

SCSL-04-14-7
(12502 - 12505)

SPECIAL COURT FOR SIERRA LEONE

The Trial Chamber

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

Registrar: Robin Vincent

Date: 18 March 2005

The Prosecutor Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
Case No. SCSL-04-14-T

DEFENCE REPLY
To Prosecution Response to Defence
REQUEST BY FIRST ACCUSED FOR LEAVE TO APPEAL
Against the Trial Chamber's Decision on Presentation of
Witness Testimony on Moyamba Crime Base, 1 March 2005

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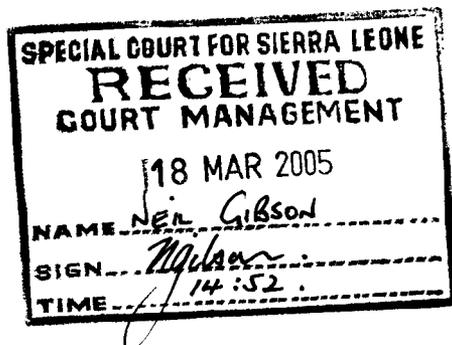
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INTRODUCTION

1. The Prosecution's proffered Response¹ to the relevant Defence Request² of 4 March 2005 is, essentially, "that the Defence cannot appeal a **decision to which it agreed**" (para. 3 of Response; emphasis added) and that in any case the Defence reasons advanced for the Request "fail to establish either exceptional circumstances or irreparable prejudice to the First Accused" (para. 9 of Response).

2. It should be pointed out at once that the said Prosecution Response falls afoul of Rule 7, especially Rule 7(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (**the RPE**) and is accordingly out of time. And as no leave has been formally obtained to file it out of time, the said Response is hereby impugned as tantamount to no filing, as accordingly null and void and non-existent and therefore needing no reply as such. However, the Defence hereby offers some further observations in respect of its Request for leave to appeal aforesaid, but strictly without prejudice.

¹ *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T: "Prosecution Response to Defence Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base, 1 March 2005, #372, RP. 12471 - 12480

² *Ibid*, "Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base, 1 March 2005," 4 March 2005.

FURTHER OBSERVATIONS

3. As to whether or not the Defence “agreed” to the Prosecution proposal that led to the **Moyamba Crime Base Decision**³ of 1 March 2005 and therefore to that Decision itself by the Trial Chamber, the context of the Defence participation in the founding proceedings and deliberations by way of impromptu Oral Motion by the Prosecution is crucial. The Defence participation therein clearly included the proposal, which was proffered as a virtual condition precedent on the spur of the moment of an Oral Motion, that proffered sets of witnesses as to “stayed” portions of the consolidated indictment be first cross-examined on behalf of the Second and Third Accused, “with **the option** for Court Appointed Counsel for the First Accused **to cross-examine if they ‘choose’ to do so**” (para. 5 of Moyamba Crime Base Decision; all emphases added). But when a Court Appointed Counsel for the First Accused sought clarification from the Trial Chamber during trial proceedings on 3 March 2005 as to whether the said “**option to cross-examine if they ‘choose’ to do so**” would include permission to seek leave on behalf of the First Accused to defer or postpone cross-examination of the relevant witnesses, their Lordships promptly rejected the said proposal as a “negation” of the said Decision. And yet such permission or leave to defer or postpone such cross-examination seemed, on the face of the language of the Moyamba Crime Base Decision itself and certainly of the deliberations that led up to it, to be clearly within the contemplation of the said Decision and of the Defence participation in the impromptu founding deliberations thereof.
4. Accordingly, in so far as Defence participation in the said founding deliberations was concerned, there was a clear instance of **non est factum**. Obviously, the said founding deliberations and the said Decision thereon as ultimately construed and implemented by the Trial Chamber were clearly not what the Defence had “agreed” to, if indeed the Defence participation therein could be said to have been an “agreement” thereto.
5. In any case, if the Defence were to participate on the spur of the moment in deliberations leading to a Trial Chamber decision, both of which the Defence

³ Ibid, “Decision on Presentation of Witness Testimony on Moyamba Crime Base”, 1 March 2005

finds out afterwards to be baseless or unfounded or insupportable in law, clearly the Defence would be in duty bound to point up and opt out of the illegality. It cannot and must not be held to it simply because it participated in, or even seemed at some stage to “agree” with, the founding deliberations leading up to the alleged illegality.

6. As to the impugned Prosecution Response that the grounds for the Defence Request “fail to establish either exceptional circumstances or irreparable prejudice to the First Accused”(para. 9 of said impugned Response), the grounds set out in paragraphs 8 to 10 inclusive of the Defence original Request⁴, which paragraphs are further adopted and repeated herein, constitute a fitting and adequate reply thereto.

CONCLUSION

7. The Trial Chamber is accordingly hereby urged to grant the reliefs sought in paragraph 10 of the aforesaid original Defence Request.

Done in Freetown 18th March 2005.

DR. BU-BUAKEI JABBI


COURT APPOINTED COUNSEL

SAM HINGA NORMAN


FIRST ACCUSED

⁴ Ibid, “Request by first Accused for Leave to Appeal Against the Trial Chamber’s Decision on Presentation of Witness Testimony on Moyamba Crime Base,” 4 March 2005, #364, RP. 12401 - 12407