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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Herman von Hebel

Date filed: 4 March February 2008

THE PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC
PROSECUTION RESPONSE TO SESAY DEFENCE APPLICATION FOR THE ISSUANCE OF A SUBPOENA

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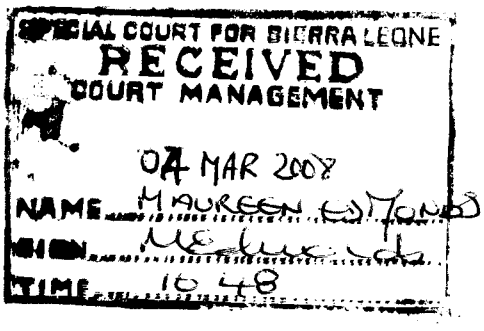

I. INTRODUCTION

1. The Prosecution files this Response to the Sesay application for the issuing of a subpoena for former President Kabbah filed on 28 February 2008 ("Application").[1]
2. The relief sought in the Application is a subpoena "to compel him [former President Kabbah] to appear as a witness in the RUF trial and to meet with the Defence in advance of his proposed testimony."[2] Although, the question posed by the Application concerns whether a subpoena should be issued, that question may be secondary to whether at this point in the trial the Application should be heard on its merits.
3. Former President Kabbah was not named in the list of witnesses produced by the Accused Sesay. To add him as a witness the Defence must, pursuant to an earlier order, show good cause: "Should the Defence seek to add any witness or to modify this list after the 16th February 2007 it may be permitted to do so only upon good cause being shown."[3] Other orders of the Trial Chamber require that the Defence must provide:
    a) a "detailed summary of each witness' testimony ... [which] should be sufficiently descriptive to allow the Prosecution and the Chamber to appreciate and understand the nature and content of the proposed testimony...."[4]
    b) "That each of the Defence teams provides to the Prosecution, the other Defence Teams and the Trial Chamber a list of the order of the next 15 witnesses which it intends to call to testify at trial, at least 14 days prior to their expected testimony;"[5] and
    c) the Defence "...shall be allowed to withhold the names or any other identifying data of its witnesses until 42 days prior to their testimony at trial."[6]
4. These orders, and the obligation that they be complied with, must be read in conjunction

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[1] *Prosecutor v Sesay et al,* SCSL-2004-15-T-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.
[2] Application, para. 1 and see also para. 33.
[3] *Prosecutor v. Sesay et al,* SCSL-04-15-T-659, "Scheduling Order Concerning the Preparation and the Commencement of the Defence Case," 30 October 2006, para. 1. This deadline was subsequently extended to 5 March 2007, pursuant to SCSL-04-15-T-705, "Decision and Order on Defence Application for an Adjournment of 16th February Deadline for Filing of Defence Material," 7 February 2007.
[4] *Ibid*, para. 1. a)(ii).
[5] *Prosecutor v Sesay et al,* SCSL-2004-15-T-746, "Consequential Orders Concerning the Preparation and the Commencement of the Defence Case," 28 March 2007, para. 7.
[6] *Prosecutor v Sesay et al,* SCSL-2004-15-T-668, "Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure," 30 November 2006, para. 25(c).

with the Trial Chamber's oral decision of 4 February 2008:

> After hearing Mr Jordash on his application, which he made in writing and filed on 4 February 2008, and which he further buttressed with oral submissions, and the Prosecution in reply, the Chamber grants Mr Jordash's application and orders as follows:
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> 1. That the Defence case for the first accused must be closed on or before Thursday, 13 March 2008.
> 2. That Mr Jordash further reduces to a strict minimum the list of Defence witnesses he intends to call.
> 3. That the reduced list of Defence witnesses to be called be filed by Mr Jordash on or before 12 February 2008, including a summary of their testimony with a view to avoiding repetitiveness and unnecessary duplication of evidence.[7] [underlining added]

5. In the CDF trial the Accused Norman had included former President Kabbah on his witness list.[8]

II. TIMING OF THE APPLICATION

6. In order for former President Kabbah to be a witness in the RUF trial the Trial Chamber would be required to: a) grant leave to add him to the witness list upon showing good cause; and b) grant an extension of time for the closing of the case for the First Accused, or grant relief from the orders that the identity of a witness must 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.
7. No applications are before the Trial Chamber seeking relief from any of the above orders. Trial Chambers do not issue orders where a *lis* has not crystallized. A motion for particulars would not be considered if filed prior to service of the Indictment, and there is no purpose to be served in determining whether a subpoena should be issued, compelling a person to be a witness and with the possibility of criminal sanctions for failing to do so, when the person is not on the witness list.
8. The facts set out in the Application show that for over three years the Accused Sesay has

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[7] RUF Transcript, 4 February 2008, p. 65.

[8] *Prosecutor v. Norman et al,* SCSL-04-14-T-499, "Defence Witness and Exhibits List for the First Accused as per the Consequential Order for Compliance of 28 November 2005 Concerning the Preparation and Presentation of Defence Case," 5 December 2005; and SCSL-04-14-T-482, "Joint Defence Materials Filed Pursuant to 21 October 2005 Order of Trial Chamber I and Request for Possible Modification Thereof," 17 November 2005.

attempted to communicate with former President Kabbah. Yet there is no explanation offered of why he waited until 14 days before the Sesay Defence case is to end before bringing an application to the Trial Chamber. Such a delay cannot be justified in the circumstances of this case, in particular, the fact that the Prosecution closed its case over 18 months ago.

9. The Application should be dismissed because the Defence has not complied with existing court orders, and the relief sought is contrary to those existing orders which have not been put in issue by either an application to vary or leave to appeal. No explanation is offered for why the First Accused did not approach the Trial Chamber after two alleged meetings with former President Kabbah were cancelled, the last one being in July 2007, over 7 months ago.[9] This is not an example of a litigant acting with due diligence. As suggested by Mr. Justice Robertson in his dissenting opinion,[10] a request from the Trial Chamber to former President Kabbah may have been all that was required of the court's process. Those comments were known to the First Accused, the matter could have been brought before the Trial Chamber as a request and could have proceeded expeditiously. To allow an effluxion of time of over 3 years and 4 months, from the time the First Accused says he first communicated with former President Kabbah to the filing of the Application, falls far short of acting with due diligence.

10. To assist the Trial Chamber the Prosecution also advances the following arguments which go to the merits of the Application.

III. THE TEST FOR ISSUING A SUBPOENA

11. Rule 54 provides that: "At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation of the trial."

12. The law developed by the Special Court for Sierra Leone ("SCSL") concerning the issuance of subpoenas has established that the applicant must "...show that the measure requested is necessary (the "necessity" requirement) and that it is for the purposes of an

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[9] Application, para. 9.

[10] See *Prosecutor v. Norman et al,* SCSL-04-14-T-689, "Dissenting Opinion of Hon. Justice Robertson on Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone," 11 September 2006, para. 35.

investigation or for the preparation or conduct of the trial (the "purpose" requirement)."[11] In addition, the applicant must show, as a preliminary requirement, that the proposed witness does not hold an immunity or a testamentary privilege.[12]

The "Purpose" Requirement

13. In order to satisfy the purpose requirement, the applicant must demonstrate a legitimate forensic purpose by showing:

> [A] reasonable basis for the belief that the information to be provided by a prospective witness is likely to be of material assistance to the applicant's case, or that there is at least a good chance that it would be of material assistance to the applicant's case, in relation to clearly identified issues relevant to the forthcoming trial.[13]

14. The decisions of the SCSL has identified that the following factors should be considered in assessing whether such a legitimate forensic purpose is established:

> ...the position held by the prospective witness is relation to the events in question, any relationship he may have or have had with the accused which is relevant to the charges, the opportunity which he may reasonably be thought to have had to observe those events or to learn of those events and any statements made by him to the applicant or to others in relation to those events.[14]

The "Necessity" Requirement

15. This Trial Chamber observed that the "...'necessity' requirement is designed to limit the use of coercive measures to a minimum."[15] The Appeals Chamber held that in order to satisfy this requirement the applicant must show "...that the subpoena is likely to elicit evidence material to an issue in the case which cannot be obtained without judicial

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[11] *Prosecutor v. Norman et al,* SCSL-04-14-T-617, "Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, Presidnet of the Republic of Sierra Leone," 13 June 2006, para. 28 ("**Subpoena TC Decision**").

[12] See *Prosecutor v. Norman et al,* SCSL-04-14-T-689, "Dissenting Opinion of Hon. Justice Robertson on Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone," 11 September 2006, para. 14(i).

[13] Subpoena TC Decision, para. 29, which requirement was confirmed by the Appeals Chamber in *Prosecutor v. Norman et al.,* SCSL-04-14-T-688, "Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone," 11 September 2006, para. 10 ("**Subpoena AC Decision**").

[14] Subpoena TC Decision, para. 29, applying *Prosecutor v. Kristic,* IT-98-33-A, "Decision on Application for Subpoenas," 1 July 2003, para. 11 ("**Krstic Appeal Decision**") and *Prosecutor v. Halilovic,* IT-01-48-AR73, "Decision on the Issuance of Subpoenas," 21 June 2004, para. 6 ("**Halilovic Appeal Decision**"). These factors were quoted with approval in the Subpoena AC Decision, para. 21.

[15] Subpoena TC Decision, para. 30.

intervention."[16] Importantly, this Trial Chamber previously held that "it would be inappropriate to issue a subpoena if the information sought to be obtained is obtainable through other means" [underlining added].[17] And finally, when considering whether or not to issue a subpoena, a Chamber must take into account the overarching interests of justice and other public considerations.[18]

16. Rule 54 expressly contains the word "necessary", and a subpoena is not necessary if the anticipated evidence can be obtained by other means. The issuance of a subpoena, which is a coercive measure potentially entailing a criminal sanction, goes against the traditional preference for cooperation. Such coercion is only justified if it is *necessary* to the truth finding process. In order to justify the necessity of a subpoena, the requesting party must meet a certain standard in terms of 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.

IV. ARGUMENT

17. The Application appears to take the position that former President Kabbah knew that Foday Sankoh had been detained without access to the RUF leadership[19] and that there was a policy to ensure that Foday Sankoh could not give orders to any RUF commander.[20]

18. The Application also asserts that former President Kabbah "must know" that there was a significant power vacuum in the RUF[21] and ECOWAS was responsible for the First Accused taking over the leadership of the RUF.[22]

19. The above issues do not meet the "necessity" requirement because with respect to some of the assertions it would be impossible for former President Kabbah to give evidence, while for others, there would be a number of other individuals better placed to provide first hand evidence.

20. The question of whether Sankoh was in fact able to communicate with others in the RUF

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[16] Subpoena AC Decision, para. 9.
[17] Subpoena TC Decision, para. 30.
[18] *Prosecutor v. Brdanin and Talic,* IT-99-36-AR73.9, "Decision on Interlocutory Appeal," 11 December 2002, para. 46.
[19] Application, para. 26.
[20] Application, para. 27.
[21] Application, para. 28.
[22] Application, para. 29.

is best answered, and can only be answered, by those responsible for his actual custody. It cannot seriously be contended that former President Kabbah would have had first-hand control and custody over Sankoh so as to be in a position to say whether or not Sankoh was permitted or otherwise was able to communicate with others in the RUF. The persons who had actual custody of Sankoh can answer that, thus the necessity requirement is not met.

21. The assertion that there was a "governmental/United Nations policy" to ensure that Sankoh could not give orders to the RUF is again a question that could be answered by a relatively large number of individuals. Assuming the existence of such a policy, at a minimum there would be people in the United Nations who knew of it, and there is no suggestion that any of those individuals were approached and requested to provide that information to the Trial Chamber. The evidence could be obtained by other means and, therefore, the necessity requirement has not been met.
22. The same can be said for the claims of a power vacuum in the RUF and that ECOWAS was responsible for Sesay taking control of the RUF. Although the existence of a power vacuum in the RUF is contested, evidence of that would best come from a member of the RUF. A person hundreds of kilometers away, having limited contact with RUF members, rank and file or senior officers, would not be in a position to give evidence on that topic, and even if they could give some evidence, it is obviously the case that many members of the RUF would also be able to give such evidence. Such evidence is clearly obtainable from other means and the necessity requirement has not been met.
23. Evidence that ECOWAS may have wanted a person such as the First Accused to take over leadership of the RUF would not be relevant to the crimes alleged in the Indictment, and as is the case with the above assertions, there can be no question that this evidence could be obtained through a number of sources other than former President Kabbah, such as officials of ECOWAS or officials who were close to any of the heads of state who constitute the ECOWAS leadership. There is no evidence that any of those individuals were approached.
24. The same point should be made with the respect to the assertion that sometime in January to April 2002 a meeting was allegedly arranged between the First Accused and Sankoh at Choithram Hospital and later at Pademba Road Prison, where it is alleged that Sankoh

refused to speak the First Accused.[23] The Application does not suggest that former President Kabbah was present at such a meeting or meetings, and the best evidence, the only reliable evidence, about these alleged meetings would come from hospital and prison staff who would have been present. There is no suggestion that those persons have been uncooperative, and again, the necessity requirment has not been met. In addition, the purpose of such evidence is not relevant or material to any of the issues of the trial. Nor can evidence that Sankoh would not meet with the First Accused be reasonably described as relevant to mitigation of sentence, the Application does not suggest that such is the purpose of the alleged evidence, but if so it could not possibly lead to a reduction in any sentence. Other, seemingly less significant, assertions are made in the Application, but the necessity test cannot be met for any of them.

25. The submissions above show that the applicant fails to meet the necessity test that is part of Rule 54. Little has been said about the purpose requirement. It would perhaps be redundant to do so as the applicant has not met the necessity test, but some comments should be offered to assist the Trial Chamber. It is not enough to suggest that a person may have evidence, the applicant must show that the intended witness likely would be of material assistance to the applicant's case in relation to clearly identified issues relevant to the trial. At the present time one simply does not know whether the evidence of former President Kabbah would be of "material assistance" to the First Accused. It may be just the opposite. And as pointed out by Mr. Justice Robertson, "evidence will only be likely to be 'material' if it would go to support a legitimate defence."[24] However, that may be a reason for considering a subpoena simply to have an intended witness attend for an interview[25] rather than the type of subpoena sought, one that would compel the intended witness to attend for an interview with the Defence and testify. There is no reason for the Trial Chamber to agree to the latter.

V. IMMUNITY PURSUANT TO SIERRA LEONEAN LAW

26. The Application comments on section 48(4) of the Constitution of the Republic of Sierra

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[23] Application, para. 30.

[24] *Prosecutor v. Norman et al,* SCSL-04-14-T-689, "Dissenting Opinion of Hon. Justice Robertson on Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone," 11 September 2006, para. 32.

[25] However, the Prosecution concurs with the observation of Mr. Justice Robertson, referred to above, that the appropriate course of conduct in a case such as this is for the Applicant to first ask the Trial Chamber to make a request that the person of interest to the Defence meet with them.

Leone,[26] in particular, the immunity that attaches to the office of the President from civil or criminal proceedings.

27. Should the Trial Chamber require argument on this point it is submitted that former President Kabbah should be served with the Application and be granted an opportunity to respond to this question of law.

IV. CONCLUSION

28. The Prosecution does not dispute the fundamental importance of the right to examine, or have examined, witnesses, and to obtain the attendance and examination of witnesses under the same conditions as the opposite party, enshrined in Article 17(4)(e) of the Special Court Statute. However, no violation of the Accused's fair trial rights have been identified in this Application. The Defence has not been denied access to any of the applicable procedures for calling witnesses. If a potential defence witnesses refuses to appear voluntarily, the Defence may request a subpoena. In order for such a request to be successful, a certain standard under the Rules must be satisfied. If the Defence fails to satisfy that standard, it cannot argue that there has *ipso facto* been a breach of a fundamental right.

29. Rule 54 provides that a Trial Chamber "may issue ... subpoenas ... as may be ***necessary*** for the ***purposes*** of an investigation or for the preparation or conduct of the trial". In order to determine whether the criteria of Rule 54 are met, the Trial Chamber must inevitably consider the purposes of a requested subpoena and the necessity of the requested subpoena. This logically requires an inquiry into whether the evidence anticipated as a result of the subpoena could materially assist the applicant's case, and whether the anticipated evidence might be obtained from other sources by non-coercive means. The application of these considerations to the particular circumstances of an individual case is a matter within the discretion of the Trial Chamber.

30. The Application should be dismissed on the basis that existing orders exist with respect to listing witnesses on a witness list, providing summaries of testimony, disclosing names of witnesses within a certain time period, and giving notice at least 14 days in advance of

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[26] Section 48(4) of the Constitution of the Republic of Sierra Leone states:
> While any person holds or performs the functions of the office of President, no civil or criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official or private capacity.

when they will testify. These orders need to be varied before the Application should be considered. No such application to vary has been made.

31. In the event the Application is considered on its merits, the Application fails to meet the necessity and purpose requirements of Rule 54, and should be dismissed.

Filed in Freetown,
4 March 2008

For the Prosecution,

P. H. Harrison
Pete Harrison

A. MOTIONS, ORDERS, DECISIONS AND JUDGMENTS

SCSL Cases

Prosecutor v Sesay et al, SCSL-2004-15-T-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-T-659, "Scheduling Order Concerning the Preparation and the Commencement of the Defence Case," 30 October 2006.

Prosecutor v. Sesay et al, SCSL-04-15-T-705, "Decision and Order on Defence Application for an Adjournment of 16th February Deadline for Filing of Defence Material," 7 February 2007.

Prosecutor v Sesay et al, SCSL-2004-15-T-746, "Consequential Orders Concerning the Preparation and the Commencement of the Defence Case," 28 March 2007.

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Prosecutor v. Norman et al, SCSL-04-14-T-689, "Dissenting Opinion of Hon. Justice Robertson on Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone," 11 September 2006.

Prosecutor v Norman, Fofana, Kondewa, SCSL-2004-14-T-617, "Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena ad Testificandum to H. E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", 14 June 2006.

Prosecutor v Norman, Fofana, Kondewa, SCSL-2004-14-T-617, "Dissenting Opinion of Hon. Justice Bankole Thompson on Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena ad Testificandum to H. E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", 14 June 2006.

Prosecutor v. Norman et al, SCSL-04-14-T-499, "Defence Witness and Exhibits List for the First Accused as per the Consequential Order for Compliance of 28 November 2005 Concerning the Preparation and Presentation of Defence Case," 5 December 2005.

Prosecutor v. Norman et al, SCSL-04-14-T-482, "Joint Defence Materials Filed Pursuant to 21 October 2005 Order of Trial Chamber I and Request for Possible Modification Thereof," 17 November 2005.

ICTY and ICTR Cases

Prosecutor v. Brdanin and Talic, IT-99-36-AR73.9, "Decision on Interlocutory Appeal," 11 December 2002. (http://www.un.org/icty/brdjanin/appeal/decision-e/randall021211.htm)

Prosecutor v. Krstić, IT-98-33-A, "Decision on Application for Subpoenas", Appeals Chamber, 1 July 2003. (http://www.un.org/icty/krstic/Appeal/decision-e/030701.htm)

Prosecutor v. Halilovic, IT-01-48-AR73, "Decision on the Issuance of Subpoenas," 21 June 2004. (http://www.un.org/icty/halilovic/appeal/decision-e/040621.htm)

Rules and Transcripts

Rule 54 of the Rules of Evidence and Procedure, as amended.

RUF Transcript, 4 February 2008, p. 65.