SCSL-04-14-T
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SPECIAL COURT FOR SIERRA LEONE

Trial Chamber 1

Before:	**Justice Pierre Boutet, Presiding** **Justice Bankole Thompson** **Justice Benjamin Mutanga Itoe**
Interim Registrar:	**Mr Lovemore Munlo**
Date:	**30 January 2006**

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

SCSL-2004-14-T

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

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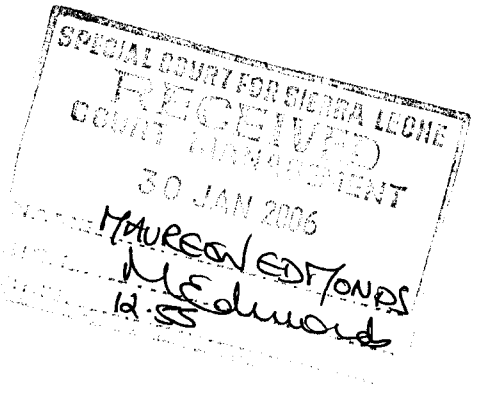

I. INTRODUCTION

1. Counsel for Samuel Hinga Norman (the "Defence") submits its reply (the "Reply") to the 'Response of the Attorney-General and Minister of Justice to the Applications Made by 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 the Attorney-General's objections to the issuance of a *Subpoena ad Testificandum* on the basis that: i) the anticipated testimony has no material relevance in proving the accused's innocent or guilt in respect of the charges contained in the indictment against him[2]; and ii) that the subpoena requested is fishing, speculative and oppressive and an abuse of process[3] are completely without merit.

3. The Attorney General also attempts to argue that the President is somehow above the law and cannot be compelled to testify as President and Head of State.[4] The Defence submits that the President does not enjoy any immunity that would prevent him from giving testimony before the Special Court.

4. For these reasons, the Defence submits that the arguments of the Attorney General should be dismissed and its Motion for Issuance of *Subpoena ad Testificandum* be granted.

II. SUBMISSIONS

5. The Defence adopts, by reference, the arguments advance in its previously submitted Reply to the Prosecution Response[5]. The Defence additionally adopts, by reference, the arguments advanced by counsel for the Second Accused as outlined in

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[1] Prosecutor v. Norman et al., SCSL-2004-14-T-541, 23 January 2006.
[2] *See* Response, ¶ 14
[3] *Ibid.*
[4] *Ibid.* ¶ 15
[5] Prosecutor v. Norman et al., SCSL-2004-14-T-532, 16 January 2006.

paragraphs 10-27 of its "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 (the "Fofana Reply")[6]. In addition to those arguments, submissions and authorities, the Defence makes the following additional submissions in this Reply.

The President is a Material Witness

6. The Attorney General suggests that because the President was "outside of the jurisdiction in a neighbouring country", his anticipated evidence has "no material effect and relevance in proving the accused's innocence or guilt in respect of the charges contained in the indictment."[7] This is factually incorrect and provides no legal basis for objecting to the issuance of a *Subpoena ad Testificandum.*

7. As outlined in our Reply to the Prosecution's Response, the anticipated evidence of the President goes to the core of issues set out in the indictment, particularly with respect to paragraphs of 13, 14, 15, 18, 20, 21[8]. Further, it is anticipated that his evidence will address, amongst other issues, the creation of the CDF itself and the appointment of the First Accused as its National Coordinator. For the Attorney General to suggest that the President's anticipated evidence has no relevance is completely without substance and the Attorney General and provided absolutely no evidence to substantiate such an objection. The fact that the President may have been outside of Sierra Leone for a limited period of time also has no relevance whatsoever to the question of whether he possesses relevant information with respect to the structures of the CDF and his involvement in that organisation. Quite conversely, in a number of respects it is this particular knowledge that the President has of events that occurred while he was in exile in Guinea that is one of the areas of material importance to the Defence.

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[6] Prosecutor v. Norman et al., SCSL-2004-14-T-546, 26 January 2006
[7] See Response, ¶ 14.
[8] See n.5, ¶¶ 20 – 24.

8. Further, a number of statements contained in the Response itself reinforces the materiality of the President's anticipated evidence.

9. Firstly, the Attorney-General states that "as a result of the very serious atrocities committed *by both the CDF and RUF/AFRC*"[9], the President communicated with the Secretary General of the United Nations regarding the need to establish a Special Court.

10. This assertion is belied by the "Fifth Report of the Secretary General on the United Nations Mission in Sierra Leone"[10] which states:

> In a letter addressed to me dated 12 June, President Kabbah requested United Nations assistance to establish a special court to try Foday Sankoh and other senior members of the *RUF* "for crimes against the people of Sierra Leone and the taking of United Nations peacekeepers as hostages".

11. Secondly, the Attorney General states that it was the result of both the rebel incursion and the activities of the CDF/AFRC/RUF, that the President was obliged for security reasons to remove himself to the Republic of Guinea.[11] Again, this statement is in direct contradiction with numerous other sources of evidence, including testimony in the Special Court[12] and indeed, previous statements of the President himself[13] where the role of the CDF in restoring the government of President Kabbah has been undisputed.

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[9] Response, ¶ 1 (emphasis added).
[10] UN Doc. S/2000/751, 31 July 2000, ¶ 9 (emphasis added).
[11] Response, ¶ 6.
[12] For example the testimony of the First Accused on January 26, 2006 at 10:49 am, pg 25, line 20 Transcript states:

> A. This message having been conveyed, His Excellency said --His Excellency Dr Tejan Kabbah, President of Sierra Leone said, "Chief, that is where we need the support of the hunters of Sierra Leone to support their people in rejecting the military government."
> Q. Who said this?
> A. The President, Dr Alhaji Ahmad Tejan Kabbah.

[13] See for example, "Address of President Kabbah at Siaka Stevens Stadium, Freetown, March 10, 1998" where the President stated:

> I urgently looked for help from friendly countries and organisations, particularly ECOWAS, to rescue you and our country from the hands of those mutinous rabbles and their collaborators. It is with a deep sense of gratitude that I say to you that ECOMOG came at once to our rescue on being mandated to do so. As you have seen, it is because of the high professionalism of these magnificent men and the gallant efforts of our Civil Defence Forces that we are here today to restart our lives. Our grateful thanks go to all of them.

12. There is evidence to demonstrate that the President was regularly in communication with the First Accused when the President was in exile in Guinea. This only begs the question: If he left the country because of the CDF, as is stated in his submission, why was he constantly in communication with the Coordinator of the CDF, the First Accused, over the conduct of the war? Moreover, if he left the country because of the CDF, why did he meet several times with the National Coordinator over the conduct of the war and provide money and material to fight the war? Answers to such questions are material to the Defence of the First Accused.

13. Thus, the Attorney General's submissions to this court have contradicted his own previous assertions including those to the U.N. Secretary General on 12 June 2000 and other public statements and well as prior testimony in this case. At a very minimum, these inconsistencies in the Response, which go to core issues in the of the Indictment, reveal the materiality of the President's anticipated testimony. Regardless the materiality of the anticipated evidence of the President extends beyond this and it is submitted that it has been sufficiently demonstrated by the Defence.

The Subpoena is not Speculative, Fishing Nor an Abuse of Process

14. In his response, the Attorney General states that the "subpoena requested is irrelevant, fishing, speculative and oppressive and should be refused by this Honourable Trial Chamber." To reach this conclusion the Attorney General relies of four common law cases. The Defence submits that that Attorney General has failed to demonstrate the relevance or applicability of this case law.

15. It is well-settled law throughout common law jurisprudence that the parties to a case, particularly a criminal case, have the right to produce "every man's evi-

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Available at http://www.sierra-leone.org/kabbah031098.html.

dence."[14] That has been stated for at least 260 years in the common law tradition. For example it has been stated that:

> Duty, not privilege, lies at the core of this problem-the duty to testify, and not the privilege that relieves of such duty. In the classic phrase of Lord Chancellor Hardwicke, 'the public has a right to every man's evidence'.[15]

16. The Defence submits that in requesting the issuance of a subpoena it is merely acting within its prerogative as defence counsel to ensure that its client receives a fair trial in as transparent a manner as possible. There is no basis whatsoever to support the contention made that the Motion for the issuance of a subpoena is irrelevant, fishing, speculative or oppressive. The Defence filed its motion for the issuance of a subpoena based on extensive investigations, as well as after months of Prosecution testimony, and review of matters of public record including speeches of the President and documentation such as the Truth and Reconciliation Report. This is hardly a fishing expedition and to characterise it as such is baseless. Further, the Attorney General has utterly failed to demonstrate how the President could be said to be oppressed by attending the Special Court to give testimony.

17. The stark accusation that this request for issuance of a subpoena is an abuse of process is disturbing, to say the least. This serious and unfounded statement deserves no reply from the Defence.

The President of Sierra Leone is not above the law and the processes of this Court.

18. The Attorney General has argued 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"[16]. It is further suggested that the President

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[14] *Society of Lloyd's v. Clementson (No.2) Times,* C.J.Q. 1996, 15(JUL) 245, Int. I.L.R. 1996, 4(5), G85-87 (29 February 1996).
[15] Debate in the House of Lords on the Bill to Indemnify Evidence, 12 Hansard's Parliamentary History of England, 675, 693, May 25, 1742, quoted in 8 Wigmore on Evidence (3d ed.) p. 64, s 2192.
[16] Response ¶ 15.

somehow enjoys immunity from process as the "President is the embodiment of the State of Sierra Leone and ex hypothesi, a subpoena cannot be issued against him..."[17]

19. The Defence respectfully submits that neither of these propositions are correct.

20. In the first instance, the President is compellable because the Special Court *is* empowered with the ability to enforce its directives issued pursuant to Rule 54. The Attorney General is quite correct to suggest that a subpoena requires a judicial penalty to enforce it. However, the Response disregards the fact that the Special Court Agreement, 2002 (Ratification) Act, No. 7 of 2002 (the "Ratification Act") and the Rules of Procedure and Evidence of the Special Court provide enforcement mechanisms to the judges equivalent to the mechanisms available to a Judge, Magistrate or Justice of the Peace of a Sierra Leone court.[18]

21. There is no legal basis for the Attorney General to suggest that "this phenomenon [enforcement of an order] cannot be implied in the provisions of Rule 8 of the Rules of Procedure and Evidence of the Special Court Sierra Leone and sections 17 and 20 of the Special Court Agreement, 2002, (Ratification) Act, 2002."[19] The law is clear.

22. The Attorney General has also invoked Art. 48(4) of the Sierra Leone Constitution[20] of 1991 as a further basis to suggest that the President is not compellable as a witness. Article 48(4) states:

> While any person holds or performs the functions of the office of President, no civil or criminal proceedings shall be instituted or continued

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[17] Ibid.

[18] Article 20 of the Ratification Act states:

> 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 court.

Article 21(2) of the Ratification Act should also be noted. It states:

> Notwithstanding any other law, every natural person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court.

[19] Response, ¶ 15.

[20] Response, ¶ 15, citing Section 48(4) of the Constitution of Sierra Leone, (Act No. 6 of 1991).

against him in respect of anything done or omitted to be done by him either in his official or private capacity.

23. A subpoena is not a "civil or criminal proceeding[ ] instituted or continued against him" under any reasonable interpretation of this provision. Therefore Article 48(4) has no application. Clearly, the President does not have any immunity under the Constitution of Sierra Leone from appearing as a factual witness before the Special Court.

24. The Attorney General further invokes jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") to suggest that the President is immune from process. Specifically the Attorney General relies on the ICTY Appeals Chamber decision in *Prosecutor v Blaskic*.[21]

25. The Defence submits that the Attorney General cannot rely on the *Blaskic* decision to support his contention as the *Blaskic* Decision was concerned solely with the production of documents.[22] In that instance, the subpoena was directed to the Republic of Croatia and to its incumbent Defence Minister to produce documents. As stated in the later Appeals Chamber *Krstic* decision:

> The Blaskic Subpoena Decision did not have to determine, and it was not directly concerned with, the issue of whether a subpoena could be issued to a person 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 functions. The justification for a 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 not apt in relation to a State official who can

[21]Response, ¶ 15, citing *Prosecutor v. Blaskic*, IT-95-14-AR108*bis*, 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").

[22] See, Prosecutor v. Slobodan Milosevic, IT-02-54-T, Trial Chamber, 'Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder', 9 December 2005, ¶ 29 "This majority view in Krstic distinguished the Blaskic Appeal Decision (requiring a binding order to the state to compel the production of state documents) on the basis that there is an inherent distinction between documents and testimony. ..[*w]itness testimony is necessarily specific to that particular individual* and that a subpoena addressed to that individual is appropriate."

> give evidence of something he saw or hear (otherwise, perhaps, than from a State document).[23]

26. Thus, the *Blaskic* decision focused on the functionality immunity[24] of a state official called upon to produce state documents pursuant to a subpoena duces tecum. This decision did not address the validity of a *subpoena ad testificandum* directed to a state official requested to give evidence of what he heard or saw during the time when he was a state official and exercising official functions.

27. The more applicable case to the present circumstance is the *Krstic* decision. In dismissing the application of the *Blaskic* decision to a subpoena ad testificandum to a state official, the Appeals Chambers stated:

> Nothing which was said by the Appeals Chamber in the Blaskic Subponea 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.[25]

28. *The Krstic,* Decision is clear: when a state official might contribute material evidence to the proceedings, he or she can be compelled to testify. There is no immunity.

29. Further, under Article 1 of the Statute of the Special Court, it is specifically contemplated that "leaders" do not enjoy immunity from prosecution.[26] A fortiori, if a

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[23] See Prosecutor v. Krstic, IT-98-33-A, Appeals Chamber, 'Decision on Application for Subpoenas", 1 July 2003 (the "Krstic Decision"), ¶ 24.

[24] The reasoning of the Appeals Chamber in the Blaskic Decision is that, as the State official has acted on behalf of the State, only the State can be responsible for the acts of that official, and that, as a corollary, the State may demand for its States officials (where their acts are attributed only to the State) a "functional immunity from foreign jurisdiction"). All of the authorities which the Appeals Chambers cited in support of the functional immunity upon which it relied related to immunity from prosecution.

[25] Ibid, ¶ 27.

[26] This lack of immunity has been recognized by the Supreme Court of Sierra Leone in *Sesay, Kondewa, Fofana v President, Registrar, Prosecutor of the Special Court and the Attorney General and Minister of Justice*, SC No. 1/2003, 1 October 2005 where the Supreme Court stated, "In addition a majority of academic commentary supports the view that an international criminal tribunal or court, may exercise jurisdiction over a serving head of state and that such a person is not entitled to claim immunity under customary international law in respect of international crimes" (pg. 15).

"leader" has no immunity from prosecution, then surely a "leader" cannot have immunity from being subpoenaed.

III. CONCLUSION

30. The Defence submits that the Attorney General has failed to provide any legal or factual basis that would prevent the President from appearing as a witness in the CDF case. As a result the Defence requests that the Chamber issue the requested subpoena.

Court Appointed Counsel for Samuel Hinga Norman

for Dr. Bu-Buakei Jabbi

INDEX OF AUTHORITIES

Constitutive Documents

1. Special Court Agreement, 2002 (Ratification) Act, 2002, Section 20

2. SCSL Rules of Procedure and Evidence

Jurisprudence

3. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-541, '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 a Subpoena ad Testificandum to President Ahmed Tejan Kabbah', 23 January 2006.

4. *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

5. *Prosecutor v. Norman et al.*, SCSL-2004-14-T-546, 'Fofana Reply to the Response of the Attorney General to the Fofana Motion for Issuance of a Subpoena ad Testificandum to President Ahmed Tejan Kabbah', 26 January 2006

6. *Prosecutor v. Blaskic*, IT-95-14-AR108*bis*, 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

7. *Prosecutor v. Krstic*, IT-98-33-A, Appeals Chamber, 'Decision on Application for Subpoenas", 1 July 2003

8. *Sesay, Kondewa, Fofana v President, Registrar, Prosecutor of the Special Court and the Attorney General and Minister of Justice*, SC No. 1/2003, 1 October 2005

9. *Society of Lloyd's v. Clementson (No.2) Times,* C.J.Q. 1996, 15(JUL) 245, Int. I.L.R. 1996, 4(5), G85-87 (29 February 1996).

Other Authorities

10. UN Doc. S/2000/751, 31 July 2000

11. Wigmore on Evidence (3d ed.)

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