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SCSL-04-14-T
(14561 - 14562)

14561

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: 18 January 2006

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

**REPLY TO PROSECUTION RESPONSE TO
FOFANA MOTION FOR ISSUANCE OF A
SUBPOENA AD TESTIFICANDUM TO
PRESIDENT AHMED 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
Mr Marco Bundi

For Moinina Fofana:

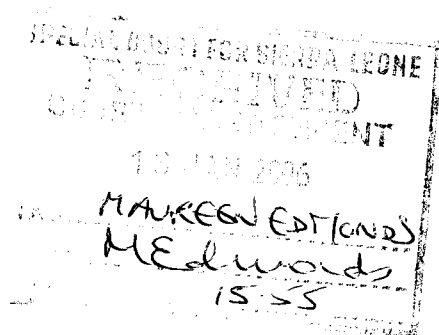
Mr Victor Koppe
Mr Arrow Bockarie
Mr Michiel Pestman
Mr Andrew Ianuzzi

For Samuel Hinga Norman:

Mr John Wesley Hall
Dr Bu-Buakei Jabbi
Mr Alusine Sani Sesay
Ms Clare DaSilva

For Allieu Kondewa:

Mr Charles Margai
Mr Yada Williams
Mr Ansu Lansana
Ms Susan Wright
Mr Martin Michael



INTRODUCTION

1. Counsel for Mr Fofana (the “Defence”) hereby submits its reply to the ‘Prosecution Response to Fofana Motion for Issuance of a *Subpoena ad Testificandum* to President Ahmed Tejan Kabbah’ (the “Response”)¹.
2. The Defence submits that the Prosecution has no standing to object to a request for the issuance of a subpoena to a third party, and that the Defence has the right to seek the production of its witnesses without unnecessary interference from the Office of the Prosecutor (the “Prosecution”).
3. Further, the Defence submits that its ‘Motion for Issuance of a *Subpoena ad Testificandum* to President Ahmed Tejan Kabbah’² (the “Motion”) sufficiently identifies both the manner in which the anticipated testimony would materially assist Mr Fofana and the precise issues to which the evidence would relate. Accordingly, the Motion should be granted.

SUBMISSIONS

The Prosecution Has No Standing To Object To The Motion

4. The Defence hereby adopts, by reference, the arguments advanced by counsel for the First Accused as outlined at paragraphs 10 through 14 of its ‘Reply to the Prosecution Response to Norman Motion for Issuance of a *Subpoena ad Testificandum* to President Ahmed Tejan Kabbah’ (the “Norman Reply”)³.
5. As noted in the Norman Reply, the Prosecution has no standing to object to a motion for the issuance of a *subpoena ad testificandum* addressed to a potential defence witness. Counsel for the Office of the Prosecutor are not the legal representatives of

¹ *Prosecutor v. Norman et al.*, SCSL-2004-14-T-528, 13 January 2006.

² *Norman et al.*, SCSL-2004-14-T-522, 15 December 2006.

³ *Norman et al.*, SCSL-2004-14-T-532, 16 January 2006.

President Kabbah, who has now been served with a copy of the Motion⁴ and is at liberty to take whatever action he, or his legal representative, feels is necessary.

6. Furthermore, the Prosecution has not explained how it is impacted by the pending Motion, and the Defence is troubled by its rather vigorous objection to a matter that simply does not concern it at this stage of the proceedings. Such attempt to hinder the Defence's legitimate investigative efforts when no identifiable Prosecution interest is presently implicated strikes the Defence as seriously misguided, to say the least.

The Defence Has A Right To Call The Witnesses Of Its Choice

7. Again, the Defence hereby adopts, by reference, the argument advanced at paragraphs 5 through 9 of the Norman Reply.
8. Article 17(4) of the Statute of the Special Court (the "Statute") provides, in pertinent part:

In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: ... (e) ... to obtain the attendance and examination of witnesses on his ... behalf under the same conditions as witnesses against him ...

9. The Response amounts to premature interference by the Prosecution in contravention of Mr Fofana's statutory right to seek to compel the attendance and examination of witness in his defence.

The Defence Has Made A Sufficient Showing for the Issuance of a Subpoena

The ICTY Test Should Be Modified

10. The Defence does dispute whether the formulation advanced by the Prosecution with respect to the general state of the law, as it exists at the International Criminal

⁴ *Norman et al.*, SCSL-2004-14-T-530, 'Affirmation of Service With Respect to Fofana and Norman Motions for Issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah', 16 January 2006.

Tribunal for the Former Yugoslavia (the “ICTY”)⁵ with respect to the issue presented by the Motion is correct. However, as we are proceeding before this Special Court, the Defence submits that the specific elements of the test to be applied at this Tribunal should always reflect the practical reality of the present situation and the unique features of our Statute and developed practice. Specifically, we submit that the test advanced by the Prosecution should be adapted to account for the fact that the Defence has been unable to interview the proposed witness, in a substantive manner, with respect to the particular issues on which evidence is sought to be elicited; and further to accommodate both the concept of “greatest responsibility” codified in Article 1.1 of the Statute and this Chamber’s liberal approach to admissibility as developed over the course of these proceedings.

11. Given the fact that the President has expressed, in no uncertain terms, his unwillingness to submit to substantive questioning by the Defence, it will be difficult to outline with the degree of precision sought by the Prosecution at this time the exact contours of the President’s proposed testimony. In this respect, we submit that the strictures of the ICTY test should be softened to account for this unavoidable reality.
12. Further, the Special Court’s Statute is markedly different from that of the ICTY, as it contains, *inter alia*, a uniquely articulated jurisdictional provision⁶. The concept of “greatest responsibility” is nowhere found in the statutes of the *Ad Hoc* Tribunals. This notion has yet to be fully explicated, and it is not—as are the particular crimes and the well-known theories of liability charged in the Indictment—susceptible of division into discrete elements. It is an overarching provision, which goes to the Mr Fofana’s alleged liability on all counts and theories of liability. As such, to the extent that the Defence anticipates that the President may be in possession of information relevant to this issue—even in a general or vague sense—the requirements of the ICTY test should be accordingly softened.
13. Finally, this Chamber has from its inception taken a liberal approach to the admissibility of evidence based on the provisions of the Rules of Procedure and Evidence (the “Rules”), in particular Rule 89(C). The Defence submits that the

⁵ See Response, ¶¶ 3–5.

⁶ See Statute, Article 1.1.

Chamber should adopt the same flexible approach to the instant Motion, at least with respect to the question of whether the Defence has made a sufficient showing as to the legitimate forensic purpose of the proposed evidence.

The Legitimate Forensic Purpose Requirement

14. Given these particular realities, the Defence submits that it has already provided a reasonable basis for our belief that the President is likely to give evidence that will materially assist our client with respect to the following clearly identified issues relevant to the current proceedings.

(i) Greatest Responsibility

15. The Defence has shown that the President's anticipated evidence will greatly impact upon the Trial Chamber's findings with respect to the elements of each crime with which Mr Fofana is charged. Indeed, Mr Fofana is accused of committing those crimes alleged in the Indictment as one who bears the greatest responsibility for their commission. The plain meaning of the phrase reveals that it is a comparative concept. Accordingly, the Defence must be given the opportunity to address the potential culpability of every other actor to the conflict—individuals and organizations alike. The President, as the ultimate leader of the CDF and as one presumably privy to all manner of information regarding the activity of other national, regional, and international actors, throughout the Indictment period, will likely be able to discuss a variety of issues relevant to Mr Fofana's relative culpability. This Chamber has held that the question of greatest responsibility is an *evidentiary* matter to be determined at the trial stage, and the Defence needs to be in a position to provide *evidence* on this crucial point.

16. The Prosecution has complained that the assertions contained in the Motion in this respect are too general and vague. However, this is a natural consequence of the fact that the concept of greatest responsibility is a general and vague one. The Defence anticipates that the proposed testimony would, in this sense, be relevant to all charges and theories of liability contained in the Indictment.

17. The Defence completely disagrees with the assertion raised at the end of paragraph 11 of the Response. Indeed, this is precisely what the defence will seek to accomplish. It has always been our stated position that the culpability of other actors to the conflict is highly relevant to Mr Fofana's own alleged responsibility. The Prosecution position, if correct, would simply render Article 1.1 devoid of its obvious and significant meaning.

(ii) Command Responsibility

18. It should be obvious that the top figure of any organization—as Mr Kabbah has been at least alleged to be—will likely have much to say about that organization's command structure. For instance, Mr Kabbah may be able to shed light on any statutory duties associated with the position of Director of War. Further he may well be able to explain how orders passed through the chain of command as well as how certain members of the alleged CDF leadership interacted with one another.

19. The fact that the CDF was fighting to restore Mr Kabbah's own government, in conjunction with the evidence already adduced that CDF personnel travelled to Guinea to attend meetings with the President and further that he was in constant contact with Mr Norman via satellite telephone, implies that Mr Kabbah may have been coordinating the entire CDF effort from Conakry.

20. All of this information, it is submitted, is highly relevant to the first element of the Prosecution's putative command responsibility case. The Defence submits it would be hard pressed to articulate a more legitimate forensic purpose. The Prosecution appears to be relying on an overly technical assessment of the ICTY rule, which we might add (as noted by counsel for the First Accused) dealt with a request for subpoenas to be issued to the heads of state of two countries not party to the relevant conflict, not, as is the case here, the alleged leader of the CDF—the very organisation at the centre of this case.

(iii) Joint Criminal Enterprise

21. Finally, the anticipated evidence will go to the second element of the Prosecution's theory of joint criminal enterprise liability, namely the existence of a common plan, design, or purpose, which amounts to or involves the commission of a crime provided for in the Statute. For the same reasons discussed above, the President will likely be able to shed light on Mr Fofana's alleged participation in any common plan, design, or purpose, to the extent such existed.

The Last Resort Requirement

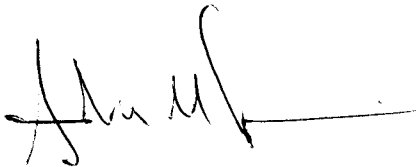
22. Naturally the President is in the best, perhaps only, position to comment on the issues noted above. No other means of obtaining the information would be as convenient as a practical matter, as credible from an evidentiary standpoint, or as transparent from a public policy point of view.

23. Mr Kabbah has already declined to cooperate with the Fofana Defence team on a voluntary basis after numerous attempts. The Defence submits that the issuance of a subpoena is now the last resort.

CONCLUSION

24. For the above-stated reasons, as well as those outlined in the Motion, the Defence respectfully requests the Chamber to issue the requested *subpoena ad testificandum* to H.E. Alhaji Dr Ahmed Tejan Kabbah without delay.

COUNSEL FOR MOININA FOFANA



Victor Koppe

DEFENCE LIST OF AUTHORITIES**Constitutive Instruments**

1. Statute of the Special Court for Sierra Leone: Articles 1.1 17(4)(e).
2. SCSL Rules of Procedure and Evidence: Rule 89(C)