630

SCSL-04-14-T
(18598-18606)

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

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 22 June 2006

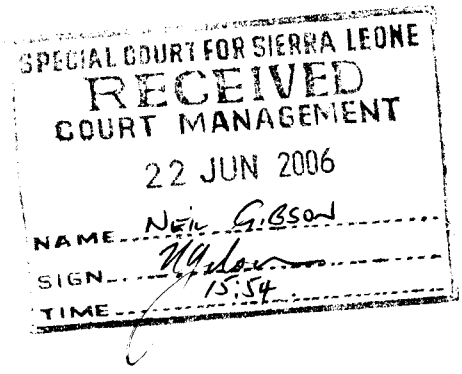
THE PROSECUTOR **Against** **Samuel Hinga Norman**
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

PUBLIC

PROSECUTION RESPONSE TO APPLICATIONS BY THE FIRST AND SECOND ACCUSED FOR LEAVE TO APPEAL THE SUBPOENA DECISION

Office of the Prosecutor:
Mr. James C. Johnson
Mr. Joseph Kamara
Ms. Nina Jørgensen



Court Appointed Defence Counsel for Norman
Dr. Bu-Buakei Jabbi
Mr. John Wesley Hall, Jr.
Ms. Clare DaSilva *(Legal Assistant)*

Court Appointed Defence Counsel for Fofana
Mr. Victor Koppe
Mr. Arrow J. Bockarie
Mr. Michiel Pestman
Mr. Andrew Ianuzzi *(Legal Assistant)*

Court Appointed Defence Counsel for Kondewa
Mr. Charles Margai
Mr. Yada Williams
Mr. Ansu Lansana
Mr. Martin Michael *(Legal Assistant)*

I. INTRODUCTION

1. The Prosecution files this consolidated Response to the applications by the First[1] and Second[2] Accused ("**Norman Application**" and "**Fofana Application**" respectively, or **Applications**") of 19 June 2006 for leave to appeal the Trial Chamber's decision in relation to the issuance of a subpoena to President Kabbah ("**Subpoena Decision**").[3] The Subpoena Decision is comprised of a majority decision by Justices Boutet and Itoe ("**Majority Decision**"), a separate concurring opinion by Justice Itoe ("**Separate Concurring Opinion**") and a dissenting opinion by Justice Thompson ("**Dissenting Opinion**").
2. The Prosecution notes the Trial Chamber's Order for Expedited Filing of 19 June 2006.[4]
3. 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.

II. ARGUMENT

The Test pursuant to Rule 73(B)

4. The Prosecution does not dispute that the applicable law consists of the conjunctive "exceptional circumstances" and "irreparable prejudice" test pursuant to Rule 73(B), as interpreted restrictively in the extensive Special Court jurisprudence in relation to applications of the type currently before the Chamber. The Fofana Application correctly points out that factors such as a dissenting opinion or the existence of an issue of importance for the development of international criminal law may be relevant to a determination of exceptional circumstances but are generally insufficient in themselves to satisfy the test. While the Prosecution does not agree that "cumulative allegations of

---

[1] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-624, "Application by First Accused for Leave to make Interlocutory Appeal against the 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", 19 June 2006 ("**Norman Application**").
[2] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-626, "Urgent Fofana Application for Leave to Appeal the Subpoena Decision", 19 June 2006 ("**Fofana Application**").
[3] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-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", ("**Majority Decision**"), Separate Concurring Opinin of Hon. Justice Benjamin Mutanga Itoe ("**Separate Concurring Opinion**"), and Dissenting Opinion of Hom. Justice Bankole Thompson, ("**Dissenting Opinion**"), 13 June 2006.
[4] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-627, "Order for Expedited Filing", 19 June 2006.

error" will necessarily satisfy the test of exceptional circumstances, a case-by-case analysis is clearly appropriate and reflects the approach taken by this Court.

Exceptional Circumstances

5. The majority proceeded on the basis that it was first necessary to determine the legal standard that it considered applicable to the issuance of a subpoena and then whether or not, factually, that standard had been met. The legal basis was correctly found to be Rule 54, which, in the considered opinion of the majority incorporated a "necessity" and a "purpose" requirement. The majority's conclusion, based on a detailed review of the submissions presented, was that the "arguments either fail to demonstrate that the proposed testimony would materially assist the cases of the First or Second Accused (the 'purpose requirement') or alternatively fail to show that the proposed testimony is necessary for the preparation or conduct of the trial (the 'necessity' requirement).[5]
6. The Prosecution submits that the exercise of applying the law to the facts that provided the basis for the Majority Decision does not give rise to exceptional circumstances. There was nothing extraordinary about its factual analysis. The Defence arguments as to exceptional circumstances constitute distractions from the core point that the Defence made a factually insufficient showing that the standard for the issuance of a subpoena had been met. There is nothing inherently novel or complex about a subpoena application pursuant to Rule 54, and the Prosecution does not agree with the Defence that the interpretation of Rule 54 in the context of a subpoena application rises to the level of a novel issue of general principle. The need to demonstrate that a subpoena is "necessary for the purposes of an investigation or for the purposes or conduct of a trial" is clear from the wording of that Rule. 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.
7. The Prosecution submits that the Defence fails to pinpoint any error amounting to exceptional circumstances in terms of the Trial Chamber's evaluation of the relevance of the proposed evidence of President Kabbah to the specific issues related to the Second

[5] Majority Decision, para. 32.

Accused's alleged liability under Articles 1(1), 6(1) and 6(3) of the Statute,[6] or the ability of the First Accused to rebut certain paragraphs of the Indictment.[7] The Trial Chamber is best placed to make such a factual assessment and the Appeals Chamber would not disturb its findings lightly. The Appeals Chamber of the Special Court has noted that it has "a limited control of the Trial Chamber's assessment of facts, which may be overturned by the Appeals Chamber only where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous".[8] As the ICTY Appeals Chamber has observed:

> [T]he Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence."[9]

8. The question of the compellability of a sitting head of state as a witness before an international criminal tribunal, while legally interesting, does not arise. This question did not form part of the deliberations of the majority and since leave to appeal is being sought against the Majority Decision as the decision of the Court, a peripheral legal issue cannot form the basis for a showing of exceptional circumstances.

9. 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, the Prosecution does not agree that there is any issue in the current application as to the accused persons' entitlement to certain minimum guarantees in full equality.[10] 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

---

[6] See Fofana Application, para. 25.
[7] See Norman Application, para. 3.
[8] *Prosecutor v. Brima, Kamara, Kanu*, SCSL-2004-16-AR73-441, "Decision on Brima-Kamara Defence Appeal Motion against Trial Chamber Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara", 8 December 2005, para. 112.
[9] *Prosecutor v. Dusko Tadic*, IT-94-1-A, Judgement, 15 July 1999, para. 64; reaffirmed in *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 63.
[10] See para. 10 of the Fofana Application.

successful, a certain standard under the Rules must be satisfied. If the Defence fails to satisfy that standard, it cannot argue an automatic breach of a fundamental right. The right is preserved by the process envisaged under the Rules.

10. The Fofana Application argues that the divergent opinions expressed in the Majority Decision and the Dissenting Opinion regarding the test for relief under Rule 54 supports the Defence argument as to exceptional circumstances.[11] The Norman Application raises this argument as a primary point and makes the sweeping, though unsubstantiated statement that "it is an exceptional circumstance that there are serious differences between the Judges over the interpretation of the Rules and Procedure of the court which are fundamental and require authoritative resolution for the sake of the trial".[12]

11. The Prosecution submits that this divergence of views over the interpretation of Rule 54 does not amount to exceptional circumstances, especially in a situation where the majority was guided by the jurisprudence of the Appeals Chamber of the ICTY, while the Dissenting Opinion did not distinguish the ICTY Appeals Chamber cases referred to by the majority.[13] Article 20(3) of the Statute provides that the judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the ICTY and ICTR and therefore the Majority Decision is in line with what would be expected of the Appeals Chamber. In its decision, the majority pointed out that Rule 54 of the Special Court's Rules is essentially identical to the provisions found in the Rules of the ICTY and ICTR[14] and the majority was therefore appropriately guided by the relevant jurisprudence. Contrary to the Defence argument, the "necessity" and "purpose" requirements are "readily discernible from the plain and ordinary meaning of Rule 54".[15] Furthermore, there is nothing to prevent the Chamber from drawing legal principles from cases that differ on their facts from the case under consideration and nothing to suggest that the majority failed to evaluate the factual context of the ICTY decisions relied

---

[11] Fofana Application, para. 16.
[12] Norman Application, para. 7.
[13] See Fofana Application para. 25, and ICTY Appeals Chamber cases of *Prosecutor v. Krstic*, IT-98-33-A, "Decision on Application for Subpoenas", 1 July 2003, and *Prosecutor v. Halilovic*, IT-01-48-AR73, "Decision on the Issuance of Subpoenas", 21 June 2004. The Dissenting Opinion distinguishes the ICTY Trial Chamber decision in *Prosecutor v. Milosevic*, IT-02-54-T, "Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder", 9 December 2005.
[14] Majority Decision, para. 27.
[15] See Fofana Application, para. 18.

upon.[16] Indeed, the factual distinctions between the cases determine how the relevant test is applied and not the ingredients of the test itself.

12. The relevance of the divergent views expressed by the Justices is limited to their views as to the interpretation of Rule 54. The fact that the Separate Concurring Opinion went on to address whether the President could be subpoenaed or whether he was entitled to immunity, and that the Dissenting Opinion took a diametrically opposed jurisprudential approach to this question, is not a relevant factor in the current assessment of exceptional circumstances.

13. The Fofana Application attempts to demonstrate the relevance of its argument by drawing the inference that the "somewhat troubling positions expressed by the Concurring Opinion likely formed part of the analysis leading to the majority Decision". There can be no basis for such an assertion. The purpose of a separate concurring opinion is precisely to take up points that were not raised in the majority opinion and the majority opinion remains the decision of the Court.

14. The Fofana Application argues that the Majority Decision contains the following legal errors: (1) an undue and unexplained preference for the ICTY approach over the more flexible ICTR approach or the even more liberal approach of the Dissenting Opinion; and (2) the creation of a double standard of relevance and the wrongful placing of emphasis on the necessity of the evidence as opposed to the necessity of the subpoena.

15. The Prosecution submits that reliance by the majority on the ICTY approach was proper and sufficiently justified. It is clear from the Majority Decision that the relevant jurisprudence was considered and the most pertinent cases selected. The ICTR jurisprudence referred to by the Defence for the Second Accused was not ignored, and the majority was entitled to reach the conclusion that "to require an applicant to clearly identify the issues in the forthcoming trial in relation to which the proposed testimony would be of material assistance is more in keeping with the criteria found in Rule 54 that a subpoena must be 'necessary for the purposes of an investigation or for the preparation or conduct of the trial'".[17]

16. The majority's approach does not create a double-standard of relevance. Rule 89(C)

---

[16] The Fofana Application returns to this argument in para. 24.
[17] Majority Decision, footnote 78.

governs the admissibility of the evidence of any witness, regardless of whether that witness came before the Court willingly or under compulsion. "The issuance of a subpoena...is only a mode by which the evidence is brought to court".[18] The distinction is that in order 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 relevant. This is because the issuance of a subpoena is a coercive measure potentially entailing a criminal sanction which goes against the traditional preference for cooperation. Thus, the emphasis was correctly placed by the Majority Decision on the necessity of the evidence. Indeed, if the emphasis were placed on the necessity of the subpoena, such a measure would always be 'necessary' if a witness refused to appear voluntarily.

Irreparable Prejudice

17. Since, in the Prosecution's view, the 'exceptional circumstances' limb of the test has not been made out, there is no need to consider whether irreparable prejudice has been demonstrated. Nevertheless, the Prosecution submits that the Defence would not suffer irreparable prejudice from the inability to call a witness with respect to whom, after a detailed consideration of all the Defence arguments, a subpoena has not been found to be warranted. The Appeals Chamber would not be the appropriate forum for the Defence to supplement their arguments as to why President Kabbah is an essential witness in their cases and, indeed, resort to the appeals process may be premature. The Defence has had many months since the original motions to proceed with investigations and other avenues may be open to them before the Trial Chamber.

III. CONCLUSION

18. For these reasons the Prosecution submits that the Applications should be dismissed.

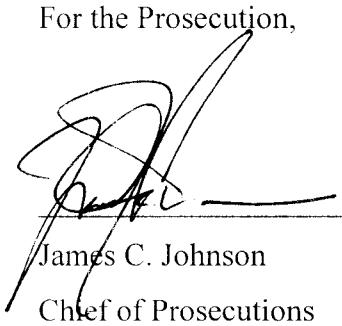
---

[18] *Prosecutor v. Krstic*, IT-98-33-A, "Decision on Application for Subpoenas", 1 July 2003, Dissenting Opinion of Judge Shahabuddeen, para. 8.

Filed in Freetown,

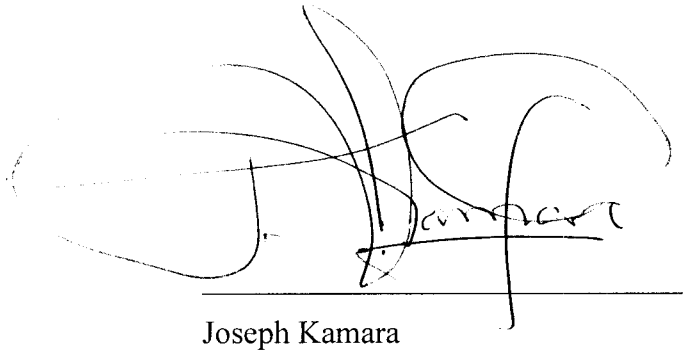
22 June 2006

For the Prosecution,



James C. Johnson

Chief of Prosecutions



Joseph Kamara

Senior Trial Attorney

Index of Authorities

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-15-T-624, "Application by First Accused for Leave to make Interlocutory Appeal against the 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", 19 June 2006.

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-15-T-626, "Urgent Fofana Application for Leave to Appeal the Subpoena Decision", 19 June 2006.

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-15-T-617, "Decision on Motions by Moinina Fofana and Sam HInga Norman fo rhte Issuance of a Subpoena Ad Testificandum to H. E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone", 13 June 2006.

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-15-T-627, "Order for Expedited Filing", 19 June 2006.

Prosecutor v Brima, Kamara, Kanu, SCSL-2004-16-AR73-441, "Decision on Brima-Kamara Defence Appeal Motion against Trial Chamber Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara", 8 December 2005.

Prosecutor v. Dusko Tadic, IT-94-1-A, Judgement, 15 July 1999, para. 64, (http://www.un.org/icty/tadic/appeal/judgement/index.htm).

Prosecutor v. Zlatko Aleksovski, IT-95-14/1-A, Judgement, 24 March 2000 (http://www.un.org/icty/aleksovski/appeal/judgement/index.htm).

Prosecutor v Krstic, IT-98-33-A, "Decision on Application for Subpoenas", 1 July 2003 (http://www.un.org/icty/cases-e/index-e.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).

Prosecutor v Milosevic, IT-02-54-T, "Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder", 9 December 2005 (http://www.un.org/icty/milosevic/trialc/decision-e/051209.htm).

Prosecutor v Krstic, IT-98-33-A, "Decision on Application for Subpoenas", 1 July 2003, Dissenting Opinion of Judge Shahabuddeen (http://www.un.org/icty/cases-e/index-e.htm).