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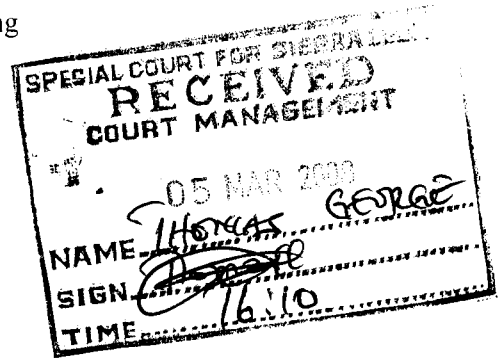
**SPECIAL COURT FOR SIERRA LEONE**  
FREETOWN – SIERRA LEONE

**TRIAL CHAMBER I**

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

Registrar: Mr. Herman von Hebel

Date filed: 5<sup>th</sup> March 2008



**THE PROSECUTOR**

v.

**Issa Hassan Sesay**  
**Morris Kallon**  
**Augustine Gbao**

Case No. SCSL-04-15-T

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**PUBLIC**

**SESAY DEFENCE REPLY TO PROSECUTION RESPONSE TO  
APPLICATION FOR THE ISSUANCE OF A SUBPOENA TO  
H.E. ALHAJI DR. AHMAD TEJAN KABBAH,  
FORMER PRESIDENT OF THE REPUBLIC OF SIERRA LEONE**

---

Office of the Prosecutor  
Mr. Peter Harrison  
Mr. Reginald Fynn  
Mr. Charles Hardaway  
Mr. Vincent Wagona

Defence Counsel for Issa Hassan Sesay  
Mr. Wayne Jordash  
Ms. Sareta Ashraph

Defence Counsel for Morris Kallon  
Mr. Shekou Touray  
Mr. Charles Taku  
Mr. Kennedy Ogetto  
Mr. Lansana Dumbuya

Defence Counsel for Augustine Gbao  
Mr. John Cammegh  
Mr. Scott Martin

## INTRODUCTION

1. On the 28<sup>th</sup> February 2008 the Sesay Defence filed its application<sup>1</sup> under Rule 54 of the Rules of Procedure and Evidence, for the issuance of a subpoena to His Excellency Alhaji Dr. Ahmad Tejan Kabbah to compel him to appear as a witness in the RUF trial and to meet with the Defence in advance of his proposed testimony (“The Application”). On the 4<sup>th</sup> March 2008 the Prosecution filed its response<sup>2</sup> (“The Response”). Herewith the Defence files its Reply.

### *Alleged Procedural Bars*

2. The Prosecution’s overall objections ought to be given little or no weight. This is amply demonstrated by the Prosecution’s attempt to elevate procedural issues above the substantive merits of the application. The Prosecution’s proposition that the Trial Chamber ought to consider an application to modify the Sesay Defence witness list; consider an extension of time for the closing of the case for the First Accused, or be asked to grant relief from the orders that the identity of a witness be disclosed 42 days before they testify; and that a witness must be placed on a list of upcoming witnesses at least 14 days before the witness testifies, *before* considering the substantive merits of the motion<sup>3</sup> ought to be roundly rejected.
3. It ought to be trite law and obvious to any party that it would be highly improper (and possibly dangerous) to name and list as a defence witness any person who had not consented to this course of action. This clearly applies – and even more so in the case of a former president of the Republic of Sierra Leone who arguably had actively avoided attempts to obtain his cooperation to become a witness for the Sesay Defence. Not only would this have misled the Court and the parties but it would also have been impossible for the Sesay Defence to provide a *bona fides* summary of the testimony or place the person into a genuine witness list.
4. Moreover as the Prosecution has previously asserted (i) persons who have not indicated their willingness to testify would not be entitled to protection under the applicable protective

<sup>1</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-1011, “Sesay Defence Application for the Issuance of a Subpoena to H.E. Alhaji Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone”.

<sup>2</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-1023, “Prosecution Response to Sesay Defence Application for the Issuance of a Subpoena”, 4 March 2008.

<sup>3</sup> *Id.*, para. 6

measures Decision of November 2006<sup>4</sup> and also (ii) to meet the Rule 69 test of “exceptional circumstances” an applying party must establish “sufficient facts supporting the subjective fears of witnesses. [and] must also provide evidence from other sources indicating an objective basis for assessing whether a threat to the witnesses’ security exists”<sup>5</sup>. The Prosecution in the Response fails to explain how this test is properly satisfied in the case of a proposed witness who has refused to meet the Defence.

5. The Prosecution also argues that the merits of the Application should not be considered because the Trial Chamber has ordered the Defence case for the First Accused to be closed on or before Thursday, 13<sup>th</sup> March 2008 and that there has been a lack of due diligence on the part of the Defence. This is nonsense. As acknowledged by the Prosecution, in order to satisfy the Rule 54 necessity requirement, and in order to go against the traditional preference for cooperation, the moving party must meet “a certain standard in ... explaining how and why the anticipated evidence, if adduced, would assist that party’s case, and why the anticipated evidence could not be obtained without a subpoena”.<sup>6</sup> In the case of a sitting President, and latterly as a former President, this required time and substantial proof of efforts made to secure the witness’ cooperation and to avoid recourse to judicial intervention. These efforts (both to secure the proposed witness’ testimony and to obtain the evidence from others) – over a lengthy period of time – ought not now be unfairly categorised as a lack of due diligence in bringing this “last resort” application.

#### MERITS

6. The Prosecution’s arguments fail to recognise that at the time of his arrest Foday Sankoh was the Vice President of the Republic of Sierra Leone. In the prevailing circumstances of his arrest in May 2000 this could not have been the actions of the Sierra Leone police or the judiciary but must have been sanctioned and ordered by the executive, namely then-President Kabbah. In other words, this means that the then-President Kabbah must be best placed – if not uniquely placed – to give direct evidence about the reasons and circumstances of the arrest and the removal of all Sankoh’s privileges including his right to communicate to others

<sup>4</sup> See *Prosecutor v. Sesay et al.*, SCSL-04-15-734, “Prosecution Response to Sesay Defence Motion for Immediate Protective Measures for Witnesses”, 12 March 2007, para. 11, referring to *Prosecutor v. Sesay et al.*, SCSL-2004-15- 668, “Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, 30 November 2006.

<sup>5</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-734, “Prosecution Response to Sesay Defence Motion for Immediate Protective Measures for Witnesses”, 12 March 2007, para. 6.

<sup>6</sup> The Response, para. 16.

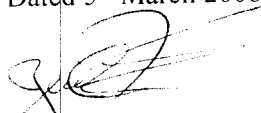
in the RUF leadership. Dr. Kabbah will know, and will have been at the forefront, of the attempts to excommunicate Foday Sankoh from the *de jure* Field Commander Mr. Sesay in order to commence the process of seeking a new leadership for the RUF to both effect the release of the UNAMSIL troops and to ensure that the RUF were brought through the disarmament process.<sup>7</sup> Dr. Kabbah will thus know of the consequential and comprehensive severing of links between the government/UNAMSIL and the RUF which made it impossible for Mr. Sesay to arrange for the immediate release of the UNAMSIL troops.

7. It is reasonable to infer that Dr. Kabbah has evidence that would materially assist Mr. Sesay's case. The evidence would fatally undermine the Prosecution's case. In short, it would provide powerful support for the Defence case: that Mr. Sesay was doing his best to protect the detained UNAMSIL troops and reinstate the stalled disarmament process.

#### REQUEST

8. The merits of the Prosecution's objections must be seen within context: both as a party that *never* fails to oppose Defence applications/requests, and that obtain clear benefit from the failure of the Defence to obtain important evidence.
9. The Defence reiterates its request for an order that Dr. Kabbah be compelled to attend for an interview and to testify. In the event that Dr. Kabbah was to be called to testify, any delay would be limited to approximately three hours of court room time and, in the circumstances, would be fair to the Accused and in the interests of justice.

Dated 5<sup>th</sup> March 2008

  
Wayne Jordash  
Sarita Ashraph

<sup>7</sup> See Annex A: UNAMSIL Press Briefing – Wednesday 17<sup>th</sup> May 2000.

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## LIST OF AUTHORITIES

### Decisions

*Prosecutor v. Sesay et al.*, SCSL-2004-15- 668, “Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, 30 November 2006.

### Motions

*Prosecutor v. Sesay et al.*, SCSL-04-15-734, “Prosecution Response to Sesay Defence Motion for Immediate Protective Measures for Witnesses”, 12 March 2007.

*Prosecutor v. Sesay et al.*, SCSL-04-15-1011, “Sesay Defence Application for the Issuance of a Subpoena to H.E. Alhaji Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone”, 28 February 2008.

*Prosecutor v. Sesay et al.*, SCSL-04-15-1023, “Prosecution Response to Sesay Defence Application for the Issuance of a Subpoena”, 4 March 2008.

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**CONFIDENTIAL ANNEX A**

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## UNAMSIL Press Briefing - Wednesday 17 May 2000

*The following is a near-verbatim transcript of a briefing by David Wimhurst, UNAMSIL Spokesman*

**David Wimhurst:** First of all, as you all know by now, Mr. Foday Sankoh the leader of the RUF was apprehended overnight. United Nations was in no way involved in his apprehension. He is currently in the custody of the Sierra Leonean Government in a secure location. This morning the Special representative of the Secretary General, Ambassador Adeniji met with President Kabba to discuss this latest development. Secondly, early mid last evening in Port Loko, the second Nigerian Battalion and the SLA engaged the RUF over a period of about two (2) hours. The RUF attacked our positions with mortars, RPG (Rocket Propelled Grenade and with small arms. There were casualties during this engagement. One NIBATT soldier is reported dead and five (5) are reported injured. Six (6) SLA are reported dead and five injured. The RUF withdrew from Port Loko but there was sporadic firing during the course of the night. Disengagement began at about 18:45 and lasted for two (2) hours yesterday. It was reported quiet this morning.

### **On the question of Detainees**

As you all know by now, ninety three (93) of our formerly detained colleagues returned to Freetown last night from Monrovia. There were eight two (81) Zambians and fourteen (14) Kenyans onboard an Illusion seventy six (76) a United Nations plane that touched down here sometime shortly before mid-night. They were all in recently good shape, they all walked off the plane, a couple of them had to be helped. There was one man on crutches who had a foot injury. Some of them had IV drips but they were in good spirits. They were wearing clothes, uniforms given by the Liberians. They went straight to medical facilities that we have set up at the Lungi airport where those who need treatment will be treated immediately. They will be debriefed. They will rest and very soon they will rejoin their units and be re-deployed in the field. The Special Representative Ambassador Adeniji met them off the plane last night, and addressed them. He praised their courage during what he said was a difficult ordeal and he encouraged them to continue to serve with honour, both their country and the United Nations Mission here in Sierra Leone. There are still forty-six (46) people released by the RUF but currently in Liberia at Foya. We understand that arrangements are being made to bring them to Monrovia today and hope also to fly them into Freetown sometime later. I don't have a schedule on that yet. This means that three hundred and fifty (350) Blue Helmets remain in the hands of the RUF and again, we at the United Nations here and at Head Quarters urged the RUF to release those remaining detainees as soon as possible. Fourthly the Indian Battalion a small party of one hundred and fifty (150) which began arriving yesterday will arrive in more force today. Six hundred (600) men are coming in on two flights and they would be arriving this evening. over the next few days, there will be a total of one thousand four hundred (1400) Indian soldiers arriving here.

- One (1) infantry Battalion
- One (1) Mechanised Unit

That will bring the total strength of this contingent up to fourteen (14). There are currently now serving in Sierra Leone some one thousand six hundred and fifty (1650) Indian Soldiers. Following this deployment of the second (2) Indian Battalion we will receive a battalion from Jordan and a Battalion from Bangladesh. Full deployment is expected sometime around the end of the month early June.

### House Keeping Rules

Finally there are very simple house keeping rules and I must insist on this. This building is the United Nations Headquarters. All Journalists who are accredited are allowed in here, for the purposes of this press briefing and to file live reports through the News Force and BBC Dish. They are not allowed to leave the lobby area or go down either of the corridors or up the stairs. You can only come in for these purposes, if you are not here to attend the briefing. If you are not here to file a report and if you're not here to see me then you must be outside the Headquarter. The British guys are also here and if they are giving a briefing obviously you can speak to them thats clear. You cannot go up to their office. If you wish to speak to them they must come down and speak to you. We do not want Journalist going up and down stairs. You are restricted to the ground floor.

### Questions and Answers

*Q. Have you yet being able to debrief the Zambians and tell us what they told you about the precise nature of how they were taken hostages.*

A. That debriefing is going on today. They arrived late last night and by midnight they were beginning to be installed in this transit facility. The debriefing will go today. So I have no information yet on that.

*Q. The president of Zambia has told CNN that one of the reasons his soldiers came here found themselves in this situation is that they were:*

1. *Poorly equipped without maps*
2. *without proper transportation*
3. *without proper support*
4. *without proper logistics and proper communications*

What is your response to that?

A. I haven't heard that report. When contingents arrive here from contributing countries, we expect them to come fully equipped and fully prepared.

*Q. What implications has the arrest of Foday Sankoh have on the remaining three hundred and fifty (350) United Nations Personnel still detained.*

A: Our position has always been clear from the beginning that the detention of Blue Helmets, Peacekeepers and Military Observer was illegal in the first place; it is still illegal as long as it continues and that all detained personnel must be released immediately.



government troops currently on the onslaught would chase the rebels up country until they get back these areas under your control?

A: That of course is a question for the government of Sierra Leone. I can only speak on behalf of the United Nations Peacekeeping Operation and what our troops are doing in Sierra Leone.

Q: You said just now that Foday Sankoh is in safe custody of the Sierra Leone Government in a secure position. The BBC made a broadcast at 11.p.m. that Foday Sankoh was airlifted in a British helicopter and taken to some secure position. what have to say on that?

A: All I can tell you, is that he is in the custody of the Government and he is in a secure location I don't have no other comments to make on that.

Q: The United Nations is pressing that the government of Sierra Leone should have faith in the Lome Peace Agreement but taken into consideration the fact that Sankoh has committed an offence that is punishable by death if found guilty by the courts of Sierra Leone. Will you feel happy to sit on the table with a criminal knowing that criminals usually have criminal tendencies and hope the Lome peace accord will succeed?

A: The Lome peace agreement was negotiated between the parties, outside the auspices of the United Nations. We came in to help the parties implement it and in the cause of that we have had dealings with Corporal Foday Sankoh as leader of the RUF. We'll once again be able to communicate with him now that he is in a secure location as to when that would be and what would be discussed. We must wait a little while the special representative has just finished meeting with the President of Sierra Leone. I will expect developments to flow from there.

Q: Have you been briefed by the government as to the circumstances leading to Foday Sankoh's arrest?

A: I think we are fairly aware of what happened to him but I am not going to comment on it. His apprehension had no United Nations involvement whatsoever.

Q: Who is now in charge of Security in Sierra Leone. UNAMSIL, government, the British or who?

A: Obviously our presence here and the existence of the government sources and the fact that there are also British forces on the ground is currently a co-operative effort. In other words we do co-operate with one another. That's essential. That it is the legitimate government of Sierra Leone which is finally responsible for the protection of the national territory. We are here with a specific mandate and we will use our troops in the appropriate way to execute that mandate as we have been doing but it is the government of Sierra Leone who has sovereign power in this.

Q: What guarantee would you give to people that UNAMSIL positions will not be attacked. Is Port Loko now safe as well as the other places that UNAMSIL is securing?

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... are safely positioned in Port Loko and we continue to remain there.

*Q: Since the whole world is anxious about this Sankoh issue. Can you let Sankoh be accessible to the press so that we ask him a few questions to clear the air?*

A: As Mr. Sankoh is in the custody of the Sierra Leone government I suggest you address that your question to them. He is in a secure location and it remains to be seen what would now develop with regards to his future, but he is in the jurisdiction of the government of Sierra Leone.

*Q: If the Sierra Leone government should decide to prosecute Foday Sankoh, will that be the end of the Lome Peace accord?*

A: The question of what the government will do is nothing I can comment on. I can only speak for the United Nations. As to the future of the Lome Peace accord that is very much up to the parties involved. If they can agree that the best way forward is to resuscitate this Lome Peace Agreement, then we will help them to implement it but it remains to be seen exactly what is going to develop in that direction. Our position is we are here to execute a mandate to help restore peace and stability to Sierra Leone, current to the mechanism of the Lome Peace Accord and we will be very vigorous in pursuing our duties in that regard, but obviously the circumstances that have taken place over the past few days do not allow us to see quite very clearly the way forward at the moment. Things have to play out over the next few days or weeks before we see where we stand.

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*Q: BBC said this morning that there were up to forty two (42) to forty six (46) casualties of the United Nations Peace Keepers. Are they the forty six (46) people you people are expecting to receive or what?*

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*Q: Could you tell us how secure it is in Freetown now that Foday Sankoh has been*

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A: All necessary steps will be taken to ensure that Freetown remains secure and free.

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- One (1) Artillery Unit plus helicopter gun ships

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*Q: The United Nations Secretary General did say that the Sierra Leone Government must be given back all their diamond and economic areas. Is this suppose to mean that the government troops currently on the onslaught would chase the rebels up country until they get back these areas under your control?*

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A: All our positions are secure but it remains to be seen whether the RUF will continue their attacks on us in Port Loko. I can't predict what they would do; nor do I suspect a new. But we are safely positioned in Port Loko and we continue to remain there.

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