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SCSL-04-14-T
(14522-14531)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Interim Registrar: Mr. Lovemore Munro

Date filed: 13 January 2006

THE PROSECUTOR

Against

Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

**PROSECUTION RESPONSE TO FOFANA MOTION FOR ISSUANCE OF A SUBPOENA AD
TESTIFICANDUM TO PRESIDENT AHMED TEJAN KABBAH**

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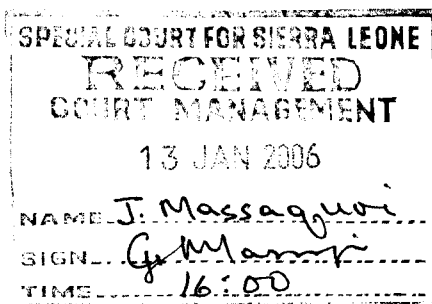
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I. INTRODUCTION

1. The Prosecution files this response to the “Fofana Motion for Issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah” (“**Fofana Motion**”)¹, filed on behalf of the Second Accused on 15 December 2005.
2. The Fofana Motion requests the Trial Chamber to issue a *subpoena ad testificandum* to President Ahmad Tejan Kabbah. For the reasons given below, the Prosecution submits that the Fofana Motion should be dismissed.

II. ARGUMENT

A. General

3. The Appeals Chamber of the ICTY has emphasized that:

“Subpoenas should not be issued lightly, for they involve the use of coercive powers ... [T]he subpoena is a weapon which must be used sparingly. While a Trial Chamber should not hesitate to resort to this instrument where it is necessary to elicit information of importance to the case and to ensure that the defendant has sufficient means to collect information necessary for the presentation of an effective defence, it should guard against the subpoena becoming a mechanism used routinely as a part of trial tactics. ... A subpoena involves the use of judicial power to compel, and as such, it must be used where it would serve the overall interests of the criminal process, not where it would merely facilitate a party’s task in litigation.”²

4. The Appeals Chamber of the ICTY has further held that a Trial Chamber has a discretion in determining whether an applicant has succeeded in making the required showing for a subpoena, “this discretion being necessary to ensure that the compulsive mechanism of

¹ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-522, “Fofana Motion for Issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah”, (“**Fofana Motion**”) 15 December 2005.

² *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004 (“**Halilović Appeal Decision**”), paras. 6, 10. See also *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, 9 December 2005 (“**Milošević Trial Decision**”), para. 35.

the subpoena is not abused.”³ It has added that “[p]articular caution is needed where the [party] is seeking to interview a witness who has declined to be interviewed.”⁴

5. It is established in the case law of the ICTY that in entertaining an application for a subpoena, a Trial Chamber should consider (1) whether the information in the possession of the prospective witness is necessary for the resolution of specific issues in the trial (the “*legitimate forensic purpose*” requirement), and (2) whether the information in the possession of the prospective witness is obtainable by other means (the “*last resort*” requirement).⁵

B. The legitimate forensic purpose requirement

6. The Fofana Motion argues that President Kabbah possesses “certain information highly relevant to the charges contained in the Prosecution’s indictment against Mr Fofana.”⁶ However, in order to satisfy the “legitimate forensic purpose” requirement, it is not sufficient for an applicant for a subpoena to show merely that the addressee of the subpoena has information or knowledge that is *relevant* to the case. Rather, the applicant for the subpoena must make an evidentiary showing of “a reasonable basis for his belief that the prospective witness is likely to give information that will *materially assist* the applicant with respect to *clearly identified issues* in the forthcoming trial”.⁷ It is not enough that the information requested may be “helpful or convenient” for one of the parties: it must be of *substantial or considerable assistance* to the Accused in relation to a *clearly identified issue* that is relevant to the trial.⁸ It is only where these requirements have been demonstrated that it can be said that the subpoena is “necessary” within the meaning of Rule 54 of the Rules of Procedure and Evidence (“Rules”).⁹

³ *Halilović* Appeal Decision, para. 6; see also *Milošević* Trial Decision, para. 35.

⁴ *Milošević* Trial Decision, para. 35 (quoting a dissenting opinion in the *Halilović* Appeal Decision).

⁵ *Prosecutor v. Krstić*, “Decision on Application for Subpoenas”, Case: IT-98-33-A, Appeals Chamber, 1 July 2003, (“*Krstić* Appeal Decision”), para. 10; *Halilović* Appeal Decision, para. 7; *Milošević* Trial Decision, para. 36.

⁶ Fofana Motion, para. 3. See also Fofana Motion, para. 13, arguing that “Mr Kabbah is in a position to provide evidence relevant to the charges”.

⁷ *Halilović* Appeal Decision, para. 6 (emphasis added). See also *Krstić* Appeal Decision, para. 10; *Milošević* Trial Decision, para. 39; *Prosecutor v. Simba, Decision on the Defence Request for a Subpoena for Witness SHB*, Case No. ICTR-01-76-T, Trial Chamber, 7 February 2005, para. 3 (an applicant for a subpoena “must have a reasonable belief that the prospective witness can materially assist its case”).

⁸ *Milošević* Trial Decision, para. 39 (emphasis added).

⁹ *Ibid.*

7. The Prosecution submits that the Fofana Motion fails to identify sufficiently (1) how any evidence that President Kabbah could give would materially assist the Second Accused, and/or (2) the precise issues to which that evidence would relate.
8. Paragraph 7 of the Fofana Motion refers to the *viva voce* evidence of several witnesses who have mentioned President Kabbah in their testimony. However, the Fofana Motion does not make any showing of how any of the matters referred to in this paragraph of the Fofana Motion could in any way impact upon the Trial Chamber's findings on any element of any crime with which the Accused is charged.¹⁰ For instance, in paragraph 7(a) of the Fofana Motion, reference is made to the testimony of one witness who said that he attended a meeting with President Kabbah, the First Accused and several others, at which the then Vice President said that it was the First Accused's responsibility to handle security in Sierra Leone in the President's absence, and at which President Kabbah gave the First Accused a sum of money to support the war effort. The Prosecution submits that the Fofana Motion does not in any way seek to identify how the guilt or innocence of the Second Accused could in any way be affected by whether or not this testimony is true. Nor does the Fofana Motion identify what possible additional information President Kabbah might be able to provide in relation to this testimony that may have any bearing on the guilt or innocence of the Second Accused.
9. To give a further example, paragraph 7(f) of the Fofana Motion refers to the testimony of one witness to the effect that the aim of the CDF was to restore President Kabbah's presidency. Again, the Fofana Motion fails to identify how the guilt or innocence of the Second Accused could in any way be affected by the question of whether or not this was the aim of the CDF. Even if it were established that the CDF may have come to the assistance of the lawful government, the issue remains whether the crimes charged in the Indictment were committed by the Accused. The fact that an Accused goes to the assistance of a lawful government does not mean that the lawful government or its members become responsible for any crimes that the Accused commits in that process. Furthermore, even if it could be established that other members of the lawful government are also individually criminally responsible for crimes committed in that process, this

¹⁰ *Milošević* Trial Decision, para. 51.

would not affect the individual criminal responsibility of the Accused. Nor does the Fofana Motion identify what possible additional information President Kabbah might be able to provide in relation to this testimony that may have any bearing on the guilt or innocence of the Second Accused. All of the other sub-paragraphs of paragraph 7 of the Fofana Motion suffer from this same defect.

10. Paragraph 8 of the Fofana Motion states that the Defence for the Second Accused also wishes to question President Kabbah about “the allegations contained in the Prosecution’s Indictment”. However, it does not in any way identify the specific issues in the Indictment to which President Kabbah’s proposed testimony would relate, nor does it explain how that specific information could in any way impact upon the Trial Chamber’s findings on any element of any crime with which the Accused is charged.¹¹ It is obvious that an applicant for a subpoena cannot satisfy the “legitimate forensic purpose” requirement by merely stating, in the most broad and general terms, that the applicant wishes to question the proposed witness about “the allegations in the Indictment”.
11. Paragraph 13 of the Fofana Motion is the nearest attempt made in the Fofana Motion to explain the significance of President Kabbah’s proposed testimony for the Second Accused’s case. That paragraph of the Fofana Motion states that President Kabbah was “commanding, materially supporting, and communicating with various members of the alleged CDF leadership, both from his exile in Conakry and later from his presidential offices in Freetown.” It further states that “the Kamajors claimed to be fighting, in part, on behalf of Mr Kabbah” and that “with respect to the question of who bears the greatest responsibility (...) the Defence submits that Mr Kabbah may himself be among such a group.” However, these allegations cannot suffice to satisfy the “legitimate forensic purpose” requirement. Even if the Defence could prove what this paragraph of the Fofana Motion alleges, namely that President Kabbah is also one of the persons bearing the greatest responsibility for crimes committed by the CDF, this would not mean that the Accused in this case would be absolved of any criminal responsibility that they would otherwise have, or that their own criminal responsibility would somehow be diminished.

¹¹ See footnotes 7 and 8 above and accompanying text.

The Fofana Motion simply fails to explain how, specifically, the testimony of President Kabbah would assist the case of the Second Accused.

12. Finally, paragraph 14 of the Fofana Motion argues that President Kabbah's testimony would serve to "enlighten the Chamber on the activities of the CDF" and that President Kabbah could provide "evidence concerning the crucial issue of command responsibility ... with respect to all three Accused persons."¹² Again, this is a far too general and vague an assertion to satisfy the "legitimate forensic purpose" requirement. The Fofana Motion does not identify the specific issues of command responsibility on which evidence is sought from President Kabbah, nor does it explain how evidence from President Kabbah on this issue would materially assist the case of the Second Accused.¹³
13. The request for a subpoena in this case bears similarities to the request made in the *Milosevic* Trial Decision. In the *Milosevic* case, the Defence applied for subpoenas addressed to Tony Blair, the Prime Minister of the United Kingdom, and Gerhard Schröder, the then Chancellor of Germany. The request for the subpoenas in that case was worded in similarly broad language, and the request was rejected by the Trial Chamber. For instance, the testimony sought from Tony Blair included information relating to the United Kingdom Government's involvement in the diplomatic initiatives

¹² Fofana Motion, para. 13.

¹³ For completeness, the Prosecution states for the record that it does not accept that paragraph 7 of the Fofana Motion accurately reflects the testimony of the witnesses to which that paragraph refers. For instance, paragraph 7(g) of the Fofana Motion claims that Witness TF2-EW1 testified that he "believed that the SLPP government in exile played a role, at the strategic level, in CDF activities in Sierra Leone based on reports that Mr Norman communicated with Mr Kabbah by satellite telephone". As a reference for this testimony, the Fofana Motion cites page 70 of the transcript of 14 June 2005. The relevant part of this transcript reads as follows:

"Q. Colonel, you would agree with me that the government exiled in Guinea was interested in the activities of the CDF?

A. That is my assumption. *I cannot be certain, but that is my assumption.*

Q. On that assumption, will you agree with me they also played some role in directing the affairs of CDF?

A. *That's a difficult question to answer, because 'some role' can mean anything.* I would assess that they did have some role at the strategic level since we have reports that Hinga Norman did speak via satellite telephone to President Kabbah. *However, if we go back to our definition of command, and what command means, command implies the ability to exert leadership, to make decisions, and control. I doubt if the Government in exile was able to either exert leadership or make decisions, or control what went on on the ground with the CDF.*" (Emphasis added.)

By omitting any reference to the italicized portion of this quotation, the Prosecution submits that paragraph 7(g) of the Fofana Motion fails to reflect accurately what is said in this part of the transcript. The Prosecution considers that there are similarly inaccuracies in other parts of paragraph 7 of the Fofana Motion. However, in view of the submissions made by the Prosecution above, it is unnecessary to deal with these inaccuracies in further detail in this response.

and negotiations concerning Kosovo.¹⁴ The Defence considered this information to be relevant to its argument that the Accused was a peacemaker whilst other states — including the UK and Germany—were the aggressors in Kosovo.¹⁵ The Trial Chamber said that:

“... this is not a legitimate ground for compelling Mr. Blair or Mr. Schröder to attend an interview or testify. General references to the policy of the governments of the UK or Germany regarding Kosovo, and to the alleged policy regarding the “diminution of the State of Serbia” in particular, do not constitute “necessary” information for the defence of any of the charges in the Kosovo indictment. Nor, more specifically, have the Assigned Counsel shown that the prospective witnesses’ “awareness” of such policies is something which, if proved, would affect the Accused’s defence case in relation to any particular charge. Therefore [these] ... categories of testimony ... do not pass the “legitimate forensic purpose” test for issuance of a subpoena under Rule 54.”¹⁶

14. In short, it is insufficient for the Defence merely to assert, in a general way, that President Kabbah has knowledge or information that is “relevant” to the allegations in the Indictment. There is no evidence provided in the Fofana Motion that the information sought from President Kabbah affects any issue relevant to the determination of the guilt or innocence of the Accused in relation to any of the charges in the Indictment,¹⁷ or that it affects any of the evidence given in relation to such charges. In the absence of any such evidence, the mere expression of desire in the Fofana Motion to question President Kabbah does not constitute a legitimate forensic purpose for the purpose of subpoenas.¹⁸

C. The last resort requirement

15. In determining whether an applicant for a subpoena has satisfied the last resort requirement, the Trial Chamber must consider whether the information the applicant

¹⁴ *Milošević* Trial Decision, para. 42.

¹⁵ *Milošević* Trial Decision, para. 57.

¹⁶ *Milošević* Trial Decision, para. 58.

¹⁷ *Milošević* Trial Decision, para. 56.

¹⁸ *Milošević* Trial Decision, para. 51 (and see also, for instance, paras. 54, 58 and 62).

seeks to elicit through the use of subpoena is obtainable through other means.¹⁹ Furthermore, the Trial Chamber must consider not only the usefulness of the information to the applicant but on its overall necessity in ensuring that the trial is informed and fair.²⁰ The Trial Chamber must take into account not only the interests of the litigants but the overarching interests of justice and other public considerations.²¹

16. In the absence of any clear indication in the Fofana Motion of the specific issues on which the testimony of President Kabbah is sought, it is impossible for the Trial Chamber to assess whether or not evidence of those issues would be obtainable from another source.²² As the onus is on the applicant to establish that the last resort requirement is met, the Fofana Motion should be refused on the ground that the Defence has not established this.
17. Furthermore, in the absence of any clear indication in the Fofana Motion of the specific issues on which the testimony of President Kabbah is sought, it is impossible for the Trial Chamber to assess whether his testimony is necessary to ensure that the trial is informed and fair, or for the Trial Chamber to balance the interests of the litigants against the overarching interests of justice and other public considerations. Again, because the onus is on the applicant for the subpoena to establish that the relevant requirements are met, the Fofana Motion should be denied on the basis that this has not been established.

D. Other issues

18. The Fofana Motion argues that the President of Sierra Leone enjoys no privilege that would prevent the Special Court from issuing a *subpoena ad testificandum* addressed to him.²³ As the Prosecution submits that the Fofana Motion should be rejected for the reasons given above, it is submitted that it is unnecessary for the Trial Chamber to address this issue.

¹⁹ *Halilović* Appeal Decision, para. 7; *Krstić* Appeal Decision, paras 10-12; *Prosecutor v. Brđanin and Talić*, “Decision on Interlocutory Appeal”, Case No. IT-99-36-AR73.9, Appeals Chamber, 11 December 2002, paras 48-50.

²⁰ *Halilović* Appeal Decision, para. 7.

²¹ *Brđanin and Talić* Appeal Decision, para. 46.

²² See, for instance, *Milošević* Trial Decision, para. 55, in which the requested subpoena addressed to Tony Blair was refused in part on the ground that the information sought was obtainable through other witnesses.

²³ Fofana Motion, para. 2.

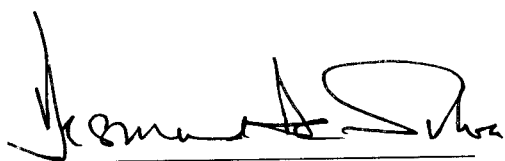
19. The Prosecution notes that in the *Krstić* Appeal Decision, the Appeals Chamber of the ICTY held that there is in principle no functional immunity enjoyed by State officials against being compelled by the ICTY to give evidence of what the official saw or heard in the course of exercising his or her official functions.²⁴ However, the Appeals Chamber of the ICTY added that “no issue arises for determination in this case as to whether there are different categories of State officials to whom any such immunity may apply”.²⁵ In other words, the Appeals Chamber of the ICTY left open the possibility that there may be some categories of State officials (such as the Head of State) who do enjoy such an immunity. This question was similarly expressly left open by the Trial Chamber in the *Milosevic* Trial Decision.²⁶ In the legal system of the Special Court, this must similarly be regarded as an open question.

IV. CONCLUSION

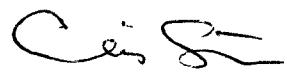
20. In light of the aforementioned reasons, the Prosecution submits that the Fofana Motion should be denied.

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13 January 2006

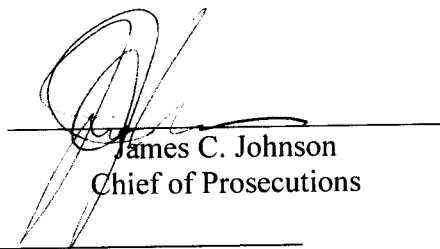
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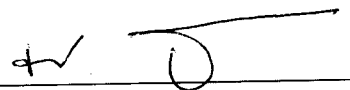
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²⁴ *Krstić* Appeal Decision, para. 27.

²⁵ *Ibid.*

²⁶ *Milosevic/Milošević* Trial Decision, para. 67.

INDEX OF AUTHORITIES

A. ORDERS, DECISIONS AND JUDGMENTS

1. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-522, “Fofana Motion for Issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah”, 15 December 2005.
2. *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, “Decision on the Issuance of Subpoenas”, 21 June 2004.
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6. *Prosecutor v. Krstić*, “Decision on Application for Subpoenas”, Case: IT-98-33-A, Appeals Chamber, 1 July 2003.
<http://www.un.org/icty/krstic/Appeal/decision-e/030701.htm>

B. RULES OF PROCEDURE AND EVIDENCE

Rules of Procedure and Evidence of the Special Court, Rule 73(B) Amended 14 May 2005.