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SCSL-04-14-T
(18959-18964)

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**SPECIAL COURT FOR SIERRA LEONE
IN THE APPEALS CHAMBER**

Before: Justice George Gelaga King, Presiding
Justice Emmanuel Ayoola
Justice A. Raja N. Fernando
Justice Geoffrey Robertson, QC
Justice Renate Winter

Registrar: Mr. Lovemore G. Munlo, SC

Date: 17 July, 2006

PROSECUTOR

Against

**Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa**

Case No. SCSL-04-14-T

Public

**NORMAN REPLY TO THE PROSECUTION RESPONSE TO NORMAN
NOTICE OF APPEAL AND SUBMISSIONS AGAINST THE TRIAL
CHAMBER'S DECISION ON THE ISSUANCE OF A SUBPOENA.**

Office of the Prosecutor:

Mr Christopher Staker
James Johnson
Joseph Kamara

For Samuel Hinga Norman

Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Alusine Sani Sesay

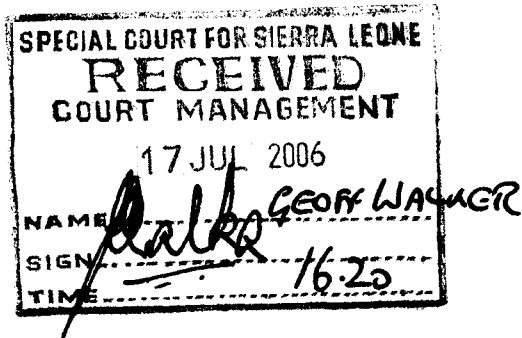
Attorney-General and
Minister of Justice of the
Republic of Sierra Leone for
President Kabbah:
Frederick M. Carew

For Moinina Fofana:

Michiel Pestman
Arrow J. Bockarie
Victor Koppe

For Allieu Kondewa:

Charles Margai
Yada Williams
Ansu Lansana
Susan Wright.



INTRODUCTION

1. Counsel for the First Accused files this Reply to the “Prosecution Response to Norman Notice of Appeal and Submissions Against the Trial Chamber’s Decision on the Issuance of a Subpoena”¹ filed on the 13th of July, 2006.
2. The Prosecution in its Response requests the Appeals Chamber to dismiss the First Accused’s Interlocutory Appeal in issue for the reasons it purports to have substantially dealt with in its Response. Counsel is hereby urging the Appeals Chamber to hereby dismiss the Prosecution’s submissions and grant the Defence application for the reasons advanced in the Notice of Appeal and submissions and this Reply to the Prosecution’s Response.

SUBMISSIONS

3. The Prosecution’s submissions on paragraph 11 that that The Separate Concurring Opinion of Justice Itoe² does not form part of the Decision of the Trial Chamber because the actual decision of the Trial Chamber (the impugned Decision) does not address the issue of whether the President of Sierra Leone can be subject to the subpoena power of the Special Court is false and misleading in the sense that the Separate Concurring Opinion is an integral part of the impugned Decision.
4. The Prosecution’s submission on paragraph 17 of the Response “that there is nothing unrealistically high about the standard, and on the contrary, the approach of the Trial Chamber is one of common sense”³ is misleading. Counsel for the First Accused submits that the distinction made between cases of non-compliance with a mandatory procedural requirement of the Statute and the Rules and cases where it is alleged that the Trial Chamber has erroneously exercised a discretionary power is not applicable in this case. The test to be applied in this case under Rule 54 of the Rules is not one that requires a discretionary power. The test under Rule 54 is necessity. Even if the Appeals Chamber were to rule

¹ SCSL-04-14-T-662: Prosecution Response to Norman Notice of Appeal and Submissions Against the Trial Chamber’s Decision on the Issuance of a Subpoena.

² Ibid, para 11

³ Ibid, para 17

that the Trial Chamber has the discretionary power under Rule 54, Counsel submits that, the Chamber has considerable though not unlimited discretion in its interpretation of Rule 54, and in exercising that discretion it has failed to follow the required standard within the unique circumstances of Special Court. Counsel submits that there was no issue of a discretionary power of the court canvassed in the Norman Notice of Appeal and submissions. It is therefore an erroneous conclusion as to the exercise of the discretionary powers of the Trial Chamber.

5. Rule 54 of Rules of Procedure and Evidence empowers a Judge or Trial Chamber to “issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purpose of an investigation or for the preparation or conduct of the Trial.” Those powers are wide, but wide as they are, they have to be interpreted and applied in accordance with the principles known to nations in the international community. The background principle informing both considerations is whether, as Rule 54 requires, the issuance of a subpoena is necessary “for the preparation or conduct of the trial.” The Trial Chamber’s consideration, then, must focus not only on the usefulness of the information to the applicant but its overall necessity in ensuring that the trial is informed and fair⁴. In deciding whether a subpoena should issue, a Trial Chamber must take into account not only the interests of the litigants but the overarching interests of justice and fair trial. The protection of the rights of the accused is an important feature of international criminal trials; proceeding at their expense may defeat the purposes of international justice and the fair trial rights in Article 17(4) of the Statute of Special Court.

ICTY PRECEDENTS

6. Counsel reiterates that the impugned Decision relied too heavily on the practice of the ICTY thereby failing to give sufficient consideration to the differences of the context and circumstances of the Special Court. The Appeals Chamber of Special

⁴ Case No. IT-01-48-AR73: The Prosecutor v. Halilovic, Decision on the issuance of a subpoena, dated 21 June 2004.

Court had this to say: “it is provided at its outset with the Rules of Procedure and Evidence of the International Criminal Tribunal for (“ICTR”) as they existed in 2002, but its judges were expressly given the plenary power to amend and adopt them to the special circumstances of the Special Court. It follows that procedures and practices that have grown up in the ICTR and International Criminal Tribunal for the former Yugoslavia (“ICTY”) should not be slavishly followed—they often reflect the different or difficult circumstances in which these courts have to operate—bilingually; sitting far from the scene of the crimes, and so on.”⁵

7. Counsel further submits that there is nothing inherently wrong in applying the jurisprudence of sister tribunals but as the Appeals Chamber put it, that this court is unique—as the UN Secretary General in his report put it, *sui generis*⁶. In the words of Justice Thompson, “by parity of reasoning, it is evident that Rule 54 directs the Court to issue, inter alia, subpoenas. In this regard, I subscribe to the view that the Court should not impose on itself any inhibiting factors, internal or external, on its authority to do what the Rule permits or empowers it to do merely to be strictly in conformity with the jurisprudence of sister criminal tribunals, in the context of their mandates and sometimes contextually different formulations of their own specific rules, in their judicial wisdom, determine their own normative preferences and methodologies in performing the complex and delicate task of judicial interpretation.”⁷
8. Counsel submits that the rights of the Accused as enshrined in Article 17(4) of the Statute cannot be equated with the rights of a person to whom a subpoena is addressed. The last resort requirement is the only option available to the person seeking to rely on the application for a subpoena. Counsel maintains that the anticipated evidence cannot be obtained through any other means and the evidence solicited will materially assist the defence of the First Accused. Counsel made evidentiary showing of the need for a subpoena and demonstrated a

⁵ SCSL-04-14-T-AR73-397: Decision on Amendment of the Consolidated Indictment, para. 46

⁶ Ibid, para 46

⁷ SCSL-04-14-T-617: Dissenting Opinion of Justice Thompson, para 10

reasonable basis for his belief, that the prospective witness has information that will materially assist the First Accused with respect to clearly identified issues in the indictment.

9. Counsel submits that the Prosecution misunderstood the criteria that is involved in determining the random or indiscriminate requirement of a high degree of specificity for both the relevant testimony and the charges it relates to. Counsel submits that, the Defence did not suggest that Rule 54 is intended to put the Defence at a procedural disadvantage by requiring the defence to disclose its strategy for the presentation of its case. The Defence is simply requesting in the interests of justice that there should be a fair application of Rule 54, instead of imposing unnecessary and burdensome requirements that go to violate the Court's mandate in the context of the absolute necessity of ascertaining the truth.
10. The Prosecution's speculative analogy in paragraph 19 that in relation to some issues in a case (such as the issue whether or not there was an armed conflict in Sierra Leone at the material times), the number of witnesses capable of giving relevant evidence is likely to number in tens or hundreds of thousands is immaterial to the relevance and necessity of a particular witness as in this case President Kabbah.

CONCLUSION

11. From the foregoing analysis and submissions and for the reasons given, and even more extensively and copiously in the First Accused's Interlocutory Appeal, Counsel requests the Appeal Chamber to allow the appeal and grant the relief sought for in the Interlocutory Appeal.


Dr. Bu-Buakei Jabbi

Court Appointed Counsel

LIST OF DOCUMENTS

1. Statute of the Special Court
2. Rules of Procedure and Evidence of the Special Court
3. SCSL-04-14-T-662: Prosecution Response to Norman Notice of Appeal and Submissions Against the Trial Chamber's Decision on the Issuance of a Subpoena.
- 4.. Case No. IT-01-AR73: The Prosecutor v. Halilovic, Decision on the Issuance of a subpoena, dated 21 June 2004
5. SCSL-04-14-T-AR73-397: Decision on Amendment of the Consolidated indictment
6. SCSL-04-14-T617: Dissenting Opinion of Justice Thompson