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SCSL-04-14-T

14662

(14662 - 14676)

SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber I

Before: Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Mutanga Itoe

Interim Registrar: Mr Lovemore Munlo

Date: 26 January 2006

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

**FOFANA REPLY TO THE RESPONSE OF THE ATTORNEY GENERAL
TO THE FOFANA MOTION FOR ISSUANCE OF A *SUBPOENA AD
TESTIFICANDUM* TO PRESIDENT AHMAD TEJAN KABBAH**

For the Office of the Prosecutor:

Mr Desmond de Silva, QC
Mr Christopher Staker
Mr James C. Johnson
Mr Kevin Tavener
Ms Nina Jørgensen

For Moinina Fofana:

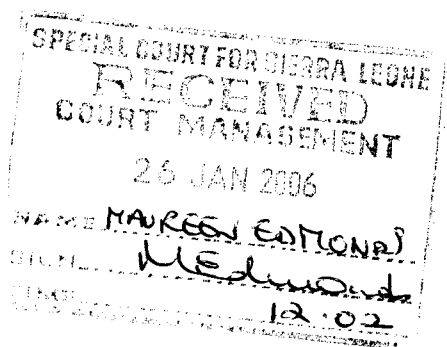
Mr Victor Koppe
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Mr Andrew Ianuzzi

For Samuel Hinga Norman:

Mr John Wesley Hall Jr
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Mr Alusine Sani Sesay
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For Allieu Kondewa:

Mr Charles Margai
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Ms Susan Wright
Mr Martin Michael



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INTRODUCTION

1. Counsel for Moinina Fofana (the “Defence”) hereby submits its reply (the “Reply”) to the ‘Response of the Attorney-General and Minister of Justice to the Applications Made by Moinina Fofana and Samuel Hinga Norman for the Issuance of *Subpoena ad Testificandum* to President Alhaji Dr Ahmad Tejan Kabbah’ (the “Response”)¹.
2. The Defence submits that its ‘Motion for Issuance of a *Subpoena ad Testificandum* to President Ahmed Tejan Kabbah’² (the “Motion”), as previously noted³, sufficiently identifies both the manner in which the anticipated testimony would materially assist Mr Fofana and the precise issues to which the anticipated evidence would relate. The Attorney General’s protestations (i) that the Motion seeks to elicit evidence not material to the allegations contained in the Indictment; (ii) that the proposed subpoena would be somehow irrelevant, speculative, or oppressive; and (iii) that the Motion is not *bona fide* are each wholly without merit and should be rejected.
3. Further, the Defence submits that the Attorney General has failed to identify any privilege—either international or municipal—which would shield the President from appearing and giving testimony before this Tribunal. Accordingly, the Motion should be granted, and a subpoena should issue without further delay.

SUBMISSIONS

4. In his Response, the Attorney General “adopts the arguments, submissions, and authorities” contained in the response to the Motion filed by the Office of the Prosecutor (the “Prosecution”) on 13 January 2006 (the “Prosecution Response”)⁴. Accordingly, the Defence hereby adopts, by reference, the arguments advanced in its previously submitted reply to the Prosecution Response⁵ and makes the following additional submissions in support of its Motion.

¹ *Prosecutor v. Norman et al.*, SCSL-2004-14-T-541, 23 January 2006.

² *Norman et al.*, SCSL-2004-14-T-522, 15 December 2005.

³ See *Norman et al.*, SCSL-2004-14-T-533, ‘Reply to Prosecution Response to Fofana Motion for Issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah’, 18 January 2006, ¶¶ 10-21.

⁴ See Response, ¶ 12, referring to *Norman et al.*, SCSL-2004-14-T-528, ‘Prosecution Response to Fofana Motion for Issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah’, 13 January 2006.

⁵ See n.3, *supra*.

The President Possesses Information Material to Mr Fofana's Defence

5. The Attorney General suggests that the President's anticipated evidence, as outlined at paragraphs 3, 13, and 14 of the Motion, would "have no material effect and relevance in proving the accused's innocence or guilt in respect of the charges contained in the indictment against him, as at the material time the President was, because of the activities of the RUF, CDF/AFRC, outside of the jurisdiction in a neighbouring country"⁶. However, this statement is both unsupported by the factual record and legally untenable.
6. As previously submitted, the President is in possession of information specifically relevant to Mr Fofana's alleged liability pursuant to Articles 1.1, 6.1, and 6.3 of this Court's Statute. The Attorney General's position that such information would "have no material effect and relevance in proving the accused's innocence or guilt in respect of the charges contained in the indictment against him"⁷ is as overstated as it is incorrect. Indeed, as outlined in detail in the reply to the Prosecution Response⁸, the anticipated evidence would go to the very heart of the charges contained in the Prosecutor's Indictment against Mr Fofana.
7. Additionally, in making the assertion quoted above at paragraph 5, the Attorney General seems to suggest that the President's geographic location during the times specified in the Indictment is somehow relevant to the question of whether the President is in possession of information likely to materially assist Mr Fofana's defence. To the contrary, the Defence submits that such suggestion is erroneous.
8. In any event, it is a matter of public record that the President was in exile in the Republic of Guinea from May 1997 through March 1998—a period of eleven months. However, the charges contained in the Indictment with respect to the alleged culpability of Mr Fofana span a much broader space of time, namely October 1997 through December 1999, a period of over two years. Accordingly, this aspect of the Attorney General's assertion is factually inaccurate.

⁶ Response, ¶ 14.

⁷ *Ibid.*

⁸ See n.3 *supra*.

9. Further, the fact that the President may have been outside of Sierra Leone during certain periods has no bearing on the question of whether he possesses relevant information with respect to the command structure of the CDF and his own involvement in that organisation. As previously noted, there has already been evidence in these proceedings with respect to the existence of various lines of communication between the president in Guinea and CDF personnel in Sierra Leone, via satellite telephone as well as through messengers and emissaries. The Defence is in possession of further information—both documentary and testimonial in nature—indicating that the President was in contact with members of the CDF leadership in Sierra Leone during his exile in Guiana. In light of this information, as well as the recent testimony of Mr Norman, the Attorney General's assertion is legally insignificant.

The Attorney General Has Failed to Substantiate His Specific Objections

10. In support of his position, the Attorney General makes reference to four common-law decisions regarding the issuance of subpoenas—the basic propositions of which the Defence does not here dispute, namely (i) that the proposed evidence sought to be elicited by a subpoena should be material to the charges contained in the indictment⁹; (ii) that the proposed subject of the subpoena should be uniquely in possession of such evidence¹⁰; (iii) that a request for a subpoena should not be irrelevant, speculative, or oppressive¹¹; and finally (iv) that such request must be *bona fide*, that is, one made for the purpose of obtaining relevant evidence and not for collateral or improper objectives¹².
11. Yet given the existing body of international criminal law dealing with the issuance of subpoenas¹³, the Defence submits that citation to these rather dated municipal authorities does not assist this International Criminal Tribunal. The Response fails to explain how such additional authorities would enhance the current state of the relevant jurisprudence. Additionally, the Attorney General has made no effort to analogize the factual scenarios

⁹ See Response, ¶ 14, citing *R.V. Baines and Another* (1908-1910) 1. ALL. E.R. at 328.

¹⁰ *Ibid.*, citing *Senior and Others v. Holdsworth* (1975) 2. ALL. E.R. at 1009.

¹¹ *Ibid.*, citing *Morgan v. Morgan* (1977) 2. ALL. E.R. at 515.

¹² *Ibid.*, citing *R.V. Agwuna*, Volume 12, West African Court of Appeal at 456.

¹³ See Prosecution Response, ¶¶ 3-17 and the Defence reply to same, n.3 *supra*, ¶¶ 10-13.

contained in his cited authorities to that of the instant case. Accordingly, their utility in the resolution of the Motion is highly, if not entirely, limited.

12. Assuming, *arguendo*, that the authorities are somehow applicable to these proceedings, the Defence submits that its Motion is in accordance with their basic propositions. While the Attorney General has taken the position that the Motion offends each of the four above-stated requirements, he fails to substantiate his submissions with any degree of specificity beyond wholly conclusory remarks.
13. With respect to the first and second points, as noted above and in our Reply to the Prosecution Response¹⁴, the Defence submits that the anticipated evidence is highly relevant and that the President is in possession of information unique to his position. Accordingly, the Defence submits that his testimony will likely have a “direct and important place in the determination of the issues before the Trial Chamber”¹⁵.
14. Further, with respect to the third proposition, the Motion is based on a variety of objective factors including testimony given during the Prosecution’s case, instructions taken from Mr Fofana, documentary evidence collected during the course of Defence investigations¹⁶, matters of public record¹⁷, as well as comments made by the President himself to a member of the Fofana Defence Team¹⁸. Naturally, as with any witness who has refused to submit to questioning, there is some degree of uncertainty as to what, exactly, the object of such subpoena will be able to address. However, the Defence submits that its request is in no way a *speculative* one—as in the type of “fishing” prohibited by the cited authority—but rather one reasonably based on available information and diligent investigation.
15. The Defence further submits that the issuance of a subpoena in this case cannot reasonably be said to be oppressive, as submitted by the Attorney General. To the

¹⁴ See n.3 *supra*.

¹⁵ Response, ¶ 14.

¹⁶ See, e.g., letter from Patricia Kabbah to Samuel Hinga Norman regarding provision of a satellite telephone, attached hereto as Annex B.

¹⁷ See, e.g., references to the Sierra Leone Truth and Reconciliation Commission Report contained in *Norman et al.*, SCSL-2004-14-T-532, ‘First Accused Reply to the Prosecution Response to Norman Motion for Issuance of a Subpoena ad Testificandum to President Ahmad Tejan Kabbah’, 16 January 2006, ¶¶ 19-20.

¹⁸ See Motion, ¶ 4.

contrary, it is reasonable to expect an individual in possession of potentially relevant information to appear as a witness before this Tribunal. The President lives in Freetown and would not be called away from his official duties for more than a few days; there are no apparent security concerns associated with his attendance at the Special Court premises; and the proceedings—sanctioned as they are by both the United Nations and the Government of Sierra Leone—are in no way at odds with the President’s position as Head of State of a sovereign nation. Simply put, the Attorney General has failed to make a specific showing as to how the issuance of the requested subpoena would oppress the President in any discernable manner.

16. Finally, and indeed somewhat alarmingly, the Attorney General has called into question the *bona fides* of the Motion, going so far as to accuse the Defence of making a request “meant to embarrass the President and cause mischief” in contravention of Rule 54¹⁹. Yet again, this rather serious accusation is unaccompanied by any factual support. The Defence submits that one as presumably experienced in the practice of law as the Attorney General should refrain from making such unfounded accusations, which unnecessarily impugn the integrity of counsel.

The President is Compellable as a Witness Before This Chamber

The Special Court is Empowered to Enforce Its Orders Issued Pursuant to Rule 54

17. The Attorney General contends that the President “is not compellable as President and Head of State by reason of the fact that a subpoena requires a judicial penalty to enforce it were it to be disobeyed”²⁰. The Defence does not dispute that a subpoena, by definition, must be backed by the threat of a judicial penalty for non-compliance with its terms. However, the Defence does take issue with the implicit premise of the Attorney General’s syllogism, namely that this Chamber somehow lacks the ability to enforce its directives issued pursuant to Rule 54.

¹⁹ Response, ¶ 14.

²⁰ Response, ¶ 15, *citing* Section 48(4) of the Constitution of Sierra Leone (Act No. 6 of 1991) (the “Constitution”) and *Prosecutor v. Blaskic*, IT-95-14-AR108bis, Appeals Chamber, ‘Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997’, 29 October 1997 (the “Blaskic Decision”).

18. On the contrary, individual Judges and Trial Chambers of the Special Court are statutorily endowed with the same enforcement mechanisms available to judges of the courts of Sierra Leone²¹. Section 20 of the Special Court Agreement, 2002 (Ratification) Act, 2002 (the “Ratification Act”) provides:

For the purposes of execution, an order issued by a Judge or Chamber shall have the same force or effect as if issued by a Judge, Magistrate or Justice of the Peace of a Sierra Leone court²².

19. Such enforcement power is further codified in the Rules of Procedure and Evidence (the “Rules”), specifically Rule 8, which provides in pertinent part:

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

20. Accordingly, as a general matter, this Chamber is empowered to enforce its orders through the very same mechanism available to its municipal counterparts, namely by directing the Inspector General of the Sierra Leone Police to issue a warrant for the arrest of an individual who fails to comply with the Chamber’s order pursuant to Rule 54. That much is evident from the plain meaning of Section 20 of the Ratification Act and Rule 8.

The President Enjoys No Immunity From Process Under Either the Laws of Sierra Leone or International Law

21. The Attorney General submits that the President, as Head of State of Sierra Leone, would be somehow shielded from a validly issued subpoena of this Court by virtue of the Constitution as well as the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (the “ICTY”)²³. However, the Defence submits that neither the former nor the latter provides the immunity the President now seeks to claim.

²¹ See Motion, ¶¶ 21-25.

²² Emphasis added.

²³ Response, ¶ 15.

22. International law currently provides no immunity to a Head of State from either prosecution or process before an international criminal tribunal²⁴. The *Blaskic* Decision, cited by the Attorney General in support of the President's position, addressed the functional immunity of a state official²⁵ called upon to produce state documents pursuant to a *subpoena duces tecum*. In that case, the Appeals Chamber of the ICTY did not decide the issue of the validity of a *subpoena ad testificandum* directed to a witness expected to give evidence of what he saw or heard at a time when he was a state official and in the course of exercising his official functions²⁶.
23. With respect to the latter issue—the issue relevant to the instant Motion—the more recent *Krstic* Decision is controlling. In that case, the Appeals Chamber of the ICTY held that the dismissal (as in the *Blaskic* Decision) of the possibility of an international criminal tribunal addressing a subpoena to a state official acting in his official capacity “can be justified only in relation to the production of documents in [his] custody in [his] official capacity”²⁷. The *Krstic* Appeals Chamber further noted:

The [*Blaskic*] Appeals Chamber did not say that the functional immunity enjoyed by State officials includes an immunity against being compelled to give evidence of what the official saw or heard in the course of exercising his official functions. Nothing which was said by the Appeals Chamber in the *Blaskic* Subpoena Decision should be interpreted as giving such an immunity to officials of the nature whose testimony is sought in the present case. No authority for such a proposition has been produced by the prosecution, and none has been found. *Such an immunity does not exist*²⁸.

²⁴ See *Prosecutor v. Krstic*, IT-98-33-A, Appeals Chamber, ‘Decision on Application for Subpoenas’, 1 July 2003 (the “*Krstic* Decision”), ¶ 26 (“It may be the case ... that, between States, such a functional immunity exists against prosecution for those acts, but it would be incorrect to suggest that such an immunity exists in international criminal courts”). See also *Case Concerning the Arrest Warrant of 11 April 2002 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002 (the “*Yerodia* Case”), General List No. 121 [unreported], ¶ 61 (where the International Court of Justice said: “Accordingly, the immunities enjoyed under international law by an incumbent or former Minister of Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. [Such Minister] may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the Former Yugoslavia”).

²⁵ N.B. The official in the *Blaskic* Decision was acting as a representative of the Republic of Croatia, to which the request was directed. The *Krstic* Appeals Chamber emphasised: “The decision of the [*Blaskic*] Appeals Chamber that a subpoena could not be directed to a State, but that a binding order to do so should have been sought pursuant to Article 29 of the Tribunal’s Statute, was directed to the production of documents, not to giving evidence”. *Krstic* Decision, ¶ 23.

²⁶ *Ibid.*, ¶ 22.

²⁷ *Ibid.*, ¶ 27.

²⁸ *Ibid.*, ¶ 27, emphasis added.

24. Accordingly, the Attorney General's submission that the President "is the embodiment of the State of Sierra Leone, and *ex hypothesi*, a subpoena cannot issue against him"²⁹ is simply not relevant to the determination of the pending Motion, which seeks the President's attendance as a factual witness with respect to his own personal observations, not as a custodian of state documents. Again, the analysis of the ICTY Appeals Chamber in the *Krstic* Decision is controlling:

The justification for the ruling that a subpoena could not be addressed to State officials acting in their official capacity was stated to be that [s]uch officials are mere instruments of a State and their official action can only be attributed to the State. Such a statement is very relevant to a custodian of State documents, but it is not apt in relation to a State official who can give evidence of something he saw or heard (otherwise, perhaps, than from a State document). Unlike the production of State documents, the State cannot itself provide the evidence which only such a witness could give³⁰.

25. Simply put, a sitting Head of State enjoys no immunity under international law against being compelled to give evidence, before an international criminal tribunal, of what he saw or heard in the course of exercising his official functions.

26. Furthermore, as noted in the Motion, the President enjoys no immunity from process under the municipal laws of this country³¹. In his submissions, the Attorney General notes that "all matters relating to the Presidency of the Republic of Sierra Leone are provided for in Chapter V of the Constitution of Sierra Leone"³² and makes specific reference to Section 48(4) of that document. However, even assuming, *arguendo*, that the rules of international criminal law should somehow give way to the specific provisions of the Constitution, the President still enjoys no immunity from appearing as a factual witness before the Special Court in this case for the simple reason that no such immunity is prescribed by the Constitution.

27. Rather, Section 48(4) of the Constitution provides for presidential immunity from proceedings "instituted or continued against him in respect of anything done or omitted

²⁹ Response, ¶ 15.

³⁰ *Krstic* Decision, ¶ 24.

³¹ Motion, ¶ 26.

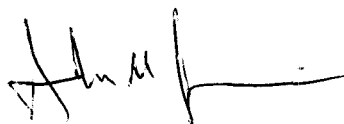
³² Response, ¶ 5.


to be done by him either in his official or private capacity". Again, as to immunity from appearing as a witness—as requested by the Motion—the Constitution is silent.

CONCLUSION

28. Because the Attorney General has presented no valid legal or factual argument as to why the President should not appear as a witness in the CDF case, and for the reason set forth in the Motion and the reply to the Prosecution Response, the Defence respectfully requests that the Chamber issue the requested subpoena without further delay. Additionally, the Defence requests that the Chamber order the President to meet with the Defence in advance of the date of his proposed testimony³³.

COUNSEL FOR MOININA FOFANA



 Victor Koppe

³³ See *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Trial Chamber I, 'Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana', 23 June 2004, ¶ 4 ("When the Defence is not fully aware of the nature and relevance of the testimony of a prospective witness it is in the interest of justice to allow the Defence to meet the witness and assess his testimony".)

ANNEX A
DEFENCE LIST OF AUTHORITIES

Constitutive Documents

1. Special Court Agreement, 2002 (Ratification) Act, 2002: Section 20
2. SCSL Statute: Articles 1.1, 6.1, and 6.3
3. SCSL Rules of Procedure and Evidence: Rule 8

Jurisprudence

4. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-522, 'Fofana Motion for Issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah', 15 December 2005
5. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-532, 'First Accused Reply to the Prosecution Response to Norman Motion for Issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah', 16 January 2006
6. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-533, 'Reply to Prosecution Response to Fofana Motion for Issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah', 18 January 2006
7. *Prosecutor v. Blaskic*, IT-95-14-AR108bis, Appeals Chamber, 'Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997', 29 October 1997
8. *Prosecutor v. Krstic*, IT-98-33-A, Appeals Chamber, 'Decision on Application for Subpoenas', 1 July 2003
9. *Case Concerning the Arrest Warrant of 11 April 2002 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, General List No. 121

Other Authorities

10. Section 48(4) of the Constitution of Sierra Leone (Act No. 6 of 1991)

ANNEX B

LETTER FROM PATRICIA KABBAH TO SAMUEL HINGA NORMAN

Bonakery

13 December 1997

Dear Chief,

I was pleased to receive your letter and I thank you for writing.

After the very distressing news we received of the atrocities that the military junta had carried out in our Bonthé District area - burning of our towns and villages, the maiming and killing of our people, it was consoling to read from your letter that all is now quiet in the area. I pray to god that the situation remains stable.

Let me also take this opportunity to express my warm appreciation to you for the good work you are doing with the kamajoes to get our country back to normal. You cannot imagine the joy with which I listened to the Focus on Africa report on the statement you made to the effect that if the junta did not honour the date for the commencement of the disarmament exercise, December 20, the Kamajoes will strike. This is very good news. This whole ordeal has been stretched out too long. We need swift and decisive action now to bring it to an end. Bravo to you.

2

I discussed with Ruijeh your request for a satellite phone. I told him that I would do everything possible to get the phone for you without delay. Ruijeh was going to let me have all the particulars on the phone so that I could make the initial payment. However, in the meantime a large consignment of electronic equipment came among which were three satellite phones. I expressed the hope to H.E. that one of the phones would go to you, and he said yes. So the problem is now solved and before long we will be able to talk to you directly.

Here is a favour I ask of you. Please arrange for the Head of the Kamajo of the Bonthe District to come and see me in Banjary. I have a message and some funds for the Kamajos in our area, from some Sherbro in the USA. I feel that it would make more of an impact if I should deliver these to the Head of the Kamajo personally together with funds from me, and then thank him for the work they are doing and continue to do to protect our people, and their own efforts to bring the military regime to an end. Please do your best to see that this

P.T.O

man travels to see me soon. Thank you in advance for this favour.

Well, we are here, hoping and praying that your efforts will soon bear fruitful results and that we shall be home soon.

With the holidays fast approaching, let me end by wishing you a very merry Christmas and a bright and prosperous New Year.

Very sincerely yours
Patricia Kabbah