

THE SPECIAL COURT FOR SIERRA LEONE ("the Court");

SITTING AS, Judge Bankole Thompson, Presiding Judge and designated pursuant to Rule 28 of the Rules of Procedure and Evidence ("the Rules") on behalf of the Trial Chamber;

BEING SEIZED of the initial *ex-parte*, and subsequently, *inter partes*, Motion To Freeze The Account of The Accused Sam Hinga Norman ("the Motion") filed by the Office of the Prosecutor of the Special Court ("the Prosecution") on 1 April 2004;

NOTING that the aforesaid Motion concerns Samuel Hinga Norman, a person, presently in the custody of the Special Court pursuant to a seven (7) count Indictment preferred against him on 7 March 2003 with approval of the Special Court for various offences falling within the jurisdiction of the Special Court;

RECALLING that the said Order approving the Indictment under Rule 47 of the Rules against the aforesaid Accused also embodied a further Order for the execution of a Warrant of Arrest and a Consequential Order directed to the relevant authorities of the Government of Sierra Leone "to identify and locate assets owned by the Accused located within the territory of any state and adopt provisional measures to freeze such assets without prejudice to the rights of third parties."

CONSIDERING that pursuant to the aforementioned Order for freezing the assets of the Accused, the Office of the Prosecutor now seeks an Order directed to the Government of Sierra Leone to freeze the account or accounts of the said Accused held at the Union Trust Bank (SL) Limited or at any other Bank in Sierra Leone;

CONSIDERING FURTHER that in response to the instant *ex parte* Motion by the Prosecution, this Court issued an Interim and Scheduling Order dated 2 April 2004 to the effect that the Government of Sierra Leone, "as an interim measure, and with immediate effect, freeze the account of the Accused numbered 210-006598-01 held at the Union Trust Bank (SL) Limited, located in Lightfoot Boston Street, PM 1237, until a decision is rendered";

NOTING that the aforementioned Interim and Scheduling Order also consequentially ordered as follows:

- 1) "Any Response from the Defence Counsel for the Accused to the Motion shall be filed by 04:00pm on Monday, 5 April 2004, if any;
- 2) Any Prosecution reply to a response shall be filed by 04:00pm on Wednesday 7 April, if any; and
- 3) Oral representations in support of the parties written submissions will be heard at an *in camera* hearing to be held in Chambers before me on Thursday, 8 April 2004 at 10:00am;"

TAKING COGNISANCE of a Revised Interim and Scheduling Order issued on 6 April 2004 in which it was ordered as follows:

1. Any Prosecution reply to the Response shall be filed before 04.00pm on Thursday, 8 April 2004, if any; and

2. Oral representations in support of the parties written submissions will be heard at an *in camera* hearing to be held in Chambers before me on Tuesday, 13 April 2004 at 10.00am.

NOTING FURTHER THAT the rationale behind the aforesaid Interim and Scheduling Order is the pre-eminent need recognised by the Prosecution and acknowledged by the Court, for the Motion to be finally determined on an *inter partes* basis in consonance with the principle of “equality of arms” which requires that each party should be afforded a reasonable opportunity to present his case under conditions which do not place him at a substantial disadvantage *vis-à-vis* his opponent, the effect of which is that each party should have the opportunity to know of, comment on, the observations filed, or the evidence adduced by the other party.¹

CONSIDERING the Response filed by Defence Counsel for the Accused Sam Hinga Norman on 6 April 2004 (“the Response”);

CONSIDERING ALSO the Reply filed by the Prosecution on 8 April 2004 (“the Reply”);

NOTING that Part IV of The Special Court Agreement 2002, (Ratification) Act, 2002 provides for mutual assistance between Sierra Leone and the Special Court, and that Section 15(3)(a) of the said Act enacts that “nothing in this Act shall limit the type of assistance the Special Court may request under the Agreement” signed between the Government of Sierra Leone and the United Nations on 16 January 2002;

NOTING FURTHER that Section 20 of the aforesaid Act provides that “for the purpose of execution, an Order of the Special Court shall have the same force or effect as if it had been issued by a Judge, Magistrate, or Justice of the Peace of a Sierra Leonean Court”;

PRE-EMINENTLY RECOGNISING that such framework for mutual assistance between the Government of Sierra Leone and the Special Court is predicated upon the paramount need to ensure that the justice process at all times adheres to the principle of *legality* and not the principle of *diplomacy*; and that no Order made pursuant thereto should infringe the said principle of *legality* in the context of the applicable jurisprudence;

NOTING THE SUBMISSIONS OF THE PARTIES

Prosecution’s Motion

1. By the instant Motion the Prosecution seeks an Order from the Court directed to the Government of Sierra Leone to freeze the account or accounts of the Accused Samuel Hinga Norman held at Union Trust Bank (SL) Limited or at any other Bank in Sierra Leone.

¹ See *Burlut v. Austria*, 24 E.H.R.R. 84, EctHR. The doctrine of “equality of arms” presupposes strict compliance with the principle of *audi alteram partem*, case-law authorities for which abound in national law systems. In the Sierra Leone national law system the decisions in *Amadu Hassan v. John Karefa-Smart* 1962 SLLR 36 and *Conteh v. Reginam* 1957-60 ALR.SL 47 are two early illustrations of the application of this principle. It must be noted that *ex parte* proceedings are, in law, exceptions to the *audi alteram partem* rule. Hence the temporary nature of such orders. It is, therefore, meretricious to suggest that *ex parte* orders are inherently illegal.

The Prosecution submits that on 7 March 2003, Judge Bankole Thompson, as Designated Judge, in his Decision On the Indictment and Order for Non-Disclosure in the case of the Accused, ordered, *inter alia*, that the relevant authorities of the Government of Sierra Leone

“identify and locate assets owned by the Accused located within the territory of any State and adopt provisional measures to freeze such assets without prejudice to the rights of third parties.”

The Prosecution relies heavily on Section 15(3)(a) and Section 20 of the Special Court Agreement, 2002 (Ratification) Act 2002 in support of the instant Motion, and urges the Court to deal with the matter expeditiously on the grounds that there is a strong likelihood that the assets will be depleted.

Defence Response

2. In its Response to the said Motion, the Defence

“submits most respectfully that the said interim order directed to the Government of Sierra Leone...was made contrary to the rules of Natural Justice in that neither the Accused nor his Counsel were heard on the reasons for the said Application before the Order was made.”

The Defence further notes that the original Order of 7 March 2003 was made expressly subject to and “*without prejudice to the rights of third parties*”, and submits that the Interim Order is

“...totally prejudicial to the rights of the Wife, Children and extended family of the Accused who are being maintained from the said Bank Account which is the only source from which this can be done...”

The Defence finally contends that the Prosecution has put forward no facts or authorities in support of the Motion, and that the Accused is presumed innocent until proven guilty and that freezing of his accounts would amount to collective punishment, and strongly urges the Court to rescind and reverse the said Interim Order of 2 April 2004.

Prosecution's Reply

3. In its Reply, the Prosecution reiterates its original position by further reliance, firstly, on Rules 47(H)(i), 54, 104, and 105 of the Rules; and, secondly, on the Decision of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in *Prosecutor v. Milosevic et al.*² In oral representations before me in Chambers, Counsel for the Prosecution submitted that from records in their possession, it may be possible to infer that funds may have been illegally transferred to the region by the Civil Defence Forces (“CDF”) to provide food and ammunition during the war, and that the leadership of the CDF might have engaged in looting property or taken advantage of such looting during the war, and lastly that the

² IT-02-54, Decision on Review of Indictment and Application for Consequential Orders, 24 May 1999 before Judge David Hunt, at para 27.

Accused is on record as having called upon his supporters to restart civil unrest and that the funds available in the account may be used for that purpose. The Prosecution also indicated that it was willing to concede that a sum of Le500,000 (Five Hundred Thousand Leones) as a monthly allotment to the family could be ordered by the Court out of the said account.

HAVING HEARD ARGUMENT *INTER PARTES* AND DELIBERATED THUS:

Applicable Law: General Perspectives

4. This Motion confronts the Special Court with the tremendous task entrusted by the international community to international criminal tribunals to determine where the freedom of persons charged with international crimes ends and where the coercive authority of the international community and the state begins. In ascertaining the régime of legal doctrines and principles applicable in addressing this task, a court, in my considered judgement, is duty bound to be mindful of the cardinal principle that runs throughout the entire web of the criminal law, as a social control mechanism, namely, the presumption that every person accused of crime is innocent until proven guilty. What is at stake here is the need to balance the competing interest of the legal right of the international community and individual states to interfere with the assets of a citizen accused of crime, before any conviction has been recorded against him and his right to be presumed innocent until proven guilty.
5. In the specific context of this Motion, the Court is called upon to demarcate that delicate boundary line between the Accused's freedom to own and enjoy property guaranteed both under national laws³ and international law,⁴ as a fundamental human right and the authority of the international community and the state of Sierra Leone to deprive him of the same in certain defined circumstances. It is noteworthy that the courts have always considered it their exclusive prerogative to define such circumstances. In traversing this extremely complex and sensitive terrain of the law governing the freezing of the assets of persons accused of crime who are awaiting trial and presumed innocent until proven guilty, it is necessary to begin by ascertaining the precise state of the law on the issue. The judicial decisions and academic commentaries show that the contemporary jurisprudence, national and international, on the subject is disparate, incoherent, and unclear.
6. This Court, therefore, seizes the opportunity to shed some light on this rather arcane area of the law, predicating its analysis on first principles and interpretations of relevant statutory provisions, case-law authorities from national law systems, and international criminal jurisprudence. In undertaking this exercise, the first question for me to address, as Designated Judge, is whether there exists a law enforcement power, nationally, to obtain a court order to freeze the bank account of a person accused of crime who is awaiting trial, being an

³ The Constitutions of nearly all states, and in the specific context of Sierra Leone, the Sierra Leone Constitution 1991, (Act No. 6 of 1991) section 22.

⁴ The Universal Declaration of Human Rights, 1948, Article 17 of which provides thus:

(1) Everyone has the right to own property, alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

and the African Charter of Human and Peoples' Rights, 1981, Article 14 of which states that:

The Right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

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unconvicted accused. One scholarly view is that such a power seems justified on the basis of common sense. Another is that such a power, even if it exists, has been “constructed on dubious legal foundation.”⁵ The law, in its present form, seems to be that of judicial recognition of the existence of such a power, a sort of pragmatic response to the new and complex operational dynamics of contemporary criminal justice systems in the prevention and detection of crime.⁶

English Case-Law Perspectives

7. *Consistent with this judicial pragmatism, the general trend in most national courts in adjudicating on the issue has been to recognise the existence of a common law or statutory right in this regard, but not to grant such applications in the absence of legal justification.* Instructively, in the English case of *Chief Constable of Hampshire v. A and Others*⁷, the defendants had purchased properties by means of substantial bank loans. The loans had been repaid out of the proceeds of fraudulent trading, the properties sold, and the proceeds paid into a bank account. The defendants had been charged with conspiracy to defraud. The Court acknowledged the existence of the power of the police to seek an injunction to freeze the bank account but refused to grant the application on the grounds that even if the trading receipts contained substantial proceeds of the fraudulent transactions, the receipts themselves were not “specific” identifiable sums of money. On appeal, affirming the lower court, the Court of Appeal clearly restricted the power to only those assets which the court could identify as either being or representing stolen property or which were otherwise unlawfully obtained.

ICTY and ICTR Jurisprudence

8. In the international criminal law sphere, there is a dearth of judicial authorities on the subject. For example, in the sister jurisdictions of ICTY and the International Criminal Tribunal for Rwanda (“ICTR”) there are only statutory provisions at this point in time from which guidance may be sought. Article 19(2) of the Statute of ICTY provides as follows:

“Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.”(emphasis added)

Further, Rule 47(H)(i) of the Rules of Procedure and Evidence of ICTY states that:

⁵ See a useful article by Suzanne Bailey entitled “Freezing the Assets of the Accused: Recommendations of the Hodgson Report” in the *New Law Journal*, September 28, 1984 pp 829-830.

⁶ Id.

⁷ (1984) *Times*, March 3. See also the English case of *West Mercia Constabulary v. Wagener* (1982) 1 WLR 127 where the Judge, reasoning by analogy, recognized the existence of the power in this way: that if magistrates could grant a search warrant authorising the police to seize a suitcase filled with stolen money stored at a bank, then why should the High Court not grant the power to freeze the same money if it was deposited in a bank account? By parity of reasoning, in *Chief Constable of Kent v. A and Another*, (another English decision), the Court held that the Chief Constable had an interest, or common law right, on behalf of the public to seize the stolen goods, detain them pending trial and eventually restore them to the rightful owner.

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“The Judge may issue an arrest warrant, in accordance with Sub-Rule 55(A), and any orders provided in Article 19 of the Statute” (emphasis added)

Rule 54 of the said Rules provides as follows:

“At the request of either party or *proprio motu*, 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.”

Rule 61(D) states that:

“The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or *proprio motu*, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.” (emphasis added)

In addition, Rule 98 *ter* states:

“(B) If the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that *unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement*. The Trial Chamber may order restitution as provided in Rule 105.” (emphasis added)

The ICTR provisions on this issue are almost identical to those of the ICTY.

9. In both ICTY and ICTR, apart from statutory provisions and rules relating to the post-conviction setting no express authority is granted to law enforcement to seek a judicial order for the freezing of bank accounts of persons accused of crime pending trial. An examination of the jurisprudence of the said tribunals reveals one ICTY decision so far on the issue, to wit, *Prosecutor v. Milosevic et al*⁸. There, the Court reasoned as follows:

“The application was initially based solely upon Rule 54, which gives power to a judge (as well as to a Trial Chamber) to issue such orders as may be necessary for the preparation or conduct of the trial...Freezing the assets of the accused, the Prosecutor submitted, may be done for two distinct purposes – for the purpose of granting restitution of property or payment from its proceeds (which may be ordered by a Trial Chamber pursuant to rule 105 after conviction, subject to appropriate findings having been made in the judgement pursuant to Rule 98*ter*) and also for the purpose of preventing an accused...from taking steps to disguise his assets or putting them beyond the reach of the Tribunal.”

SCSL Jurisprudence: Applicable Test

10. By parity of reasoning, under the statutory mechanism established by the founding instruments of the Special Court for Sierra Leone for the prosecution of persons who are

⁸ Case Number IT-02-54, Decision on Review of Indictment and Application for Consequential Orders, 24 May 1999, before Judge David Hunt, at para. 27.

alleged to bear the greatest responsibility for the violation of international humanitarian law and specified laws of Sierra Leone, *nowhere is it expressly provided that there is a law enforcement power to seek an order from a court to freeze the assets of an indicted person pending trial.* Article 19(3) of the Court's Statute authorises the Court to freeze or forfeit assets of accused persons in a post-conviction rather than a pre-conviction setting in these terms:

"In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets *acquired unlawfully or by criminal conduct*, and their return to their rightful owner or to the State of Sierra Leone." (emphasis added)

To a like effect, are Rules 88 and 104 of the Rules. Rule 88(B) states that:

"If the Trial Chamber finds the accused guilty of a crime, the Trial Chamber may order the forfeiture of the property, proceeds *and any assets acquired unlawfully or by criminal conduct* as provided in Rule 104." (emphasis added)

According to Rule 104(C):

"The Trial Chamber may order the forfeiture of any property, proceeds and any assets it finds has been *acquired unlawfully or by criminal conduct*, and order its return to the rightful owner, or its transfer to the state of Sierra Leone, as circumstances may require." (emphasis added)

Rule 105 provides a machinery for compensation to victims in a post-conviction setting.

11. *It is of the utmost significance that the common thread that runs throughout the foregoing provisions, even in a post-conviction context, is the requirement that the targeted property must either have been acquired unlawfully or as a result of criminal conduct.*
12. By way of further elucidation, it is significant to note that the power is effectuated in the Warrant of Arrest ordered by a Judge who approves an indictment pursuant to Rule 47 of the Rules of Procedure and Evidence of the Court, by way of a consequential order subject to a major limitation to wit, *without prejudice to the rights of third parties.* In the instant case it was so ordered when the indictment was approved, *ex parte*, by me on 7 March 2003. However, as already noted, the existing state of the law is that there is judicial recognition of such law enforcement power. As Designated Judge, I do not propose in this Decision to revisit the issue of the soundness or otherwise of the legal foundation for the power. My immediate task is twofold: (1) to articulate a test to be applied in determining whether to grant an application of this nature or not; and (2) whether the instant Motion satisfies the requirements of that test.
13. What, then, should be the applicable test? *In my considered view, the proper test to be applied in determining whether or not to grant an application by the police or the Prosecution to freeze assets in the bank account of a person charged with crime pending trial is whether there is clear and convincing evidence that the targeted assets have a nexus with criminal conduct or were otherwise illegally acquired. What is 'clear and convincing evidence' depends on the particular facts and circumstances of each case. The targeted property must be specifically identifiable as a product of criminality or illegality. Neither probable cause nor mere suspicion or speculation will suffice.*

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14. As Designated Judge, I also deem it my judicial obligation to emphasise that an application of this nature with far-reaching implications for a constitutionally guaranteed and internationally recognised right, to wit, an individual's right to own property cannot be granted as a matter of course and without sound legal justification especially in a context where the presumption of innocence is a competing, if not compelling, juridical imperative. For this reason, I do not consider myself bound by some doctrine of judicial estoppel as regards the original order of 7 March 2003 made consequentially during the *ex parte* review of the Indictment for approval under Rule 47.

Does the Motion Satisfy the Prescribed Test?

15. The key question now for my determination is whether the Motion herein does satisfy the prescribed test. In answering this question, I have very carefully evaluated the evidence proffered by the Prosecution in support of the Motion alongside its submissions of law. The relevant evidence can be gathered from its oral submissions before me in Chambers on 13 April 2004. For an avoidance of doubt, it is summarised below:

That from records in the possession of the Prosecution it may be possible to deduce (i) that funds may have been illegally transferred to the region by the CDF to provide food and ammunition during the war, (ii) that the CDF leadership may have engaged in looting of property or taken advantage of such looting during the war, and (iii) that the Accused may use the targeted funds to restart a civil unrest.

The aforesaid submissions fall far short of establishing grounds upon which this Court can be satisfied that there is clear and convincing evidence that the targeted property has nexus with criminal conduct or was acquired illegally by the Accused. In effect, it is my finding that the Prosecution has not adduced a scintilla of evidence to satisfy the prescribed test. The Prosecution's position is tenuous and highly speculative. Having thus concluded, it seems appropriate to observe, by the way, as regards applications of this nature that courts of justice cannot be insensitive to the fact that persons accused of crime who have not yet been tried and their dependants have to live and all court orders, particularly of an interlocutory character, should to the extent possible, do justice to all the parties. One negative imagery of the law depicted by Charles Dickens, that famous nineteenth-century English novelist is that its greatest potential is "to exhaust finances". Forums of justice, whether national or international, must not be perceived as arbitrary institutions; they must, at all times, adhere to the principle of legality.

16. Based on the foregoing considerations, and especially the finding that the Prosecution has failed to adduce clear and convincing evidence to establish a nexus between the targeted assets of the Accused and criminal conduct or illegality, I accordingly have no other judicial option open to me but to reject the application, rescind and discharge the interim order authorising the freezing of the Bank Account numbered 210-006598-01 of the Accused at the Union Trust Bank (SL) Limited located at Lightfoot Boston Street, PM 1237.

17. By way of a strong caution embodied as a footnote to this Decision addressed to Counsel who practise before the Special Court, I take this opportunity as Designated Judge in this matter to remind all Counsel that matters pending before courts of justice are subject to the doctrine of *sub judice* until final disposition. Accordingly, public comments and press interviews given while litigation is pending may well border on contempt of court, having regard to how such comments are framed. Specifically, my attention was directed to some immoderate comments on the Interim Order in this matter by Defence Counsel during a radio interview. I say, with

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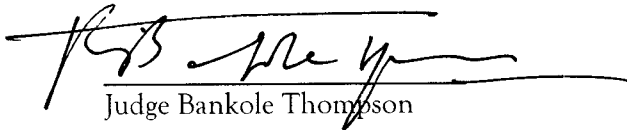
all judicial forthrightness, that it is expected that learned Counsel of seniority and standing at the Bar should appreciate the difference between their obligations, as Officers of the Court, and the alluring attractions of populism and ideological posturing so as to ensure the harmonious co-operation and mutual respect that have always characterised the relationship between the Bench and the Bar in the administration of justice.

IN FINAL DISPOSITION OF THE MOTION:

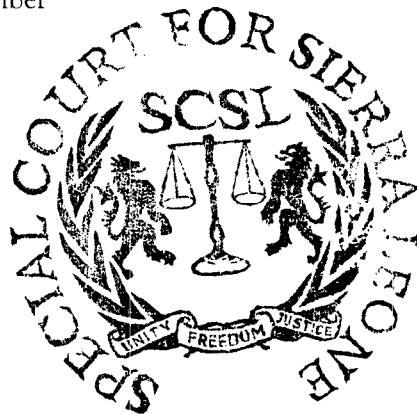
18. As Designated Judge, I hereby deny the Motion and accordingly dismiss it. I also order consequentially as follows:

- i) That the Interim and Scheduling Order dated 2 April 2004 is rescinded and discharged to the extent that it authorised the freezing of the Accused's bank account numbered 210-006598-01 held at the Union Trust Bank (SL) Limited located in Lightfoot Boston Street, PM 1237;
- ii) That the Revised Interim and Scheduling Order dated 6 April 2004 is likewise rescinded and discharged to the same extent as in the above

Done at Freetown this 19th day of April 2004


Judge Bankole Thompson

Presiding Judge, Trial Chamber
Designated Judge Pursuant
To Rule 28 of the Rules.



[Seal of the Special Court for Sierra Leone]