

SCSL-04-14-T  
(14612-14627)

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**REPUBLIC OF SIERRA LEONE**

14612



**Attorney-General and Minister of Justice**

Attorney-General's Chambers,  
Ministry of Justice  
Guma Building  
Lamina Sankoh Street  
Freetown, Sierra Leone

☎: 229303/223498

Fax: 229366

.....,20.....

Ref: L.470

23<sup>rd</sup> January 2006.

Mr. Lovemore Munlo  
Interim Registrar  
Special Court for Sierra Leone  
New England  
Freetown

Dear Mr Registrar

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SCSL-04-14-T  
(14475-14491)

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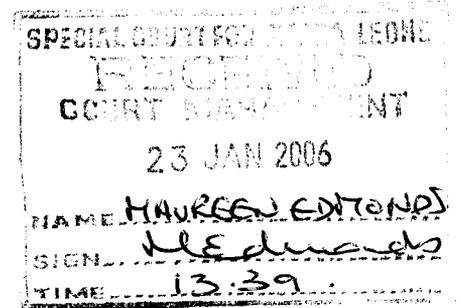
**SPECIAL COURT FOR SIERRA LEONE**

In Trial Chamber I

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

Interim Registrar: Mr Lovemore Munlo

Date: January, 2006



**THE PROSECUTOR**

**-against-**

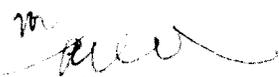
**SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA**

SCSL-2004014-T

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

I refer to the Special Court Trial Chamber 1's Order dated 19<sup>th</sup> January 2006 in respect of the above mentioned matter and I enclose herein seven (7) copies each of the Attorney-General and Minister of Justice's response to the application made by Moinina Fofana and Samuel Hinga Norman as ordered for service on the interested parties.

I thank you for your continued cooperation.

  
F. M. Carew  
ATTORNEY-GENERAL and  
MINISTER OF JUSTICE

Encls.

## SPECIAL COURT FOR SIERRA LEONE

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In Trial Chamber I

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

Interim Registrar: Mr Lovemore Munlo

Date: January 2006

**THE PROSECUTOR****-against-****SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA**

SCSL-2004014-T

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THE RESPONSE OF THE ATTORNEY-GENERAL and MINISTER OF JUSTICE TO THE APPLICATION MADE BY MOININA FOFANA FOR THE ISSUANCE OF SUBPOENA AD TESTIFICANDUM TO PRESIDENT ALHAJI DR. AHMAD TEJAN KABBAH PURSUANT TO RULE 54, RULES OF PROCEDURE AND EVIDENCE OF THE SPECIAL COURT FOR SIERRA LEONE PURSUANT TO THE ORDER OF THE SPECIAL COURT DATED 19 JANUARY 2006

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**For the Office of the Prosecutor:**

Mr James C. Johnson  
Mr Kevin Tavener  
Ms Nina Jorgensen  
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 Jabbie  
Ms Clare DaSilva  
Mr Kingsley Belle

**For Allieu Kondewa:**

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

SCSL-2004-14-T

## INTRODUCTION

1. It will be recalled that sometime between 1999 and 2000, as a result of the very serious atrocities committed by both the CDF and RUF/AFRC, His Excellency President Alhaji Dr. Ahmad Tejan Kabbah (herein after referred to as “The President”) communicated with the Secretary-General of the United Nations in New York regarding the need to establish a Special Court for Sierra Leone to ensure that all persons considered to bear the greatest responsibility for such atrocities be brought to justice
2. As a result of the said communication between The President and the Secretary-General of the United Nations, an Agreement was entered into between the United Nations and the Government of the Republic of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14<sup>th</sup> August 2000 (hereinafter referred to as “the Agreement”)
3. That following the said Agreement entered into on the 16<sup>th</sup> January 2002, Parliament of the Republic of Sierra Leone ratified it on the 29<sup>th</sup> March 2002 hereinafter referred to as The Special Court Agreement, 2002 (Ratification) Act 2002 as amended by The Special Court Agreement 2002 (Ratification) (Amendment) Act 2002, this Honourable Court was established.

## BACKGROUND

4. The President was elected as President of the Republic of Sierra Leone in 1996 and re-elected in 2002.
5. 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 1991 (Act No.6 of 1991)
6. That as a result of the rebel incursion and the activities of the CDF, AFRC/RUF, The President was obliged for security reasons to remove himself from the seat of Government in Freetown to a neighbouring State, that is, the Republic of Guinea.
7. That on the 15<sup>th</sup> of December 2005 an Application by Motion entitled “The Prosecutor against Samuel Hinga Norman, Moinina Fofana, and Allieu

Kondewa for issuance of a subpoena Ad Testificandum to The President pursuant to Rule 54 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

8. That in the said Motion of Moinina Fofana he alleged, inter alia, that The President is in possession of certain information highly relevant to the charges contained in the prosecution's indictment against Moinina Fofana. That The President's failure to testify in these proceedings would deprive the Trial Chamber of the evidence necessary to arrive at a comprehensive and considered decision in the instant case.
9. The applicant further submitted that The President is in a position to provide evidence relevant to the charges contained in the prosecution's indictment against Fofana and his co-defendants vide paragraphs 3, 13 and 14 of Fofana's motion.
10. The applicant also alleged in the said motion that The President's testimony would serve to enlighten the Trial Chamber on the activities of the CDF during the periods listed in the prosecution's indictment as well as to provide evidence concerning the crucial issue of command responsibility, a theory of liability with which all three accused persons have been charged.
11. The Attorney-General and Minister of Justice's response to the motion of Moinina Fofana is for the said application to be dismissed.

## **ARGUMENTS AND SUBMISSIONS**

12. The Attorney-General and Minister of Justice has had the opportunity of reading the prosecution's response to Fofana Motion for Issuance of subpoena Ad Testificandum to The President, and The Attorney-General and Minister of Justice respectfully adopts the arguments, submissions and authorities therein contained.
13. In addition to the said arguments, submissions and authorities referred to in the said Prosecution's response to Fofana Motion The Attorney-General and Minister of Justice respectfully makes the following submissions:-
14. The Attorney-General and Minister of Justice submits that the allegations contained in paragraphs 3, 13 and 14 of Fofana's Motion 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.

In R. V. Baines and Another (1908 – 1910) 1. ALL. E.R. (Reprint) page 328, an Order granted in the lower Court for the issuance of a subpoena for a different purpose, a purpose which was held to be immaterial (irrelevant) to the charges in the indictment before the Court was set aside.

Again, in Senior and Others v Holdsworth (1975) 2. ALL. E.R. 1009, where there was a break up of a popular music festival, and cameramen from ITN made films during the several days of the festival, an Order which had earlier been made in the Lower Court issuing a subpoena to the producer was set aside on the grounds that the producer had no knowledge of the festival.

It is submitted that whatever evidence The President may give if the requested subpoena is issued, it is unlikely that such evidence would have a direct and important place in the determination of the issues before the Trial Chamber. The mere assertion that the evidence may have some bearing would not be enough.

In Morgan v. Morgan (1977) 2. ALL. E.R. 515 in a divorce proceeding where a subpoena had been issued by a Lower Court to a father to disclose his family income, the said subpoena was set aside on the grounds given in Senior's case above by Lord Denning MR and further extended by the Court of Appeal stating that if the judge considers that the request is irrelevant, or fishing, or speculative, or oppressive he should refuse it.

It is submitted that the subpoena requested in this case is irrelevant, fishing, speculative and oppressive and should be refused by this Honourable Trial Chamber.

In R V Agwuna Volume 12 West African Court of Appeal (WACA) page 456 where a witness summons was served upon the Governor and the Chief Secretary to give evidence in a seditious libel case, it was held at page 457 that a person served with a subpoena had a right to apply to the Court to set it aside on the ground that such subpoena is not bona fide required for the purpose of obtaining any evidence that can be relevant and the court upon such application will interfere when it is satisfied that the process is being used for indirect or improper objects. It was further held that the issue of the subpoena on the Governor and the Chief Secretary in that case was an abuse of the process of the Court. It was further opined that the rule confining evidence to the point at issue excludes evidence of collateral facts which are incapable of affording any reasonable presumption of the matters in dispute as such evidence tends to draw away the mind of the trial Court from the points at issue and to excite prejudice.

It is further submitted that the application for the issuance of a subpoena Ad Testificandum to The President, is not bona fide but meant to embarrass the President and cause mischief and therefore an abuse of the process of the Trial Chamber as provided for under Rule 54 of the Rules of this Honourable Trial Chamber.

15. Further, it is submitted that even if this Honourable Trial Chamber were to disagree with the above stated submissions and order the issuance of the subpoena prayed for in Fofana motion, it is submitted 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. This is by virtue of section 48(4) of the Constitution of Sierra Leone Act No. 6 of 1991 as well as the decision of the ICTY Appeals Chamber in the Prosecutor Vs. Blaskic IT-95-14, Appeals Chamber.

In that case, it was held that the Court “cannot issue a subpoena in the sense of an injunction accompanied by the threat of penalty – to States or State actors, as it does not possess any power to take enforcement measures against States”. It is

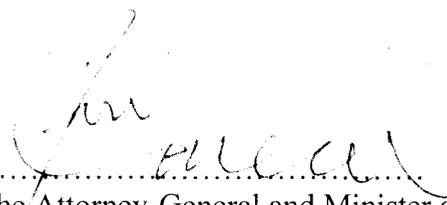
submitted that The President is the embodiment of the State of Sierra Leone and ex hypothesi, a subpoena cannot issue against him and a penalty cannot be ordered and enforced against him were he, as Head of State, to disobey it. It is submitted that this phenomenon cannot be implied in the provisions of Rule 8 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone and sections 17 and 20 of the Special Court Agreement, 2002, (Ratification) Act, 2002.

### **CONCLUSION**

16. In the light of the aforementioned reasons and submissions, the Attorney-General and Minister of Justice submits that Fofana motion should be denied.

Filed in Freetown,

January, 2006.

  
.....  
The Attorney-General and Minister of Justice

## **ATTORNEY-GENERAL'S LIST OF AUTHORITIES**

### **A STATUTES:**

- (1) The Constitution of Sierra Leone 1991 Act No. 6 1991
- (2) The Special Court Agreement 2002 (Ratification) Act 2002, Act No. 7 of 2002
- (3) The Special Court Agreement (Ratification) (Amendment) Act 2002, Act No. 16 of 2002

### **B. DECIDED CASES**

- (a) R v Baines and Another (1908 – 1910) 1. ALL. E.R. Reprint page 328
- (b) Senior and Others v Holdsworth (1975)2 ALL. E.R. 1009
- (c) Morgan v Morgan (1977)2 ALL E.R. 515
- (d) R V Agwuna Volume 12 West African Court of Appeal (WACA) page 456
- (e) Prosecutor Vs Blaskic IT-95-14, Appeals Chamber

### **C. RULES OF PROCEDURE AND EVIDENCE**

Rules of Procedure and evidence of the Special Court Rule 54 Amended 14<sup>th</sup> May 2005.

## 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: January, 2006

**THE PROSECUTOR****-against-****SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA**

SCSL-2004014-T

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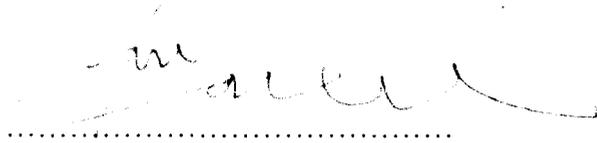
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**CONCLUSION**

- 16. In the light of the aforementioned reasons and submissions, the Attorney-General and Minister of Justice submits that the Samuel Hinga Norman Motion should be denied.

Filed in Freetown,

January, 2006.



.....  
The Attorney-General and Minister of Justice

# ATTORNEY-GENERAL'S LIST OF AUTHORITIES

14627

## **A** STATUTES:

- (1) The Constitution of Sierra Leone 1991 Act No. 6 1991
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Rules of Procedure and Evidence of the Special Court Rule 54 Amended 14<sup>th</sup> May 2005.