18 indictment is about, not about a social conversation.

19 MR JABBI: My Lords, we have patiently --

20 JUDGE ITOE: No, no, Dr Jabbi, the learned Prosecutor is on  
21 his feet.

22 MR De SILVA: I'm grateful to My Lord.

23 JUDGE ITOE: It is important that he is heard.

24 MR De SILVA: I'm grateful to My Lord. Given the issues  
25 that have been raised in the first accused's defence, one then  
26 looks at the indictment --

27 MR JABBI: My Lords, I'm sorry, please bear with me. Let  
28 me make a very short point. The learned Prosecutor is, in fact,  
29 delving into evidence given before the Court as the basis for his





1 analysis of the criteria for making -- requesting a subpoena.  
2 My Lords, earlier on when counsel for the second accused  
3 attempted to use parts of the evidence adduced before this Court,  
4 Your Lordships indicated that, for the purpose of this motion,  
5 such evidence is not before the Court because the relevant papers  
6 that have been filed do not carry that information. That is the  
7 same, surely, My Lord, what the Prosecutor is doing in relation  
8 to the evidence of the first accused.

9 PRESIDING JUDGE: Thank you. You wish to respond to that,  
10 Mr De Silva?

11 MR De SILVA: My Lord, the only point I was making is that  
12 when the jurisprudence calls for clearly defined issues, and the  
13 Court has heard what those issues are from the defendant, I can't  
14 improve on that. There it is. It is a fact of life. It's quite  
15 different to what my learned friend Mr Bockarie was seeking to  
16 do. Where are these clearly defined issues which this Court has  
17 got to determine? I was simply underlining the fact that seen in  
18 the light of reality, those issues don't exist. That is why, in  
19 our respectful submission, these applications must fail.

20 PRESIDING JUDGE: Thank you, Mr De Silva. The Court will  
21 adjourn to 3.00 this afternoon. Mr Attorney General, we will ask  
22 you to kindly come back this afternoon. We will break for lunch  
23 and reconvene this afternoon at 3.00.

24 MR CAREW: Thank you, My Lord.

25 MR BOCKARIE: Your Honour, sorry. Just to clarify, whether  
26 we are going to make a formal reply?

27 PRESIDING JUDGE: Yes, you will.

28 MR BOCKARIE: Thank you.

29 [Luncheon recess taken at 1.20 p.m.]



1 [CDF14FEB06E - SV]

2 [Upon resuming at 3.18 p.m.]

3 PRESIDING JUDGE: Yes, Mr De Silva.

4 MR De SILVA: My Lords, in my anxiety to finish with the  
5 utmost expedition this morning there was a matter I overlooked.  
6 I hoped I might have Your Lordship's leave to deal with it before  
7 the learned Attorney General addresses the Court.

8 PRESIDING JUDGE: What is the issue?

9 MR De SILVA: My Lord, the issue is this: It arises from  
10 the motion of the second accused and it is paragraph 7 of that  
11 motion where the second accused sets out the matters upon which  
12 he seeks to justify the issuance of a subpoena. At paragraph 7  
13 he says that, "The seven prosecution witnesses have mentioned the  
14 President in their viva voce testimony in the CDF trial." The  
15 point I intended to make this morning that I failed to make was  
16 this: That the mere fact that President Kabbah's name is  
17 mentioned during the case cannot of course itself be a basis for  
18 the issuance of a subpoena.

19 Then at paragraph 7 the defendant sets out all the matters  
20 upon which he relies, namely the evidence that has already been  
21 given. Well, if the evidence has already been given, that  
22 evidence is before the Court, and secondly, there's little or no  
23 dispute.

24 PRESIDING JUDGE: I took that comment to mean not that the  
25 evidence has been given in respect of whether or not what  
26 President Kabbah, if he is assigned to come to testify, will  
27 testify about, but to the effect that -- anyhow they will have  
28 the occasion to reply to that. So I will leave them to argue  
29 that if need be.



1           MR De SILVA: My Lord, it simply sets out that seven  
2 prosecution witnesses have dealt with the evidence. It sets it  
3 out. The point is this evidence is not really the subject of  
4 dispute by the Prosecution. We would say that, there being  
5 little or no dispute in regard to these matters, these matters  
6 cannot be said to, to use the words in paragraph 13 of the  
7 Milosevic case, cannot be said to be of substantial and  
8 considerable assistance to the Defence because these matters are  
9 hardly the subject of dispute.

10          JUDGE THOMPSON: But we don't have any -- remember we had  
11 asked both sides to get together and to give us a statement of  
12 matters in respect of which there is no dispute. At no point in  
13 time, except now, that this Court was able to be given the  
14 benefit of matters that are agreed. And so the question really  
15 is what is in issue in controversy between the parties is in the  
16 air. It is in the air and up to this point in time it is so  
17 difficult to say whether we have a catalogue or an inventory of  
18 matters in dispute between the parties and matters that are not  
19 in dispute, and the Court is being invited to assume that certain  
20 matters, specific matters, of which we have not been appraised,  
21 even though several times at status conferences we called upon  
22 the parties to give us this documentation.

23          MR De SILVA: My Lord, Your Lordships, I hope, appreciate  
24 that if the Prosecution had, for example, defence witness  
25 statements, such agreements could take place. But here we are  
26 dealing with witness evidence given by the Prosecution which has  
27 not been the subject of dispute by cross-examination by the  
28 Defence. So if matters are not in dispute, it is curious that  
29 other evidence is required to underline that evidence.



1 JUDGE THOMPSON: That is the difficulty which we find  
2 ourselves in because it is as if there is some kind of magic  
3 about in terms of the Court being able, based upon submissions of  
4 counsel, to have some visual picture, some chart of matters in  
5 dispute and matters not in dispute. We take your words for it.  
6 You get up and say this is not being disputed and the first time  
7 we'd have it on the record. But there is a machinery for doing  
8 that and the machinery was not taken advantage of.

9 MR De SILVA: My Lord, the machinery, with respect, is that  
10 there is clear authority that if one party or another to a case  
11 disputes the evidence of a witness giving evidence for the other  
12 side, that evidence has to be challenged specifically.  
13 Otherwise, the other party who has called that witness is  
14 entitled to assume that evidence is not in dispute and therefore  
15 not call further evidence.

16 JUDGE THOMPSON: In criminal trials?

17 MR De SILVA: Yes.

18 JUDGE THOMPSON: In criminal trials?

19 MR De SILVA: Well, if Your Lordships want the authority I  
20 would be happy to supply it.

21 PRESIDING JUDGE: We will hear that in due course at the  
22 end of the trial, but not at this particular stage as such.

23 JUDGE THOMPSON: Probably in civil cases, that would apply  
24 with such finesse, as you suggest. But in criminal trials  
25 remember the persuasive burden remains throughout on the  
26 Prosecution to prove its case, and the Defence can just sit there  
27 and say nothing. They can say nothing.

28 MR De SILVA: With great respect --

29 JUDGE THOMPSON: I mean, according to the rules. I mean,





1 have the fundamental rules of criminal law changed where the  
2 burden is throughout on the Prosecution to prove their case  
3 beyond a reasonable doubt?

4 MR De SILVA: It is. My Lord, there is no dispute about  
5 that, but it has never been my understanding that the other side  
6 can fail to put its case to a prosecution witness or indeed that  
7 the Prosecution can fail to put its case to a defence witness.

8 JUDGE THOMPSON: My difficulty is that if the other side  
9 fails to put its case, does that necessarily damn the other side?

10 MR De SILVA: Yes.

11 JUDGE THOMPSON: Does it take away or diminish the burden  
12 on the Prosecution to prove their case beyond a reasonable doubt?  
13 Does it diminish it?

14 MR De SILVA: As My Lord Boutet said, this is not the  
15 moment for debating.

16 JUDGE THOMPSON: All right. I will take that. I shall  
17 restrain myself.

18 MR De SILVA: Clearly, can I -- well, I shall restrain  
19 myself as well, My Lord, yes.

20 PRESIDING JUDGE: As you know, we have been very careful up  
21 to this stage of this trial not to make any assessment, nor any  
22 comment which would convey that we have been made any assessment  
23 about, and/or credibility of witnesses, whoever they may be. So  
24 that applies to the Prosecution's case. So any witness that has  
25 been called by the Prosecution still has to be accepted as being  
26 credible, and that, even if we accept that as being credible, we  
27 have to determine what weight we are to assess to that particular  
28 witness. So, I mean, that's the overall picture. So, as I say,  
29 at the end of the trial we will give you ample opportunity to



1 make all of these arguments, Mr De Silva, you can rest assured.

2 MR De SILVA: If I am still alive, yes.

3 PRESIDING JUDGE: So, we turn to you now,  
4 Mr Attorney General and we would be pleased to hear submissions  
5 on your part as to this application.

6 MR CAREW: Thank you, My Lords. Coincidentally, My Lords,  
7 when I arrived in this Chamber this morning and sitting by the  
8 learned Prosecutor, while I was looking through the authority on  
9 which I was going to rely upon to address Your Lordships, I found  
10 out that we were both turning over the same authority; that is  
11 the Milosevic case.

12 So, My Lord, my first submission is that -- my first  
13 request is that you permit me to rely entirely on the Milosevic  
14 case, My Lord, which was cited to you by the learned Prosecutor  
15 this morning. I would seek, with your leave, to adopt ipsissima  
16 verba the sections or the paragraphs referred to you by the  
17 learned Prosecutor this morning. That is paragraphs 34 to 40.

18 Now that, My Lord, clearly states the argument for my  
19 submission that the applicants in this matter have not presented  
20 or shown enough valid reasons why Your Lordships should use your  
21 discretion to grant them this application of issuing a subpoena  
22 to His Excellency the President to be interviewed by the defence  
23 counsel and to give evidence before Your Lordships. Now, with  
24 your leave, I entirely adopt those paragraphs and the learned  
25 Prosecutor's argument on this issue.

26 My Lords, the issue my learned friend was raising --  
27 unfortunately I have not had the opportunity or have not been a  
28 party to the proceedings, nor had the opportunity of hearing the  
29 evidence in court. But what I believe my learned friend was



1 saying, if I may put it in this way, is that the Defence are  
2 asking you to grant this subpoena for His Excellency to come and  
3 give evidence simply because his name has been mentioned by seven  
4 prosecution witnesses.

5 Now, I would put it this way, My Lord, with your leave:  
6 That if you look at the motion of Moinina at page 3,  
7 Your Lordships will see or have before you the evidence which  
8 connects President Kabbah to Mr Norman who, according to him,  
9 visited His Excellency in Conakry while he was outside the  
10 jurisdiction to discuss whatever he was doing at least a thousand  
11 miles away in the bush. And that for which they have been  
12 charged he expects Your Lordships to say President Kabbah has  
13 knowledge and so what was happening beyond Kailahun, over a  
14 thousand miles away, and he should come here to give that  
15 evidence.

16 My submission is that that evidence is already at paragraph  
17 7 which the learned Prosecutor referred you to. With your  
18 permission, if Your Lordships will allow me to read -- I am sorry  
19 for my voice, I'm recovering from cold.

20 "At least seven prosecution witnesses have mentioned  
21 President Kabbah in their viva voce testimonies at the CDF  
22 trial.

23 "(A) Witness TF2-140 testified that he travelled to Guinea  
24 with Mr Norman where he met President Kabbah, then  
25 Vice-President Joe Demby and then the British High  
26 Commissioner."

27 That is the then British High Commissioner, Peter Penfold.

28 "According to the witness, Mr Demby indicated that it was  
29 Mr Norman's responsibility to handle security in



1 Sierra Leone during the President's absence and Mr Kabbah  
2 gave Mr Norman a sum of money to support the war effort.

3 "(B) Witness TF2-096 testified that Mr Norman arrived at  
4 Talia in 1997 along with Maxwell Khobe. According to the  
5 witness, Mr Norman said that Papa Kabbah had told him and  
6 General Khobe to fight the war together.

7 "(C) Witness TF2-190 testified that he travelled to  
8 Freetown to receive Mr Kabbah from exile at the invitation  
9 of Mr Norman.

10 "(D) Witness TF2-001 testified that the Kamajors entered Bo  
11 as a group after the coup to restore President Kabbah's  
12 government.

13 "Witness TF2-005 testified that he went to Conakry in  
14 September in 1997 to inform Mr Kabbah that the Kamajors  
15 lacked proper logistics to support their operations.  
16 Further, according to the witness:

17 "1. Mr Kabbah instructed him to contact Mr Norman in  
18 Monrovia.

19 "2. Mr Kabbah sent an envoy to investigate the activities  
20 of the Death Squad in Sierra Leone.

21 "3. Mr Norman had direct links to Mr Kabbah in Guinea.

22 "4. Mr Kabbah was the Minister of Defence when voluntary  
23 co-operation of the party" --

24 Sorry.

25 "When Mr Norman was serving as Deputy Minister of Defence.

26 "5. That the CDF, the Sierra Leone Army and the Sierra  
27 Leone police were under unified command of Mr Kabbah; and

28 "6. Even though the President Kabbah had been overthrown,  
29 the CDF still regard him as their commander-in-chief.





1           "(F) Witness TF2-014 testified that the aim of the CDF was  
2           to restore President Kabbah's presidency.

3           "(G) That the Prosecution's military expert, Witness  
4           TF2-EW1, testified that he believed that the SLPP in exile  
5           played a role at the strategic level in the CDF activities  
6           in Sierra Leone based on reports that Mr Norman  
7           communicated with Mr Kabbah by satellite telephone."

8           Now, that is the evidence already before you, My Lords, and  
9           already before Your Lordships. And Your Lordships with the  
10          greatest respect, are about to take cognisance of that fact that  
11          it is before you.

12          Now, the rhetorical question I would like to ask, what more  
13          evidence, reading through the motion that President Kabbah, if  
14          Your Lordships exercise your discretion to subpoena him to appear  
15          before Your Lordships, would have to give other than what  
16          Mr Norman in giving evidence on oath, what Demby, the former  
17          vice-president, gave here on oath and, if you permit me,  
18          My Lords, as the evidence was relayed over the wires I heard  
19          distinctly that Mr Norman was saying or said that at no time did  
20          President Kabbah give him an illegal command.

21          Secondly, that he did not report because the CDF never  
22          committed any offence. Now, what relevance, My Lord, I may ask  
23          also, that is still not before Your Lordships that the applicants  
24          would ask you to grant them a subpoena for President Kabbah to  
25          come here?

26          Now, if Your Lordships look, with your permission, sirs,  
27          look at the very motion, particularly paragraphs 3. I start:

28                 "The Defence submits that Pa Kabbah is in possession of  
29                 certain information highly relevant to the charges



1 contained in the Prosecution's indictment against  
2 Mr Fofana. The President's failure to testify in this  
3 proceeding would deprive the Chamber of evidence necessary  
4 to arrive at a comprehensive and considered decision in the  
5 instant case."

6 Now, if I refer Your Lordships also to paragraphs 7, as I  
7 have already done, and also paragraph 13. Their purpose of  
8 asking Your Lordships to exercise your discretion here to grant  
9 this subpoena.

10 "The Defence submits that Mr Kabbah is in a position to  
11 provide evidence relevant to the charges contained in the  
12 Prosecution's indictment against Fofana and his  
13 co-defendants. It is submitted that at times relevant to  
14 the indictment Mr Kabbah was commanding, materially  
15 supporting" --

16 THE INTERPRETER: Your Honours, the interpreter is sorry,  
17 but learned counsel is going at a very fast pace for the  
18 interpreter to keep up with him.

19 PRESIDING JUDGE: Mr Carew, if I may, sorry. We have been  
20 informed by the interpreters that you are moving too fast.

21 MR CAREW: Too fast, sorry, My Lord.

22 PRESIDING JUDGE: They are unable to follow your pace. So,  
23 if you wouldn't mind taking just the last part. You were  
24 referring to paragraph 13.

25 MR CAREW: 13, My Lord.

26 PRESIDING JUDGE: So when you read, please go a bit more  
27 slowly.

28 MR CAREW: Sorry, My Lords.

29 PRESIDING JUDGE: Thank you very much.



1 MR CAREW: Sorry. I said one of the reasons for the  
2 Defence asking Your Lordships to exercise your discretion is also  
3 that:

4 "The Defence submits that Mr Kabbah is in a position to  
5 provide evidence relevant to the charges contained in the  
6 Prosecution's indictment against Mr Fofana and his  
7 co-defendants. It is submitted that at times relevant to  
8 the indictment Mr Kabbah was commanding, materially  
9 supporting and communicating with various members of the  
10 alleged CDF leadership, both from his exile in Conakry and  
11 later from the presidential office in Freetown.

12 "As further indicated by the prosecution's evidence,  
13 Mr Kabbah claimed to be fighting" -- the Kamajors rather.  
14 "The Kamajors claimed to be fighting in part on behalf of  
15 Mr Kabbah with a view to effecting the restoration of the  
16 democratically elected president of the nation. With  
17 respect to the question who bears the greatest  
18 responsibility for the alleged violation of the CDF during  
19 the conflict, the Defence submit that Mr Kabbah may himself  
20 be among such a group, at the very least that he is in a  
21 position to give evidence regarding relative culpability of  
22 the three accused persons."

23 Let me here, My Lords, with your leave, stop and refer  
24 Your Lordships to the indictment. That is the indictment The  
25 Prosecutor against Samuel Hinga Norman, Moinina Fofana and Allieu  
26 Kondewa. Now, if Your Lordships were to look at the entire  
27 document, Your Lordships will see that the three accused persons  
28 stand charged for violating human rights law and, contrary to the  
29 Geneva Convention against not combatants, against the civilian



1 populations of Sierra Leone. Not combatants -- against  
2 combatants. And even if it were against combatants, the Geneva  
3 Convention provides how you are supposed to treat combatants who  
4 are opposing you in a battle. Or if you look at the counts,  
5 eight counts for which they are charged, they are charged for  
6 killing or using violence against the civilian populations.

7 Now, when you compare that, My Lords, I may submit, how on  
8 earth can it affect President Kabbah, who was about a thousand  
9 miles away in Conakry, while in Buedu or Mano Junction or  
10 [indiscernible] or wherever it is in Sierra Leone these offences  
11 were alleged to have been committed by the accused or those under  
12 their command?

13 The other thing I would like to say, My Lords, and I'd like  
14 Your Lordships to take judicial notice of that, that after the  
15 agreement between the United Nations and Sierra Leone to  
16 establish Your Lordships' Honourable Court, an independent  
17 prosecutor was appointed to come and investigate and see, or find  
18 out those who bear the greatest responsibility for the atrocities  
19 committed. While President Kabbah was far away in Guinea, he was  
20 in Freetown here investigating and, independently, after visiting  
21 village by village from civilians, from poor people, by virtue of  
22 the evidence he gathered he decided to frame these charges now  
23 before Your Lordships against the accused persons. What  
24 evidence, I ask rhetorically also, that President Kabbah can  
25 give.

26 My Lords, I can go on. As I've said, I've already adopted  
27 the arguments and the case I have cited. The standards are laid  
28 down. I don't need to repeat them, My Lord. I say if  
29 Your Lordships go through line by line of the standards laid down





1 to be achieved before Your Lordships can exercise your  
2 discretion, you'll find out that the applicants have woefully  
3 failed to achieve those standards and, therefore, the evidence  
4 they are seeking is not necessary to help Your Lordships either  
5 determine the case before you or for them to prove their  
6 innocence.

7       You see, My Lord, even if you admitted all the facts, I'd  
8 like to submit that if those facts are not relevant, the  
9 speculative evidence they are wanting you to allow them to have  
10 are not relevant to Your Lordships' finding of their innocence or  
11 determining this matter, then they would have fallen below the  
12 standard laid down in that case and Your Lordships are  
13 respectfully urged not to grant this application.

14       Now, My Lord, having said that I was adopting the entire  
15 argument of the learned Prosecutor and the authorities we cited,  
16 there is only one legal matter I'd like to address Your Lordships  
17 on. That is we said now -- now we say, My Lord, that assuming  
18 that Your Lordships grant the subpoena, we submit and we request  
19 that this Honourable Court should not act in vain. No court in  
20 any part of the world has ever made orders that will make them  
21 look -- that will diminish their authority because it's difficult  
22 to enforce.

23       Now, My Lords, nobody, as has been said particularly by  
24 learned friend Bockarie this morning, that Your Lordships have  
25 the power or not the power. We are not disputing. We, our  
26 President, of his own volition and the government, were so  
27 concerned about the poor people in Sierra Leone that they  
28 approached United Nations secretary for this Court to be  
29 established so as to redress impunity. So it is highly



1     unbelievable that the allegations - insinuations, I should say -  
2     insinuations made by the Defence that President Kabbah could have  
3     been so foolhardy, having known within himself that he  
4     participated or gave commands - if Your Lordships believe that he  
5     in fact did so - gave commands to the defendants or the accused  
6     persons for them to commit such atrocities, to ask that the  
7     United Nations establish a Special Court here to redress those  
8     impunity.

9             But all we are saying, My Lord, we would like to refer  
10    Your Lordships to section 48(4) of our Constitution, which  
11    Your Lordships are already aware of. I do not want to waste  
12    Your Lordships' time to read the question of whether the  
13    President within the jurisdiction of Sierra Leone has any  
14    immunity.

15            First of all, I'd like to distinguish, My Lords, the case  
16    where the head of state is indicted for committing any crime  
17    against humanity or anything contrary to international law. The  
18    current authorities make it quite clear that he cannot enjoy any  
19    immunity. My Lords, the case of Hassan, which was cited to you  
20    by my learned friend, was distinguishable. I was myself present,  
21    or I took part in that case when this Special Court - the  
22    President, Registrar - were taken to the Supreme Court and it was  
23    alleged that their establishment here was illegal. What  
24    His Lordship was saying in the judgment, or what the Court was  
25    saying, that if a head of state had committed -- who has  
26    committed any offence contrary to the offences stated in the  
27    statute or international law, then he cannot hide behind his  
28    fingers, or by saying, "I am head of state and, therefore, I  
29    cannot be reprimanded or put in custody."



1           Now, My Lords, if you look at section 29, which my learned  
2 friends were citing to you, that that reverses or -- then  
3 Your Lordships spoke to my learned friend. He was saying we  
4 waiver instead of reversing or nullifying. Now, if you look at  
5 the sidelines, what does it say? It says, "Official position of  
6 accused no bar to prosecution." "Accused". That is the  
7 important word I would like Your Lordships to take note of. If  
8 our President was accused like the Taylor case, Taylor was head  
9 of state, he was accused of committing atrocities. So my  
10 submission is that those cases are distinguishable. They are not  
11 on all fours. They are not, in fact -- they do not fall within  
12 the competence of the authority my learned friends were putting  
13 them with.

14           The Milosevic case, I submit, is almost on all fours with  
15 this matter before you, this application, where, because Prime  
16 Minister Blair was the head of government in United Kingdom,  
17 where Chancellor Gerhard was the Chancellor, head of government,  
18 in Germany, therefore whatever was done in Kosovo, the mere fact  
19 they took part in deciding what was to be done, they could be  
20 called to give evidence to show what part they played as heads.  
21 There, of course, Your Lordships will recall that the arguments  
22 as contained in that case, the application was refused.

23           Now, My Lords, I do not want to waste any of your time  
24 since I have adopted the arguments of the learned Prosecutor and  
25 we have already filed our responses to the applicant's case. I  
26 have made the following submission that they have not fulfilled  
27 the standards laid down in that case. The purpose of making this  
28 application, I would say, My Lords, is to embarrass  
29 His Excellency the President, to fish out evidence which already



1     they have, as I have shown in the motion case, and to be  
2     oppressive in their attitude for the President to come here, and  
3     they get personal satisfaction that they have brought the head of  
4     state before a court. I'm not even saying, Your Lordships, a  
5     court --

6             MR BOCKARIE: My Lords, excuse me. Please, I want certain  
7     points clarified. I think our position -- sorry.

8             PRESIDING JUDGE: Please sit down, Mr Carew. Yes.

9             MR BOCKARIE: I think our position in this matter is clear.  
10     All that we want is assistance in defence of --

11            JUDGE ITOE: But, Mr Bockarie, you have all the time. You  
12     were assured that you are going to reply.

13            PRESIDING JUDGE: We're coming to you.

14            JUDGE ITOE: The learned Attorney General is still on his  
15     feet. Let him conclude and you will visit those areas which you  
16     think you can revisit. That is his point of view and it is his  
17     submission, isn't it?

18            PRESIDING JUDGE: That's right.

19            JUDGE ITOE: You may not agree with that and so you will be  
20     allowed to address us in reply.

21            MR CAREW: Thank you, My Lords.

22            PRESIDING JUDGE: Yes. You were stating that the purpose  
23     of this motion was to -- it was a fishing expedition and you were  
24     sort of caught in the middle of your sentence at that time. Can  
25     you take it back from there?

26            MR CAREW: Yes, My Lords. I said there's abundant evidence  
27     about President Kabbah being whatever, a head in the structure of  
28     the Kamajors or spoke to Hinga Norman, or this or that, or all  
29     that they are talking about. What I am saying, My Lord, it's





1 just fishing to embarrass and humiliate His Excellency the  
2 President, to get that personal satisfaction or revenge, if I may  
3 put it that way, My Lords. That situation, with the greatest  
4 respect to Your Lordships, should not be allowed because the  
5 standards are laid quite clearly. And I submit that unless  
6 Your Lordships are very satisfied that the standards laid in the  
7 authority we have relied on, the learned Prosecution and myself -  
8 I would not waste Your Lordships' time - that the application  
9 should be denied. Thank you, My Lord.

10 PRESIDING JUDGE: Mr Carew, before you sit down.

11 MR CAREW: Yes.

12 PRESIDING JUDGE: I have heard what you've said and I would  
13 like to hear very clearly your position should this Court decide  
14 to issue such subpoena. And don't take my comments to mean that  
15 we have decided. I just want to know because, obviously, your  
16 colleague from the Prosecution has stated that they need not to  
17 address that and that was his prerogative. But you, as the AG  
18 for the Republic of Sierra Leone, as such, you're coming here  
19 essentially to speak on behalf of the President.

20 MR CAREW: Yes, My Lord.

21 PRESIDING JUDGE: Presumably to, at the same time, say that  
22 we may not have enough information or substantiation to issue a  
23 subpoena. But should the Court decide to issue such a subpoena,  
24 what's your position of the Republic of Sierra Leone in that  
25 respect?

26 MR CAREW: My Lords, I think I did cut short by simply  
27 saying that the Court doesn't act in vain.

28 PRESIDING JUDGE: You have said so but you did not expand  
29 on that.



1 MR CAREW: Yes, My Lords. The Court will not act in vain  
2 because, for us, within the jurisdiction of Sierra Leone, as long  
3 as His Excellency the President has not been indicted or has not  
4 committed any offence, internationally or otherwise, I cannot see  
5 myself as Attorney General to order his arrest and put him in --  
6 order his arrest and request the police to put him in custody.  
7 This is why I said, My Lord, there are certain things the Court  
8 will refrain because they do not want to diminish their image and  
9 their authority. We are not saying that you don't have the  
10 power, My Lord. It was the question of the practical enforcement  
11 of that order.

12 JUDGE THOMPSON: Is it always the case that a court decides  
13 to adjudicate and issue orders purely on the basis of whether its  
14 orders or directives can be complied with or not complied with?

15 MR CAREW: No, My Lord. No, with greatest respect.

16 JUDGE THOMPSON: So why is this becoming such a very  
17 prominent feature?

18 MR CAREW: No, no.

19 JUDGE THOMPSON: I mean, there have been cases where  
20 courts -- for example, there are a number of cases in the United  
21 States of America where the courts have decided firmly and their  
22 decisions have been ignored by the executive. So why is this a  
23 new mandate that courts only decide or make decisions only when  
24 they're sure that their orders would be complied with, and why is  
25 it a very important factor? Of course, I'm not saying that in  
26 some cases it may not be, but why is -- I mean, otherwise what  
27 you're saying is that the Court set up under the constitutions of  
28 the national system and -- would have to abdicate legality just  
29 because they feel that their orders may not be obeyed. One would



1 have thought that in the case of those who were in power, they  
2 sometimes accept, based on a court's decision, their own  
3 disabilities.

4 MR CAREW: With the greatest respect, My Lords, I'm not  
5 putting it as blunt as Your Lordship.

6 JUDGE THOMPSON: I mean, the way you seem to argue it  
7 suggests that --

8 MR CAREW: If Your Lordship read -- I should say, as you  
9 read the -- recollect from my submission, that if Your Lordships  
10 were -- that's how the practicality of it. If Your Lordship were  
11 to make an order and, of course, I do believe that conditions  
12 laid down in Milosevic case have not been complied with and  
13 therefore Your Lordships be persuaded not to. But if you did,  
14 now under 48(4) our Constitution provides that our President  
15 within Sierra Leone, other than being committed for any offence,  
16 cannot be brought before our courts of law.

17 JUDGE THOMPSON: Well, he's immune from process.

18 MR CAREW: Exactly.

19 JUDGE THOMPSON: Whether civil or criminal. Yes, quite.

20 MR CAREW: But what we are saying, if you were to issue --  
21 a right of course which you have. If you were to issue, the  
22 disobedience of the President -- as my learned friend said to  
23 you, they visited the President and he even told them, as I'm  
24 told, that, according to the agreement with the United Nations,  
25 he would not be called to give any evidence. That's what they  
26 told us, the Defence.

27 Now if he disobeyed, then of course Your Lordships would be  
28 bound to, as it was said, under Article 77 for contempt or you  
29 make an order under 29. Now when you make that order, then of



1 course under Article 15 of the Statute, in which the State of  
2 Sierra Leone through the Attorney General has to cooperate to  
3 effect your order, then even the Attorney General himself is put  
4 in a very awkward situation. And not because he does not want  
5 to, but he may be unable to effect that order. That's the  
6 practical. That's why I said, My Lords, that the high esteem  
7 with which courts are held, they have always refrained from  
8 making such orders that will go in vain.

9 JUDGE THOMPSON: Well, isn't it also true that if courts  
10 are timid and refuse to make orders consistent with the principle  
11 of legality and also the rule of law which binds executives and  
12 legislature and the judiciary, they expose themselves to the  
13 criticism of, in a way, acting in a manner that would attract the  
14 criticism of being sort of judicially subservient or bowing to  
15 the executive or popular will, abdicating the principle of  
16 legality.

17 So where you have this kind of conflict, where the judges,  
18 called upon to dispense justice and to uphold the principle of  
19 legality, find that they are in a sort of dilemma as to whether  
20 to uphold the principle of legality or to act on the basis of  
21 some extraneous consideration, albeit political, how do the  
22 judges -- what is their election? Do they abdicate legality or  
23 do they say that, well, we can do nothing? I mean, what's your  
24 view on this? If you're saying that judges must avoid issuing  
25 decisions in some cases that may not be enforced because of the  
26 status of the actors involved, then what do the courts do? And  
27 they're supposed to uphold the rule of law. Do they abdicate  
28 legality and risk being criticised by submitting themselves to  
29 the executive will or some popular will? I mean, I'm just





1 stating this in the context of the judicial oath that judges are  
2 called upon to adjudicate on matters dispassionately,  
3 impartially, objectively, without fear of favour or prejudice.

4 MR CAREW: I had hoped, with the greatest respect to  
5 Your Lordships, that we would not get to that point of argument  
6 because --

7 JUDGE THOMPSON: With the greatest respect to the learned  
8 Attorney General, your suggestion that courts must not act in  
9 vain opened up this legal Pandora's box, suggesting that, whether  
10 you like it or not, you're dealing here with a special case  
11 hanging over your heads like the Sword of Damocles and if you  
12 decide to go the way you want to go, you may be met by some kind  
13 of negative response. I am saying to what extent a judge is  
14 called upon to factor in that kind of thing matters where they  
15 are supposed to uphold the principle of legality.

16 MR CAREW: My Lords, as I said, I wish I were in  
17 Your Lordships' chambers to answer that question.

18 JUDGE THOMPSON: Well, perhaps I should -- let me now say  
19 to the learned Attorney General that, in fact, I will end the  
20 debate here and some day, at some future time, you and I might  
21 have an opportunity of debating it in the context of the judicial  
22 process and the choices open to judges.

23 MR CAREW: My Lord, thank you. My Lord, let me just say  
24 this, a rhetorical question not for Your Lordships: Isn't there  
25 in the judicial system what is known as public policy decisions?

26 JUDGE THOMPSON: We will pursue it. I will rest on this  
27 issue and we might pursue it at some future time.

28 MR CAREW: Thank you, My Lords. First of all, let me thank  
29 Your Lordships for giving me leave to intervene in this matter.



1 I do appreciate that.

2 PRESIDING JUDGE: Thank you very much, Mr Attorney General.

3 JUDGE ITOE: Mr Carew, before you take your seat, I just  
4 want to ask you -- forget about the applications that have been  
5 made by the two learned gentlemen. Supposing at a certain stage,  
6 even if those applications were not made, this Court decided that  
7 they thought that the Kabbah component was necessary for it to  
8 arrive at a decision, at a fair determination of this case. That  
9 is, the Court decided to have him as a court witness. What would  
10 be your comment to this?

11 MR CAREW: My Lord, as Attorney General, I would advise  
12 His Excellency to attend.

13 JUDGE ITOE: Thank you.

14 PRESIDING JUDGE: Mr Bockarie.

15 MR BOCKARIE: Yes, Your Honour. I will be very brief.  
16 Your Honours, we would like to re-emphasise that the purpose of  
17 our motion is a legitimate forensic one. This application is not  
18 motivated by politics and it is not meant to embarrass or  
19 humiliate His Excellency the President in any way. All we want  
20 is the assistance of His Excellency in ascertaining the truth.

21 Your Honours, the testimony of the seven prosecution  
22 witnesses forms, in part, the basis of our reasonable belief that  
23 His Excellency the President is in possession of relevant  
24 information material to our defence.

25 My Lord, a lot of emphasis was based on the Slobodan  
26 Milosevic case. A distinction has to be drawn here. Unlike  
27 Mr Tony Blair and Mr Schroeder, His Excellency the President is  
28 considered to be an integral part of the armed conflict in this  
29 country under the auspicious of the Civil Defence Force.



1           Your Honours, the motto of the CDF was a very simple one.  
2    To wit, "We Fight For Democracy". We, being counsel for the  
3    second accused, reasonably believe that His Excellency shares in  
4    the aspiration of that motto. And in furtherance of the  
5    realisation of the goal of CDF, which was to restore his  
6    government, we believe that he must have acted in some role of  
7    conspicuous importance. Therefore, as a matter of public policy,  
8    we crave the indulgence of this Court to ensure his attendance.

9           Finally, Your Honours, the learned Prosecutor made mention  
10   of taking the Fifth. Your Honour, it is an absolute and  
11   unqualified right of the second accused, Mr Fofana, not to appear  
12   as a witness in his own case. This right, Your Honours, is  
13   further strengthened by Article 17(4) of the Statute.

14          I thank you.

15          PRESIDING JUDGE: Thank you, Mr Bockarie. Dr Jabbi, do you  
16   wish to reply?

17          MR JABBI: Yes, My Lord. I hope I can also make it as  
18   brief as possible.

19          PRESIDING JUDGE: Thank you.

20          MR JABBI: My Lords, if I may begin --

21          PRESIDING JUDGE: So it not be too expansive or extensive,  
22   Dr Jabbi, you will confine your comments, if any, to any new  
23   matter that may have been raised by the response by either the  
24   Prosecutor or by the Attorney General.

25          MR JABBI: Thank you, My Lord.

26          PRESIDING JUDGE: Because we've heard your submission this  
27   morning. So that's all I'm trying to aim at.

28          MR JABBI: Yes. My Lords, if I may begin with the very  
29   last comment made by the learned Attorney General in answering



1 the question posed by the Bench. If, not assuming that it has  
2 been so decided yet, but if the Court were to issue a subpoena to  
3 His Excellency the President what would he do? He said  
4 categorically, "I will, as Attorney General, advise him to  
5 attend." My Lords, that is an answer that is in the best  
6 tradition of that high office of Attorney General and, for my  
7 part, I wish it had been the total submission by the  
8 Attorney General this afternoon.

9       However, to be set against it is the learned  
10 Attorney General's submission that, in his perception, the  
11 application is intended to embarrass His Excellency by bringing  
12 him to give evidence. My Lords, my colleague Arrow Bockarie has  
13 dealt with that and clarified that this application, with all the  
14 submissions filed and orally made in this Court, cannot, should  
15 not and ought not to be perceived in that spirit at all. We have  
16 tried to show the Court the need for the evidence anticipated  
17 from His Excellency to be requisitioned, as it were, by the  
18 subpoena process and we have also related it to specific aspects  
19 of the indictment.

20       I would want, if this will be comfort to the  
21 Attorney General, to refer to Rule 85(D) of the Rules of  
22 Procedure, to the effect that sitting in that witness seat in  
23 this Court as a witness is by no means the only mode of giving  
24 testimony to this Court. With Your Lordship's leave, if I may  
25 read Rule 85(D).

26       PRESIDING JUDGE: Yes, please.

27       MR JABBI: Very, very short. It says: "Evidence may be  
28 given directly in court, or via such communications media,  
29 including video, closed-circuit television, as the Trial Chamber





1 may order." If by any chance the perception of embarrassment is  
2 likely to be seen as probable from direct evidence in court,  
3 there are other modes available and this Court will adopt, no  
4 doubt, an appropriate mode in all the circumstances.

5 My Lords, the learned Attorney General adopted in toto the  
6 submissions made by the learned Prosecutor. My Lords, I want to  
7 refer briefly to the submissions by the learned Prosecutor, more  
8 particularly with reference to his sustained citation of certain  
9 paragraphs from the Milosevic case decision of 9th December 2005  
10 to make a few observations which I hope will set the record  
11 straight. That is paragraphs 34 to 41, not merely to 40.

12 My Lords, the first point I want to make there, before I  
13 read any portions of it, is the learned Prosecutor's assumption  
14 throughout his submission that the relevance of the information  
15 to be elicited from the prospective witness for subpoena purposes  
16 is to issues in the evidence of the Defence.

17 [CDF14FEB06F - SGH]

18 He then cited what he perceives the defence of the first  
19 accused to be.

20 The first point, My Lords, the relevance of the information  
21 in question, is not to the evidence or the defence of the  
22 accused, but to the case against him. That is, to the  
23 indictment, special issues in the charges in the indictment. It  
24 is to that that the relevance of the information anticipated from  
25 the prospective witness is to be related and not the evidence of  
26 the first accused.

27 My Lords, whilst on that note, it is also necessary to  
28 clarify that the defence of the first accused is not confined to  
29 the evidence that he has given. The defence of the first accused



1 is not confined to the evidence that he has given and it should  
2 not be assumed that his defence has been fully given in evidence  
3 merely by his own testimony. That also needs to be clarified.  
4 The defence of the first accused will be fully stated by the time  
5 of the last witness to be called in his defence. Until then, it  
6 should not be assumed that his defence has been given in  
7 totality.

8 My Lords, having made that point, I would want to read  
9 three paragraphs, the final three paragraphs of the passage from  
10 the Milosevic case decision on subpoenas, which the learned  
11 Prosecutor cited and which was fully adopted by the learned  
12 Attorney General. And to suggest and submit that the main  
13 criteria of that decision have indeed been met by the submissions  
14 on behalf of the accused in the filed documents and by oral  
15 rendition today.

16 With your leave, My Lords, paragraph 39 to 41, embracing  
17 the two main aspects of the requirements for a subpoena decision.  
18 If I may read those paragraphs with your leave, My Lords.

19 PRESIDING JUDGE: Don't you think we have been through it  
20 enough? We can refer to them, but I don't think we need to be  
21 putting that again.

22 MR JABBI: As Your Lordships please.

23 PRESIDING JUDGE: But if there are special portions or  
24 parts of that you want to highlight, you are welcome.

25 MR JABBI: As Your Lordships please.

26 PRESIDING JUDGE: But not to read the paragraphs, please.

27 MR JABBI: As Your Lordships please. In compliance with  
28 that, My Lord, let me first of all say those three paragraphs --

29 PRESIDING JUDGE: You mean 39, 40, 41?



1 MR JABBI: 39, 40, 41.

2 PRESIDING JUDGE: Of Milosevic, yes.

3 MR JABBI: Set out the two main criteria for subpoena  
4 applications. 39 and 40 are the concluding bit on the criterion  
5 of legitimate forensic purpose. 41 is the full statement on last  
6 resort. In 40, for example, there is a requirement that the  
7 applicant for subpoena must be specific about the information  
8 sought from the prospective witness, and that he must demonstrate  
9 a nexus between that information and the case against the  
10 accused. Not his evidence, but the case against him.

11 My Lords, close nexus was indeed outlined as to the  
12 relationship between the evidence anticipated from the President  
13 and the various aspects and items of the indictment. Here is  
14 this sentence trying to set out the aspects of the nexus in  
15 question. "Factors that may be relevant to establishing this  
16 nexus include the position held by the prospective witness in  
17 relation to the events in question; any relationship the witness  
18 may have had with the accused which is relevant to the charges;  
19 any opportunity the witness may have had" - that is the  
20 prospective witness - "may have had to observe or to learn about  
21 those events, and any statements the witness made to the  
22 Prosecution or others in relation to them."

23 My Lords, at least four aspects or factors in establishing  
24 the nexus are indicated in the sentence I have just read out.  
25 And I submit, My Lords, that of those four only the last one -  
26 "any statements the witness made to the Prosecution or others in  
27 relation to them" - only that last one is for the moment unlikely  
28 to be fully obvious and apparent. But even there, evidence is to  
29 be adduced that indeed such statements have been made by the



1 prospective witness. So far as the others are concerned, it is  
2 lucidly clear and abundantly so that all the other factors are  
3 fully satisfied. The position held by the prospective witness in  
4 relation to the events in question - the President as President  
5 of Sierra Leone, as Commander-in-Chief of Sierra Leone, as  
6 Minister of Defence - in all those capacities between the period  
7 from the 30 November 1996 to December 1999 his position  
8 pre-eminently qualifies as a factor of nexus in this application.  
9 Then any relationship the witness may have had with the accused  
10 which is relevant to the charges, the first accused was the  
11 deputy minister of defence with his immediate boss the minister  
12 of defence.

13 MR CAREW: May it please, My Lords. Your Lordship has  
14 guided my learned friend.

15 PRESIDING JUDGE: Could you open your microphone, please.

16 MR CAREW: Sorry. I believe your Lordship has guided him  
17 by saying that he was entitled to address anything that is new.  
18 Could my learned friend please bear that into mind. Please.  
19 Because all we have been hearing is a repetition of what is in  
20 the document and what you have said or he himself has said.

21 PRESIDING JUDGE: Thank you, Mr Carew. Dr Jabbi.

22 MR JABBI: Thank you very much, My Lord. My Lord, this  
23 particular citation was made by both the Prosecutor and the  
24 learned Attorney General.

25 PRESIDING JUDGE: Proceed. Proceed.

26 MR JABBI: Thank you, My Lord.

27 Any relationship the witness may have had with the accused  
28 which is relevant to the charges, there are at least three modes  
29 of relationship the first accused had with the prospective





1 witness which are relevant to the charges in the indictment. He  
2 was his deputy defence minister with the prospective witness  
3 being the minister of defence; he was a member of his government  
4 with the prospective witness being the President; he was also, as  
5 charged in the indictment, national co-ordinator of the CDF. All  
6 those three factors having emanated from the magnanimity, if one  
7 may call it so, of the prospective witness in making appointments  
8 of the accused in those three capacities. And any opportunity  
9 the prospective witness may have had to observe or to learn about  
10 those events, of course, Mr President was -- a coup was staged  
11 against Mr President, 25th May 1997, which occasioned his having  
12 to leave the country, and it further occasioned the CDF having to  
13 put up a stout resistance to the coup makers with a soul and  
14 dominant purpose of reinstating.

15 PRESIDING JUDGE: Dr Jabbi, please, your reply of a  
16 response that was not that extensive in this respect. I mean,  
17 please do not re-state your whole case here.

18 MR JABBI: Thank you, My Lord.

19 PRESIDING JUDGE: You have your written submissions.

20 MR JABBI: It is just to relate --

21 PRESIDING JUDGE: Yes?

22 MR JABBI: -- these aspects of the criteria.

23 PRESIDING JUDGE: I know, but you have underlined them --

24 MR JABBI: I am satisfied that I have done that  
25 sufficiently already.

26 PRESIDING JUDGE: Thank you.

27 MR JABBI: Now, My Lords, the last one, information sought  
28 being a matter of last resort.

29 My Lords, I will just simply say there that there are



1 various aspects of the information anticipated from the  
2 prospective witness which cannot be obtained from any other  
3 source.

4 And with that, My Lords, we rest our submissions and our  
5 urging the Court most respectfully to issue an order of subpoena  
6 to His Excellency the President Alhaji Dr Ahmad Tejan Kabbah to  
7 testify in this Court on behalf of the first accused. Thank you  
8 very much, My Lord.

9 PRESIDING JUDGE: Thank you, Dr Jabbi. Before you sit  
10 down, my brother Justice Thompson has one question for you.

11 JUDGE THOMPSON: Learned counsel, without meaning to  
12 detract from the jurisprudential cogency of the reasoning in the  
13 Milosovic case, having regard to the plain and ordinary meaning  
14 of the rule of statutory interpretation, to what extent in your  
15 submission is the formula "illegitimate forensic purpose" a valid  
16 interpretative emanation of the criteria of "necessary for the  
17 purposes of investigation in the preparation or conduct of trial  
18 as provided for in our own Rule 54"? In other words, where does  
19 this formula come from? And the same applies to "as a last  
20 resort." Our Rules says that our own test is "necessary for the  
21 purposes of an investigation in the preparation or conduct of  
22 trial." I want you to guide me, since you have relied on it to  
23 some extent, and as I said, I do not mean to detract from the  
24 cogency or the reasoning there. But is this a valid legitimate  
25 emanation, having regard to the plain meaning rule of statutory  
26 interpretation?

27 MR JABBI: My Lords, as I said in my original submission,  
28 the Rule 54 requirement is clear and plain and this Court has the  
29 discretion to apply it without necessary reference to what other



1 tribunals have construed that provision to mean. That is the  
2 first point, My Lord.

3 Secondly --

4 JUDGE THOMPSON: I should like to factor into that that  
5 another Chamber has interpreted "necessary for the purposes of an  
6 investigation in the preparation or conduct of trial as helpful  
7 or useful." So you have all these different statutory  
8 variations. And when you have this -- when I say another  
9 Chamber, I mean another Chamber in this Tribunal. So where do we  
10 go with all these various interpretations when, in fact, we are  
11 supposed to be guided by the plain and unambiguous meaning of the  
12 rule?

13 MR JABBI: My Lords, I do not have a certain authority on  
14 me which I would have liked to cite, but that authority conceding  
15 the applicability and relevance of the plain meaning rule also  
16 does say "however". The context can play games even with clarity  
17 of meaning and sometimes the context in which a word may be used  
18 and the circumstances to which it may be applied may call for  
19 interpretative responses even when, apparently, the words in  
20 question have been very clear.

21 My Lords, I will supply that authority in the morning.

22 JUDGE THOMPSON: Thank you.

23 MR JABBI: But I am quite clear that the rule is clear.  
24 But if there have been applications of that concept with certain  
25 criteria, I would also want to submit that those criteria,  
26 notwithstanding that it may not have been necessary to invoke  
27 them, they are, however, not inconsistent with the concept in  
28 question.

29 JUDGE THOMPSON: Thank you, you sufficiently answered my



1 question.

2 MR JABBI: Thank you, My Lord.

3 PRESIDING JUDGE: Thank you, Dr Jabbi. Given that it is  
4 quarter to five and we normally sit on until 5.30, I do not think  
5 it would be appropriate to just resume hearing the evidence with  
6 the witness that we had in witness seat. So we will just adjourn  
7 proceedings until tomorrow morning at 9.30.

8 Yes, Mr De Silva, you seem to be eager to stand up to speak  
9 to the Court.

10 MR De SILVA: My Lord, yes. It is a short matter and it  
11 may be a convenient matter to be dealt with so far as my learned  
12 friend Mr Jabbi is concerned. It is again to do with a witness.  
13 And your Lordships will know that the ninth witness, I think  
14 the --

15 PRESIDING JUDGE: On the list of 16 witnesses or --

16 MR DE SILVA: Well, one of them is Brigadier John Riley of  
17 the British Army.

18 PRESIDING JUDGE: Yes. I don't think he was on the list of  
19 the 16 witnesses to be called at this session, but he is on the  
20 witness list.

21 MR DE SILVA: My Lord, I understand my learned friend would  
22 be anxious to call him on the 20th of this month or --

23 PRESIDING JUDGE: I thought was it not Riley. I thought it  
24 was Richards. Am I right, Dr Jabbi?

25 MR JABBI: Yes, My Lord. And, in fact, I wanted to bring  
26 that up as last issue for today.

27 PRESIDING JUDGE: Is it in issue?

28 MR JABBI: It is General Richards, not General Riley that  
29 we want to call around the 21st.





1           PRESIDING JUDGE: I know that on the witness list you had  
2           two senior officers, one was Richards and the other one Riley.  
3           My understanding was it was Richards.

4           MR JABBI: Richards, My Lord.

5           PRESIDING JUDGE: I think he is Major General Richards.

6           MR De SILVA: My Lord, yes. There is no problem about that  
7           at all. But your Lordships will recall there was another major  
8           general now, but who was brigadier then, I think, whom my learned  
9           friend would wish to call as a witness at some point.

10          PRESIDING JUDGE: Yes.

11          MR De SILVA: But, as Your Lordships will recall and  
12          understand, senior officers, they have to make some provision for  
13          their arrival here to give evidence if they are to give evidence.  
14          Your Lordships know sufficiently of course that in real terms the  
15          last accusation, if I can put it that way, or the last allegation  
16          made against the first accused is probably November 1999, that  
17          sort of time. There is no allegation against him subsequently.  
18          I think that's right, isn't it? I see Mr Tavener, who is a  
19          master of all the detail on the Prosecution side, confirms that.  
20          My Lord, I have a document.

21          PRESIDING JUDGE: But, Mr De Silva, without challenging you  
22          on this, just by looking very quickly, I see some allegations  
23          between November 1997 and December 1999. So there are  
24          allegations that are a bit wider than just November. It's your  
25          case, not our case.

26          MR De SILVA: All right, December 1999. It doesn't matter.  
27          It is just that I have a document that I am going to put before  
28          Your Lordships and before my learned friend.

29          My Lord, of course I have looked at the summary for



1 Brigadier Richards, as he was then, and General Riley, as he is  
2 now. My Lords, I notice of course, having made the appropriate  
3 inquiries, that he didn't arrive in Sierra Leone until October  
4 2000, nearly a year after the events in the indictment, the final  
5 allegations against Chief Norman. I am concerned, naturally,  
6 about the expenditure of money of bringing witnesses here as to  
7 fact, because he is set out to be as a witness of fact, not an  
8 expert. How it comes to be that people are being called to come  
9 across the seas at considerable expense when, on the face of it,  
10 I am confronted by a situation where I am informed  
11 authoritatively that he wasn't even here until the following year  
12 and the end of the following year after the allegations that the  
13 Prosecution makes.

14 My Lords, I simply put myself in Your Lordships' hands  
15 about this because I am concerned about time, I am concerned  
16 about witnesses coming who may have no relevance at all, and of  
17 course, on the necessary expenditure that falls upon the Court.

18 It is for that reason that I raise this matter. If my  
19 learned friend could tell me what evidence of fact this witness  
20 could possibly give. I have no statement. I have no statement  
21 of this witness and I have only got three lines in summary  
22 saying, "Role of the international community in supporting the  
23 CDF in restoring democracy in Sierra Leone." Well, nobody  
24 disputes that.

25 PRESIDING JUDGE: Mr De Silva, if I may on this, this is  
26 not a witness that is to be called at this particular session.  
27 This is a witness -- I haven't seen the witness list for the next  
28 session that the counsel for the Defence are intending to call.  
29 As you know, the procedure we normally follow, we will have a



1 status conference leading to the next session which will be after  
2 Easter. We firmly intend - I can tell you that - to look into  
3 the witness list at that particular time to go into these matters  
4 as such, General Riley or any other witness. I am leaving aside  
5 General Richards because there is an application about General  
6 Richards which is different. I would suggest to you that your  
7 submission would be more than appropriate at that time because we  
8 want to look at the witness list to make sure that witnesses that  
9 are being called are not irrelevant or redundant, as such.

10 This is a serious concern of ours as well, because we have  
11 looked at the witness list and we feel it is quite expansive as  
12 to number of witnesses. I am not talking money here, I am just  
13 talking the number of witnesses. But we will look at that very  
14 seriously and we will look into this matter, as I say, at the  
15 status conference that is forthcoming. I can just give you a  
16 pre-warning about that to come and inform the Court in this  
17 matter when we get there, and so is the Defence being warned  
18 about that.

19 MR DE SILVA: I am indebted.

20 PRESIDING JUDGE: Thank you. My colleague Justice Itoe has  
21 a question for you.

22 JUDGE ITOE: Yes, I have no question. I am just on the  
23 same radar screen with the learned Presiding Judge. We want the  
24 Defence to put across its case, but not with a very long list,  
25 you know, of witnesses who may turn out to be repetitive and to  
26 waste the time of the Court. This Court, whether we like it or  
27 not, has a time-limited mandate. And where witnesses are coming  
28 to repeat themselves, we would not want to get there, but there  
29 is a prerogative, there is a legal prerogative, for us to shut



1 up, you know, the list of witnesses when they become very  
2 repetitive. And I think that the comments made by the learned  
3 Prosecutor are very pertinent and we would appeal to the defence  
4 teams to review their witness list, because we see some defence  
5 teams calling more witnesses than the Prosecution ever called.  
6 So it is disturbing. You are entitled to conduct your defence,  
7 but I think it is important that you scrutinise the witness list  
8 and be focused. It is not the number of witnesses which will  
9 make the defence better than it would have been made by just a  
10 few witnesses. Thank you.

11 MR DE SILVA: I am indebted.

12 PRESIDING JUDGE: Thank you. Yes, and just a few words  
13 again from Mr Justice Thompson.

14 JUDGE THOMPSON: Yes, quite. I would like to associate  
15 myself generally with what my learned two brothers have said, but  
16 just to make one reservation that I am not as fiscally minded as  
17 the Prosecutor. Of course, it has never been for me a factor  
18 here since I have always felt that justice conforming to some  
19 principle of least cost is not my favourite. And so I don't  
20 particularly appreciate the fiscal pre-occupation that you have.

21 MR DE SILVA: Yes, I am not as extravagant as  
22 Your Lordship.

23 PRESIDING JUDGE: Thank you, Mr De Silva. Court is  
24 adjourned until 9.30 tomorrow morning.

25 MR JABBI: Sorry, My Lord. My Lord, I further was about to  
26 bring up the issue of General Richards just before the --

27 PRESIDING JUDGE: The last we have heard about that you  
28 were to discuss with the Prosecution. Have you discussed with  
29 the Prosecution? Is there any agreement on this?





1 MR JABBI: I believe so, My Lord.

2 JUDGE ITOE: You are believing so. You had better get into  
3 reasonable discussions and let us know where you stand because  
4 the Court should not inconvenience --

5 PRESIDING JUDGE: We will hear you tomorrow morning on that  
6 issue.

7 MR CAREW: Yes, may I crave your indulgence?

8 PRESIDING JUDGE: Yes, yes.

9 MR CAREW: Are we required tomorrow for this motion?

10 PRESIDING JUDGE: No, you are not required.

11 MR CAREW: Notices will be sent?

12 PRESIDING JUDGE: This motion is taken under advisement at  
13 this particular moment and we will give a decision in due course.  
14 Thank you very much. Yes, you can be dispensed.

15 JUDGE ITOE: Learned Attorney General, thank you very much  
16 for being with us this morning and for spending a whole day with  
17 you. Thank you.

18 MR CAREW: Thank you.

19 [Whereupon the Oral Motion adjourned at  
20 4.55 p.m.]

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