

**SPECIAL COURT FOR SIERRA LEONE
Trial Chamber 1**

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

Registrar: Mr. Lovemore G. Munlo, SC

Date: 26th June 2006

PROSECUTOR

Against

**Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa**

Case No. SCSL-04-14-T

Public

First Accused's Reply to the "Prosecution Response to Application by the First and Second Accused for Leave to Appeal the Subpoena Decision."

Office of the Prosecutor:

Mr Christopher Staker
James Johnson
Joseph Kamara

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

For Samuel Hinga Norman

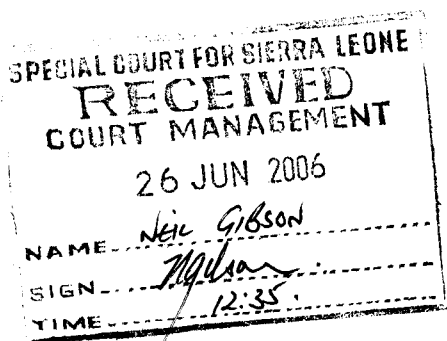
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Alusine Sani Sesay

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 hereby file a Reply to the Prosecution's Response to Applications by the First and Second Accused for leave to Appeal the Subpoena Decision as follows:
2. The Prosecution opposes the Applications on the basis that the requirements for a successful application for leave to appeal pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("Rules") have not been satisfied by the Defence.¹

SUBMISSIONS

Arguments

3. Counsel for the First Accused submit that contrary to the Prosecution's submission that the Defence fails to pinpoint any error amounting to exceptional circumstances in the Trial Chamber's evaluation of the proposed evidence of President Kabbah,² the Defence has made a proper showing by pinpointing factual errors which led to the differences of legal opinion expressed by the Judges on the Decision³ and that issues of such fundamental importance constitute exceptional circumstances. Counsel further submit that this would further impact on the Accused's right to fair a trial and the presentation of the case of the First Accused
4. The Prosecution submits that, the relevance of the divergent views expressed by the Justices is limited to their view as to the interpretation of Rule 54⁴...is not a relevant factor in the current assessment of exceptional circumstances is not true. The Trial Chamber has stated in various Decisions⁵ on leave to appeal that differences of legal opinion on issues of fundamental importance constitute exceptional circumstances. While granting leave to appeal in one of its Decisions the Trial Chamber observed that; "Convinced also of the controversial nature of the specific issues addressed by the Trial Chamber in the Decision which is the subject of the application herein and the diverse legal perspectives from which they can be viewed as evidence by the Majority Decision, Separate Concurring opinion, and Dissenting opinion of the Judges of the Trial Bench; and that it does not conduce to the overall interests of justice and the preservation of the integrity of the proceedings to leave the law on such important issues in international criminal adjudication unsettled and in a state of uncertainty."⁶

¹ SCSL-04-14-T-630: Prosecution Response to Applications by the First and Second Accused for Leave to Appeal the Subpoena Decision, para 3

² Ibid, para 7

³ SCSL-04-14-T-617: Decision on Motions by Moinina Fofana and Sam Hinga Norman for the issuance of a Subpoena

⁴ Ibid, para 12

⁵ SCSL-04-14-T-313: Decision on Application by First Accused for Leave to Make Interlocutory Appeal Against the Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, dated 16th Dec. 2004, SCSL-04-14-T-312: Decision on Prosecution Application for Leave to Appeal "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment"

⁶ SCSL-04-14-T-313: Decision on Application by First Accused for Leave to Make Interlocutory Appeal Against the Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, dated 16th Dec. 2004, page 3

important issues in international criminal adjudication unsettled and in a state of uncertainty.”⁶

Issue of Sitting Head of State not a Peripheral Issue

5. The Prosecution argues that the question of compellability of a sitting head of state as a witness before an international criminal tribunal, while legally interesting, does not arise. The prosecution went further to state that “a peripheral legal issue cannot form the basis for a showing of exceptional circumstances.”⁷ Counsel for the First Accused submit that the compellability of a sitting head of state is not a peripheral issue.

6. A careful perusal of the Decision of the Trial Chamber and Separate Concurring Opinion reveal that the fact that President Kabbah is a sitting head of State substantially influenced the Decision of the Trial Chamber. The Separate Concurring Opinion opined it clearly when it stated “that H.E. Dr. Ahmad Tejan Kabbah is not just an ordinary Sierra Leonean but also, by a rare coincidence of destiny and history, the current, sitting in, and incumbent President and Sovereign Head of State of the Republic of Sierra Leone who, I would like to add, for this same purpose, was in office at the time , not only when these Motions for the issue of the *Subpoena Ad Testificandum* against him were filed and argued, but also continues to be the President and Sovereign Head of State of this Country today, and indeed, at this time that the Decision on these Motions is being rendered.”⁸ The Appeals Chamber stated that “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such person.”⁹

The Defence Has not Failed to Show the Factual Relevance of President Kabbah’s Evidence

7. The Prosecution has stated that the Defence was required to establish that President Kabbah was a relevant witness and failed to provide a sufficient factual showing of relevance to satisfy the Trial Chamber.¹⁰ Counsel for the First Accused submit that the testimony of the President is going to materially assist its case to rebut the evidence adduced by the Prosecution to the effect that the First Accused was the National Coordinator of the CDF. As such he was the principal force in establishing, organizing, supporting, providing logistical support, and promoting the CDF.¹¹ Counsel has reasonable basis for his belief that President Kabbah is likely to give information that will materially assist the First

⁶ SCSL-04-14-T-313: Decision on Application by First Accused for Leave to Make Interlocutory Appeal Against the Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment, dated 16th Dec. 2004, page 3

⁷ SCSL-04-14-630, para 8

⁸ SCSL-04-14-T-617 Separate Concurring Opinion, para 58

⁹ SCSL-04-14-T-3014 Decision on immunity from Jurisdiction, para 45

¹⁰ SCSL-04-14-T-630 para 6 of the Prosecution Response

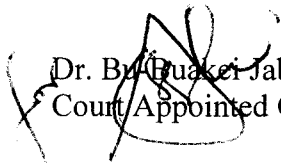
¹¹ SCSL-04-14-T-003, INDICTMENT, para 13

Accused with respect to the clearly identified paragraphs in the indictment¹². Further more, as Counsel stated in its Motion for leave, some of the most crucial evidence about various material aspects of the charges, and testimonies before the court lie in the breast of the president and may not be obtained otherwise.¹³

8. The Prosecution argues that to justify the issuance of a Subpoena, the requesting party must meet a certain standard in terms of explaining how and why the evidence, if adduced, would be relevant¹⁴. Counsel for the First Accused submit, there is substantial explanation in the Motion for leave filed by First Accused as to how and why the evidence of President Kabbah, if adduced, would be relevant to the charges against the First Accused. As the ICTY Appeals Chamber has observed: “the assessment of the chance that the prospective witness will be able to give information which will materially assist the defence in its case will depend largely upon the position held by the prospective witness in 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 those events) and any statements made by him to the prosecution or to others in relation to those events”¹⁵. Counsel further submit that, the Trial Chamber should not only focus on the usefulness of the information to the First Accused, but on its overall necessity in ensuring that the trial is informed and fair.

Conclusion

9. On the basis of the foregoing arguments, Counsel for the First Accused respectfully urges the Trial Chamber to discountenance the arguments put forward by the Prosecution and grant the First Accused leave to file an appeal against the subpoena decision.


 Dr. B. Guakeri Jabbi
 Court Appointed Counsel.

¹² SCSL-04-14-T-624 Motion for leave, para 3

¹³ Ibid, para 10.

¹⁴ SCSL-04-14-T-630, para 16

¹⁵ IT-98-33-A: The Prosecutor v. Krstic: Decision on Application for Subpoenas of 1 July 2003, para 11

Index of Authorities

1. SCSL-04-14-T-313: Decision on Application by First Accused for Leave to make interlocutory Appeal against the Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment.
2. SCSL-04-14-T-630: Prosecution Response to Applications by the First and Second Accused for Leave to Appeal the Subpoena Decision.
3. SCSL-04-14-T-312: Decision on Prosecution Application for Leave to Appeal "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment"
4. IT-98-33-A: The Prosecutor v. Krstic: Decision on Application for Subpoenas of July 2003, para 11
5. 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, President of the Republic of Sierra Leone
6. SCSL-04-14-T-617: Separate Concurring Opinion
7. SCSL-04-14-T-3014: Decision on Immunity from Jurisdiction
8. SCSL-04-14-T-003: Consolidated Indictment