(18631-18637)

SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber I

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

Registrar: Mr Lovemore Munlo, SC

Date: 26 June 2006

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

PUBLIC

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

For the Office of the Prosecutor:
Mr Christopher Staker
Mr James C. Johnson
Mr Joseph Kamara
Ms Bianca Suciu

For H.E. Ahmad Tejan Kabbah:
The Attorney General and Minister of Justice of the Republic of Sierra Leone,
Mr Frederick M. Carew

For Moinina Fofana:
Mr Victor Koppe
Mr Michiel Pestman
Mr Arrow Bockarie
Mr Andrew Ianuzzi

For Samuel Hinga Norman:
Dr Bu-Buakei Jabbi
Mr Alusine Sani Sesay
Ms Clare DaSilva
Mr Kingsley Belle

For Allieu Kondewa:
Mr Charles Margai
Mr Yada Williams
Mr Ansu Lansana
Mr Martin Michael

INTRODUCTION

1. Counsel for the Second Accused, Mr Moinina Fofana, (the "Defence") hereby submits its reply to the 'Prosecution Response to Applications by the First and Second Accused for Leave to Appeal the Subpoena Decision'[1] (the "Response"). The Defence has advanced three discrete arguments in support of its 'Application for Leave to Appeal the Subpoena Decision'[2] (the "Application"), each of which—standing alone—is sufficient to satisfy the conjunctive test set forth in Rule 73(B) of the Rules of Procedure and Evidence (the "Rules"). *A fortiori*, the cumulative weight of these claims, it is submitted, demonstrates the strength of the Application. Briefly and without re-arguing its points in great detail, the Defence hereby reiterates its positions, taking up the arguments advanced by the Office of the Prosecutor (the "Prosecution") in turn.

SUBMISSIONS

Exceptional Circumstances Have Been Sufficiently Pleaded

Mr Fofana's Right to Call and Examine a Witness of His Choice Has Been Unduly and Unnecessarily Compromised

2. Pursuant to the jurisprudence of this Court, where an impugned decision implicates a fundamental right under Article 17(4) of the Statute, this—in and of itself—*may be* sufficient grounds for granting leave to appeal if there is a danger that an accused person has been deprived of such a right unfairly or without sufficient justification[3]. The Defence does not suggest that, merely because a Trial Chamber decision deals with an Article 17(4) right, leave to appeal should be granted automatically. Indeed, such a position would amount to a far too liberal reading of the applicable jurisprudence. However, where it can be shown that an Article 17(4) entitlement may have been unduly or unnecessarily limited, then leave to appeal becomes summarily appropriate[4].

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[1] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-630, 22 June 2006.
[2] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-626, 19 June 2006 (the "Application").
[3] *See Prosecutor v. Brima*, SCSL-2004-16-T-367, Trial Chamber II, 'Decision on Brima-Kamara Application for Leave to Appeal From Decision on the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel', 5 August 2005.
[4] *Ibid.* This is due to the paramount importance of the rights enshrined in Article 17(4), inalienable rights afforded to an accused person not only by the Special Court but by other international criminal tribunals and most municipal legal systems of the world. Such rights are truly fundamental.

3. With respect to this argument, the Prosecution takes the position that the Application does not raise an issue "as to the accused persons' entitlement to certain minimum guarantees in full equality"[5]; so long as "a certain standard under the Rules" is satisfied, the Defence "cannot argue an automatic breach of a fundamental right"[6]; and such right "is preserved by the process envisaged by the Rules"[7].

4. To the contrary, the Defence submits that Mr Fofana's fundamental right to call and examine witnesses of his choice has been unduly and unnecessarily limited[8]. While a typically liberal and purposive approach to the application of the Rules has thus far guided this Chamber, an unnecessarily stringent and exclusionary analysis was applied to the 'Fofana Motion for Issuance of a Subpoena *ad Testificandum* to President Ahmad Tejan Kabbah'[9] (the "Motion") under Rule 54. The Defence submits that the latter method is not "the process envisaged by the Rules", and that its application to the instant case begs the question as to whether Mr Fofana's Article 17(4) rights are truly being recognized in full equality[10].

The Divergent Views Expressed by the Justices of this Chamber as to New and Important Issues of International Criminal Law Require Appellate Resolution

5. The impugned decision concerns novel and substantial aspects of international criminal law, which require definitive interpretation by the Appeals Chamber given the divergent views expressed in the various opinions of the Chamber[11]. Again, this alone is a sufficient reason for granting leave to appeal[12]. The Prosecution, however, insists "there is nothing inherently *novel* or *complex* about a subpoena application pursuant to Rule 54"[13]. This assertion is incorrect.

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[5] Response, ¶ 9.
[6] *Ibid.*
[7] *Ibid.*
[8] *See* Application, ¶¶ 10-12.
[9] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-522, 15 December 2005.
[10] Article 17(4)(e) of the Statute of the Special Court for Sierra Leone (the "Statute") provides that an accused persons shall have the right to "obtain the attendance and examination of witnesses on his or her behalf *under the same conditions* as witness against him" (emphasis added).
[11] This Chamber's 'Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena *ad Testificandum* to H.E. Alhaji Dr Amad Tejan Kabbah, President of the Republic of Sierra Leone', SCSL-2004-14-T-617, 14 June 2006 (the "Subpoena Decision") is comprised of a majority decision (the "Majority Decision"), a separate concurring opinion (the "Concurring Opinion"), and a dissenting opinion (the "Dissenting Opinion").
[12] *See* Application, ¶¶ 13-20.
[13] Response, ¶ 6 (emphasis added).

6. First of all, the Motion is the first application for a subpoena under Rule 54 of the Special Court, a tribunal whose nature and purpose have been described by the Appeals Chamber as *sui generis*[14]. While it may be accurate to state that the question as to the proper test to be applied to a request for a subpoena is no longer debated before trial chambers of the *ad hoc* tribunals[15], the issue as to which method best suits this Court is by no means a settled one. Indeed, Justice Thompson has advanced a third approach to the issue, one very much grounded in the particular practice which has developed at the Special Court[16]. It is submitted that only an Appeals Chamber decision can definitively settle this matter, not only for the benefit of Mr Fofana, but for the several other accused persons who no doubt may be required to make use of similar procedures in the near future.

7. Adding to the complexity of the matter is the Concurring Opinion. The Prosecution is correct to state that the compellability question did not arise for decision and that, under normal circumstances, the mere existence of a concurring opinion would be largely irrelevant to the Rule 73(B) analysis[17]. However, as pleaded in the Application[18], these are not normal circumstances. The Concurring Opinion, it is submitted, demonstrates a questionable juridical approach to the Motion, one which openly injects political considerations into the legal arena and fails to take cognizance of the law applicable to international criminal tribunals[19]. In short, because it is apparent that one author of the Majority Decision would not have granted the Motion *under any circumstances*, the Defence submits that the Majority Decision is tainted[20]. Given that the Defence disputes the result of the Majority Decision, the Concurring Opinion's exceptional approach to the Motion cannot be considered "peripheral"[21] to the Rule 73(B) determination in this case.

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[14] *See Prosecutor v. Norman et al.*, SCSL-2004-14-AR73-397, Appeals Chamber, 'Decision on the Amendment of the Consolidated Indictment, 18 May 2005, ¶ 46.
[15] The International Criminal Tribunal for the Former Yugoslavia (the "ICTY") and the International Criminal Tribunal for Rwanda (the "ICTR") have notably adopted different approaches to their own identical rules with regard to the issuance of, *inter alia*, subpoenas. *See* Application, nn 33, 36, and 37.
[16] *See* Dissenting Opinion.
[17] *See* Response, ¶ 8.
[18] *See* Application, ¶ 20.
[19] *See* Application, ¶ 19.
[20] *N.B.* In its opening statement, the Defence urged the Chamber not to be influenced by political considerations in discharging its duties. *See Prosecutor v. Norman et al.*, SCSL-2004-14, Trial Transcript, 19 January 2006 at 25:23–26:11. Yet, it is submitted that the Concurring Opinion reveals a judicial mind disposed to denying the Motion for reasons of political expediency. While the Defence does not make these comments lightly, it is submitted that Courts should not avoid difficult issues because they fear the political consequences of their actions. *See, e.g., United States v. Nixon*, Supreme Court of the United States, 418 U.S. 683, 24 July 1974.
[21] Response, ¶ 8.

The Majority Decision is Erroneous

8. The Majority Decision contains several errors which, cumulatively and in conjunction with the grounds pleaded above, amount to exceptional circumstances. The Prosecution claims 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 Accused's liability"[22]. Again, this is inaccurate: the positions pleaded in the Application are sufficiently specific for the purposes of an application for leave to appeal[23].

9. The Defence argument in this regard is two-fold. First, the Majority Decision applied an unnecessarily restrictive test to the question presented by the Motion. Contrary to the Prosecution's assertion[24], the nuances of the so-called "necessity" and "purpose" requirements as formulated by the ICTY are not obvious from a plain reading of Rule 54. The language of that Rule is ambiguous, and reasonable minds could differ as to whether the phrase "necessary for the purposes of an investigation or for the preparation or conduct of the trial" refers simply to the necessity of the information or the necessity of compulsory process to gain such information. The Defence submits that it is by no means clear that the interpretation given by the ICTY is the only suitable one, or that it is necessarily the best approach for this Court[25].

10. Further, assuming *ex arguendo* the application of the proper test, it is the Defence position that a reasonable trier of fact would have gone beyond the mere statement of the rule in the *Halilovic*[26] and *Krstic*[27] cases and, in looking closely at the underlying facts, would have arrived at a conclusion different from that of the Majority Decision[28]. The Defence does not dispute that general legal principles may be drawn from cases with

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[22] Response, ¶ 7.
[23] *See* Application, ¶¶ 21-25.
[24] *See* Response, ¶ 11.
[25] The Defence submits that the necessity requirement should focus on the "traditional preference for cooperation". Response, ¶ 16. For example, where a party has exercised all diligence and sought to secure voluntary cooperation by all possible means but failed and where the proposed evidence is not available from any other source, then a subpoena becomes necessary. Such a requirement should not, however, be used to impose an additional standard of heightened relevance. In this regard, the ICTY approach is misconceived.
[26] *Prosecutor v. Halilovic*, IT-91-48-AR73, Appeals Chamber, 'Decision on the Issuance of Subpoenas', 21 June 2004.
[27] *Prosecutor v. Krstic*, IT-98-33-A, Appeals Chamber, 'Decision on Application for Subpoena', 1 July 2003.
[28] *See* Application, ¶ 24.

different factual underpinnings[29]. However, *stare decisis* requires an evaluation of how such principles were applied to the particular facts of the decided case, such that meaningful analogies can be made to the case under consideration[30].

Granting Leave is Necessary to Avoid Irreparable Prejudice to the Defence

11. The Prosecution's position that the Defence will "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"[31] is belied by the Defence position that only President Kabbah can provide the necessary, relevant information sought[32]. Contrary to the Prosecution's assertions, the Defence is not seeking to "supplement"[33] its arguments on appeal. It is the Defence position that the factual explanations contained in the Motion and subsequent replies should have been sufficient to satisfy the requirements of Rule 54. Finally, the Defence submits that no amount of additional investigation or exploration of "other avenues"[34] could uncover a suitable substitute for the unique, relevant information that only President Kabbah can provide.

CONCLUSION

12. For the reasons contained in the Application, and as further discussed above, the Defence respectfully requests the Chamber to grant leave to appeal the Subpoena Decision without delay.

COUNSEL FOR MOININA FOFANA

Victor Koppe

[29] *See* Response, ¶ 11.
[30] *See* Application, n 38 (distinguishing the facts of the *Halilovic* case).
[31] Response, ¶ 17.
[32] *See* Application, ¶ 26.
[33] Response, ¶ 17.
[34] *Ibid.*

APPENDIX A

Defence List of Authorities

Constitutive Documents of the Special Court

1. Statute of the Special Court for Sierra Leone: Article 17(4)

2. Rules of Procedure and Evidence: Rules 54 and 73(B)

Jurisprudence of the Special Court

3. *Prosecutor v. Norman et al.*, SCSL-2004-14-AR73-397, Appeals Chamber, 'Decision on Amendment of the Consolidated Indictment', 18 May 2005

4. *Prosecutor v. Brima et al.*, SCSL-2004-16-T-367, Trial Chamber II, 'Decision on Brima-Kamara Application for Leave to Appeal From Decision on the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel', 5 August 2005

Jurisprudence of the *Ad Hoc* Tribunals

5. *Prosecutor v. Halilovic*, IT-91-48-AR73, Appeals Chamber, 'Decision on the Issuance of Subpoenas', 21 June 2004

6. *Prosecutor v. Krstic*, IT-98-33-A, Appeals Chamber, 'Decision on Application for Subpoenas', 1 July 2003

Other Jurisprudence

7. *United States v. Nixon*, Supreme Court of the United States, 418 U.S. 683, 24 July 1974