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SPECIAL COURT FOR SIERRA LEONE

Trial Chamber 1

Before: **Justice Perre Boutet, Presiding**
Justice Bankole Thompson
Justice Benjamin Muntanga Itoe

Interim Registrar: **Lovemore Munlo SC.**

Date: **16 January 2006**

PROSECUTOR **AGAINST** **SAM HINGA NORMAN**
MOININA FOFANA
ALLIEU KONDEWA

Case No. SCSL-04-14-T

FIRST ACCUSED REPLY TO THE PROSECUTION RESPONSE TO NORMAN MOTION FOR ISSUANCE OF A SUBPOENA AD TESTIFANCDUM TO PRESIDENT AHMAD TEJAN KABBAH

Office of the Prosecutor

Desmond de Silva, QC
Christopher Staker
James C. Johnson
Kevin Tavener

Court Appointed Counsel for Hinga Norman

Dr Bu-Buakei Jabbi
John Wesley Hall
Alusine Sani Sesay

Court Appointed Counsel for Moinina Fofana
Victor Koppe
Arrow Bockarie
Mickiel Pestman

Court Appointed Counsel for Allieu Kondewa
Charles Margai
Yadda Williams
Ansu Laansa
Susan Wright

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INTRODUCTION

1. The First Accused replies to the Prosecution's objection to the request for the First Accused Motion to subpoena President Ahmad Tejan Kabbah is as follows:
2. The Prosecution argument, if accepted, will effectively interfere with the ability of the defence to have a meaningful opportunity to defend against these serious charges potentially in violation of Art. 17(4) of the Statute of the Special Court of Sierra Leone, which is a restatement of Art. 14(3) of the International Covenant on Civil and Political Rights.
3. The Prosecution has no standing to object to a subpoena to a third party, it has no control over whether a third party whose name has come up during this trial as a potential material witness shall be called as a witness, and its objection casts a pall over the proceedings because it simply is not the Prosecution's business to be concerned with whom the defence subpoenas. The witnesses can certainly object and move to quash; the Prosecutor cannot.

II. ARGUMENT

A. The Prosecution argument violates the right of the defence to due process of law and to prepare without interference and in violation of "full equality"

5. Art. 17(4) of the Statute of this Court provides as follows:

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:

a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
c. To be tried without undue delay;
d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
g. Not to be compelled to testify against himself or herself or to confess guilt.

6. Read as a whole, this statute, which incorporates the International Covenant on Civil and Political Rights is tantamount to a list of fundamental procedural rights of persons accused of crime in this Court under international law. They are fundamental to the ability to put on a defence with the aid of counsel, and put on a defence that his not cleared in advance through the good graces of the Prosecution. The defence case is neither to be investigated nor conducted at the pleasure or under the oversight of the Prosecution.
7. The Prosecution certainly did not have to clear all its investigative requests and witnesses through the defence before it issued subpoenas. That means, in full equality, that the defence does not have to clear its subpoenas through the Prosecution. Statute, Art. 17(4)(d); International Covenant, Art. 14(3)(d). Moreover, the Prosecution has had virtually unlimited access to funds to investigate, has a legion of prosecutors and investigators with vehicles of their own to fan out and collect evidence and witnesses. In any normal situation, the prosecution would not even find out a subpoena to gather evidence for trial, just like the defence was never privy to what the Prosecution was doing to prepare for trial. One would be certain that the Prosecution would be the first to complain if the defence had a say in who it could subpoena for trial. and how it would be done.
8. To do so interferes with the First Accused's right to counsel for his defence. Statute, Art. 17(4)(d); International Covenant, Art. 14(3)(d).
9. The right to put on defence is a fundamental human right, recognized in all civilised jurisdictions and legal systems, and Prosecution efforts to interfere with that right deny the accused person due process of law and the ability to summon witnesses in his own behalf. Statute, Art. 17(4)(e); International Covenant, Art. 14(3)(e). Permitting the Prosecution to object to a subpoena that does not involve it violates due process.

B. The Prosecution lacks standing to object to a defence subpoena to a third party

10. The Prosecution simply lacks standing to have any say in the issuance of this subpoena.

11. The settled rule in the United States federal court system is that one party has no standing to interfere with another party's subpoenas to third persons. 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2459, at 41 (1995) (available on Westlaw, "FPP" database; the footnotes renumbered from 15 & 16, and the appellate authorities are in the footnotes here; there are also numerous trial court (U.S. District Court) decisions in accord):

> A motion to quash, or for a protective order, should be made by the person from whom the documents or things are requested. Ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action[[1]] unless the party claims some personal right or privilege with regard to the documents sought.[[2]]

12. We ask this court to apply that rule here. President Kabbah is the person to object to this subpoena if he believes that it is overbroad or burdensome.

13. Prosecutorial interference in the conduct of the defence is a violation of due process of law, the right to a fair trial, the right to effective assistance of counsel, the right to compulsory production of witnesses on behalf of the accused, and a denial of full equality. The Prosecution conceivably should not have been served.[3] Who the First Accused calls as a witness simply is none of the Prosecution's business.

14. In *Prosecutor v. Halialovic,* "Decision on issuance of Subpoenas," (ICTY) 21 June 2004, ¶ 6[4], but ¶ 5 states "A Trial Chamber may issue a subpoena when it is 'neces-

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[1] *See, e.g., Brown v. Braddick,* 595 F.2d 961, 967 (5th Cir. 1979).

[2] *See, e.g., In re Impounded Case,* 879 F.2d 1211 (3d Cir. 1989); *In re Antitrust Grand Jury,* 805 F.2d 155 (6th Cir. 1986).

3. The applicant seeking a subpoena must make a certain evidentiary showing of the need for the subpoena. In particular, he must demonstrate 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. To satisfy this requirement, the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relationship the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or to learn about those events, and any statements the witness made to the Prosecution or others in relation to them. The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure

sary for the purposes of an investigation or for the preparation or conduct of the trial.'" (citing ICTY Rule 54). That is precisely what the First Accused is seeking to do. Moreover, the defence in *Halialovic* was seeking to subpoena prosecution witnesses who simply refused to talk to the defence, which is the witnesses' right, but the crux of the decision was the fact that the defence would get to cross-examine the witness anyway, and the right to cross-examination mitigated the entire defence claim of need to talk to the witness. *Halialovic*, the defence submits, is not controlling because of the critical availability of cross-examination to the accused to confront the witnesses to be called. Here, there will be no cross-examination; indeed, no production of this witness at all because that is the net result if the Prosecution's position is sustained. Therefore, the critical element of that case supporting the Prosecution's assertion here in pages 2-3 of its Response is absent, and that makes the case not support the Prosecution. The *Milosevic case* trial holding cited by the prosecution in its footnote 4 can be distinguished as the prosecution was not served since it is not their business as to who the defence calls as a witness.

C. The defence has made a proper showing

15. The Prosecution cannot put an important witness out of the reach of a person accused of crime by merely asserting that the accused has not satisfied the requirements for the issuing of a subpoena.

16. The Prosecution overlooks *Prosecutor v. Krstic,* "Decision On Application For Subpoenas" (ICTY) 1 July 2003, ¶ 17:

> Where--as in the present case--an appellant seeks the issue of a subpoena to a prospective witness to be interviewed in anticipation of tendering that person's evidence on appeal pursuant to Rule 115, the legitimate forensic purpose to be established must be slightly adapted. An appellant must establish that there is a *reasonable basis* for his belief that there is a *good chance* that the prospective witness *will be able to give information which will materially assist him in relation to clearly identified issues* arising in his appeal against conviction, that the defence has been unable to obtain the cooperation of the witness, and that it is at least reasonably likely that an order would pro-

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that the compulsive mechanism of the subpoena is not abused. As the Appeals Chamber has emphasized, "[s]ubpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction."

> duce the degree of cooperation needed for the defence to interview the witness. If those matters are established, then--subject only to one general issue raised by the prosecution in the present case--the appellant would be entitled to the orders which he seeks pursuant to Rule 54. (emphasis added)

16. The failure of the defence to have President Ahmad Tejan Kabbah as a witness would be failing the duty of defence counsel to provide zealous, loyal, and effective representation to the First Accused under his rights "[t]o have adequate time and facilities for the preparation of his or her defence," "[t]o be tried without undue delay," "to defend himself or herself in person or through legal assistance," and "[t]o examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her." Statute, Art. 17(4)(b-e); International Covenant, Art. 14(3)(b-e).
17. Besides, it is entirely conceivable that President Kabbah may want to testify to the atrocities of the civil war caused by the RUF and the AFRC and *not* by the CDF, which was under his ultimate command.

III. SPECIFIC OTP OBJECTIONS

18. Assuming the Trial Chamber gets to the specific objections of the Prosecution, and without waiving our claim that the Prosecution simply lacks standing to object, we respond:
19. The prosecution submits that the Norman Motion should be denied for failing to identify sufficiently (1) how any evidence that President Kabbah would materially assist the Accused, and/or (2) the precise issues to which that evidence would relate. The Prosecution stated in paragraph 13 of the indictment that that the First Accused "was the principal force in establishing, organizing, supporting, providing logistical support, and promoting the CDF". It is stated in paragraph 755 of the TRC Report, however, that 'President Kabbah controlled the institutional workings of the CDF and the purse strings on the money it received from the central government" and the furthermore that the president ensured that he retained intimacy with the operations of the CDF during his period in exile. It is further stated in paragraph 756 that

> the President set up a regular session which began at 6.00 a.m (US Eastern Standard Time) two to three days a week, at which time we [SLAM-CDF] would make a three-way conference call between himself [Kabbah]in Conakry and Chief Hinga Norman in Monrovia. These weekly sessions lasted almost throughout the period of time the President was in exile in Guinea. The general purpose of these sessions was to allow President Kabbah and Chief Hinga Norman to discuss plans for restoration of democracy in Sierra Leone and general security issues.

20. The First Accused further states that the evidence of President Ahmad Tejan Kabbah is going to materially assist its case to rebut paragraphs 13, 14, 15, 18, 20, 21 of the indictment as it is further stated in paragraph 731 of the TRC report that

> President Kabbah's final effort to contrive institutional accountability and oversight of the CDF's operations in Sierra Leone was his establishment of a structure known as the War Council in Exile', base with him in Conakry . Chairman of this War Council was awarded to Kabbah's staunchest political ally. It comprised twelve members, all of them SLPP 'party stalwarts' and ministers or senior officials of Kabbah's government.

21. The First Accused further states that the President is a relevant and important witness to his defence as he is constitutionally the Minister of Defence who appointed his deputy minister (First Accused) as the Coordinated of the CDF and who at all material times was answerable to him throughout the period of the conflict. The whole case revolves around President Ahmad Tejan Kabbah as the President and Minister of Defence who created the Committee on National Militia/CDF to handle all policy relating to the National Militia/CDF and Chaired by the then Vice President with various ministers as members. Numerous witnesses, starting with Norman, will testify that President Kabbah was in constant contact with Norman for input on how the war should be conduct and that Kabbah helped raise money to pay for it. Kabbah knew what Norman was doing at all times because Norman was in contact with Kabbah by satellite phone. Norman was in the field, but Kabbah was either at the State House or in Conakry.
22. The Statute of the Court states that "The Special Court shall, except as provided in Subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean Law committed in the territory of Sierra Leone since 30 November 1996,

including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone." The prosecution tendered the CDF calendar which was admitted as an exhibit which shows the the President occupying the topmost position in the hierarchical structure of the CDF where the First Accused occupies the fifth position. If, for one reason or the other, the Prosecution failed to indict the President, then it is not their business for them to question the First Accused why the President's evidence is necessary for the proper execution of his defence.

23. The Prosecution's reliance on *Prosecutor v. Milosevic,* IT-02054-T, "Decision on Assigned Counsel Application for Interview of Tony Blair and Gerhard Schroder," 8 December 2005 is misplaced as simply inapplicable. These were leaders of other countries. Here we are talking about the leader of this country, the head of the CDF, and this is the CDF trial. To merely state that the First Accused wants to subpoena the head of the CDF to the CDF trial that the First Accused is Indicted in should answer the question itself.

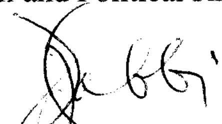
24. Finally, it runs throughout the TRC report that the atrocities in this civil war were committed by the RUF and AFRC and not the CDF under Kabbah's ultimate control as President. The testimony thus far has been thin that the CDF accused committed any war crimes, yet there has been testimony by witnesses in this trial that saw potential war crimes committed by the other side (RUF and AFRC) in this civil war. President Kabbah can certainly testify what he knows happened to the people of his country and caused by whom, and it was not the CDF.

III. CONCLUSION

25. The issue in this motion implicates no less than the right to production of evidence, the right to compel attendance of witnesses, the right to put on a defence without interference by the Prosecution, and the rights to due process of law, a fair trial, and full equality. The Prosecution has had years to investigate this case. When the defence seeks an important witness as the President, that goes to the heart of this case, the Prosecution objects. The Prosecution has no standing to object. The Government of Sierra Leone does, but it gets the opportunity to object after the subpoena

or court order is served and it then is free to move to quash the subpoena if it objects. Then we have a hearing, and the Prosecution gets to watch, but not even participate.

26. But, even if it does have standing, the defence here makes a proper showing as to why the Court should compel President Ahmad Tejan Kabbah to appear as a witness for the First Accused and to further order that the President meet with the defence of the First Accused before appearing in court to testify. Fundamental fairness and the right to pursue a defence require no less under the Statute creating this court and the International Covenant on Civil and Political Rights.



Dr. Bu-Buakei Jabbi
Court Appointed Counsel

INDEX OF AUTHORITIES

Cases:

Brown v. Braddick, 595 F.2d 961, 967 (5th Cir. 1979)

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Prosecutor v. Krstic, "Decision On Application For Subpoenas" (ICTY) 1 July 2003

Prosecutor v. Milosevic, IT-02054-T, "Decision on Assigned Counsel Application for Interview of Tony Blair and Gerhard Schroder," (ICTY) 8 December 2005

Statutes and Treaties:

Art. 17(4) of the Statute of the Special Court of Sierra Leone

Art. 14(3) of the International Covenant on Civil and Political Rights

Treatises:

9A Charles A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2459 (1995)