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SCSL-03-01-T
(28988-28996)

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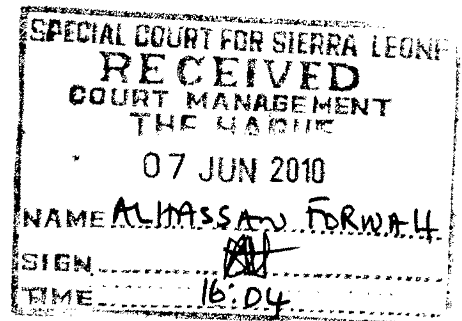
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

TRIAL CHAMBER II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Ms. Binta Mansaray

Date filed: 7 June 2010



THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION REPLY TO DEFENCE RESPONSE TO PROSECUTION MOTION FOR THE ISSUANCE OF A SUBPOENA TO NAOMI CAMPBELL

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I. INTRODUCTION

1. The Prosecution files this Reply to the "Defence Response to Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell" ("**Response**").[1]
2. Contrary to the arguments made in the Response, the Prosecution has satisfied the appropriate legal standard for the Trial Chamber to issue a subpoena; having established both the "purpose" requirement (or "legitimate forensic purpose" requirement) and the "necessity" requirement.

II. ARGUMENT

The "Purpose" Requirement:

3. In relation to the "purpose" requirement (or "legitimate forensic purpose" requirement) the Prosecution set out the applicable law in the Motion.[2] However, in the Response, the Defence conveniently ignore the appellate jurisprudence on this issue and instead refer to a series of decisions from the Trial Chambers of the ICTR.[3] The appellate decisions of the Special Court are controlling.
4. The Appeals Chamber of the Special Court has confirmed that to satisfy the "purpose" requirement, the party applying for a subpoena must show "**a reasonable basis** for the belief that the information to be provided by the prospective witness is **likely to be of material assistance** to the applicant's case, or **that there is at least a good chance that it would be of material assistance** to the applicant's case, in relation to clearly identified issues relevant to the forthcoming trial".[4] The Appeals Chamber of the Special Court was guided by decisions of the Appeals Chamber of

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-968, "Defence Response to Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell," 31 May 2010 ("**Response**").

[2] *Prosecutor v. Taylor*, SCSL-03-01-T-961, "Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell," 20 May 2010 Motion, paras. 5 – 7.

[3] Response, para. 8.

[4] *Prosecutor v. Norman et al.*, SCSL-04-14-T-617, "Decision on Interlocutory Appeals Against Trial Chamber Decision refusing to Subpoena The President of Sierra Leone", 11 September 2006, "***Norman* Subpoena Appeal Decision**", at para. 10 (emphasis added) confirming the approach of the Trial Chamber; see paras. 9 – 18.

the ICTY, in the cases of *Halilovic* and *Krstic,* which contain similar formulations of the test.[5]

5. Further, in the *Krstic* decision, the ICTY Appeals Chamber elaborated that the assessment of the chance that the prospective witness will be able to give information that will materially assist the applicant's case "would have to be applied in a reasonably liberal way", although the party would "not be permitted to undertake a fishing expedition – where it is unaware whether the particular person has any relevant information".[6] Notably, in the circumstances of this application the information contained in the statements of Mia Farrow and Carole White providing a clear and cogent basis for the Prosecution's belief that Ms. Campbell's anticipated evidence would materially assist its case.

6. Contrary to the suggestion made by the Defence,[7] there is no requirement that the Prosecution must either have interviewed or spoken to a potential witness, to satisfy the "purpose requirement". Additionally, although Ms. Campbell previously denied having received a diamond from Charles Taylor when she was asked about this by an ABC news reporter,[8] this was a limited and spontaneous response, which is not necessarily in contradiction with the anticipated evidence of other witnesses, and would depend on how the word "received" is interpreted. Further, in a subsequent interview with Oprah Winfrey, Ms. Campbell did not deny having received a diamond from the Accused, rather she said that she did not want to be part of these proceedings because she was afraid for the safety of her family.[9]

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[5] Ibid., at para. 10 and accompanying footnote 13 and at para. 15 and accompanying footnotes 23 and 24 and para. 16. In *Prosecutor v. Sefer Halilovic*, Case No. IT-01-48-AR73, "Decision on Issuance of Subpoenas", 21 June 2004, ("***Halilovic* decision** ") at para. 6 the Appeals Chamber states that "the applicant seeking a subpoena must make a certain evidentiary showing of the need for the subpoena. In particular he must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly defined issues in the forthcoming trial". In the *Prosecutor v. Krstic*, IT-98-33, "Decision on Application for Subpoenas", 1 July 2003, "(***Krstic* decision**") the Appeals Chamber states at para. 1 that "An applicant for such an order or subpoena before or during the trial would have to demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to the forthcoming trial".

[6] *Krstic* decision at para. 2.

[7] Response, para. 4.

[8] Response, para. 4.

[9] See the Motion, and arguments set out at paras. 16 – 17,

7. Further, contrary to the arguments made by the Defence,[10] the anticipated evidence of Ms. Campbell is highly probative, material to the Indictment and directly relates to the credibility of the Accused's testimony.[11]

The Necessity Requirement:

8. As regards the "necessity requirement" the Defence points to the potential evidence of Mia Farrow and Carole White in support of an argument that the potential evidence of Ms. Campbell could be obtained elsewhere.[12] In this regard, it is of note that when the Prosecution sought to use the statement of Mia Farrow during the cross-examination of the Accused, one of the reasons given by Lead Defence counsel in opposition to use of this statement was that Ms. Campbell "would be the person in the best position to say what happened in relation to that diamond".[13] While the evidence of both of the other witnesses is relevant to this issue, Ms Campbell is a material witness as she was the person who allegedly interacted with the Accused during the dinner and was the alleged recipient of the diamond.

9. Furthermore, it is apposite to recall that according to the ICTY Appeals Chamber, when considering whether or not to issue a subpoena, the Chamber must take into account "the interests of justice in having **all relevant evidence** before the Trial Chamber for a proper assessment of the culpability of the individual on trial".[14]

That a Witness may prove to be hostile is no bar to the issuance of a subpoena:

10. The Defence argument that the Prosecution should not be allowed to call a knowingly hostile witness,[15] is without merit. First, the argument *assumes* that should the Trial Chamber issue a subpoena, Ms. Campbell would be a "hostile witness". Although

[10] Response, para. 2 and 7.
[11] See the Motion, paras. 12 – 13 where the argument is set out in full.
[12] Response, para. 2 and paras. 10 – 13.
[13] *Prosecutor. v. Taylor*, TT 14 January 2010, 33342 lines 19 – 20.
[14] *Prosecutor v. Brdjanin and Tadic*, IT99-36-AR73.9, "Decision on Interlocutory Appeal", 11 December 2002, para. 46. See also the *Halilovic* decision, infra, para 7, which states that "The Trial Chamber's considerations, then, must focus not only on the usefulness of the information to the applicant but on its overall necessity in ensuring that the trial is informed and fair". Emphasis added.
[15] Response, para. 2 and para. 14.

Ms. Campbell has indicated that she does not wish to be involved in the case, there has been no evidence to suggest that if she were served with a subpoena that she would refuse to comply. Nor is there evidence to conclude that she would necessarily be a "hostile witness" if required to give evidence in court.

11. Secondly, this argument lacks any legal basis. The Defence misquote the single decision from a Trial Chamber of the ICTR in *Karemera* on which they rely to support their argument. Contrary to the Defence assertion, the decision does not support the proposition that "before a subpoena should be issued, it must be at least reasonably likely that an order would produce the degree of co-operation needed".[16] Rather, the relevant paragraph of the *Karemera* decision states that "the Appeals Chamber furthermore held that a subpoena **should be issued** if "it is at least reasonably likely that an order would produce the degree of cooperation needed **for the defence to interview the witness**".[17] The *Karemera* Trial Chamber decision refers to the decision of the ICTY Appeals Chamber in *Halilovic.*[18] The *Halilovic* decision is concerned with an appeal arising out of a Trial Chamber's refusal to issue subpoenas to enable the Defence to interview potential Prosecution witnesses at the pre-trial stage. These decisions therefore relate to entirely different circumstances and do not support the proposition advanced by the Defence in their Response. Finally, there are commonly applied procedures for presenting the evidence of hostile witnesses and the possibility that a witness may prove hostile does not bar the issuance of a subpoena.

That a third party state might not implement a subpoena is no bar to its issuance:

12. In support of its argument that the Trial Chamber should not issue a subpoena the Defence also argues that "the Trial Chamber should not issue orders that may not be

[16] Response, para 14.
[17] *Prosecutor. v. Edouard Karemera*, ICTR-98-44-T, "Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses Nz1, NZ2, and NZ3", 12 July 2006, para. 10. Emphasis added.
[18] Ibid., at footnote 11, referring to the *Halilovic*, decision (cited above) para. 17. Notably, however, there is no paragraph 17 in this decision, although the decision does relate to the issuance of subpoenas for the purpose of interviews with a party, as detailed above.

implemented".[19] This argument lacks any jurisprudential support. The Defence suggests that subpoena's issued by the ICTR and ICTY are backed by "enforcement mechanisms found in Article 28 of the ICTR Statute and Article 29 of the ICTY Statute". However, these articles do not contain "enforcement mechanisms", rather they simply state that States "shall" co-operate with the ad hoc tribunals, without referring to any "enforcement mechanism" to enforce that obligation. Notably, not every request for a subpoena issued by the *ad hoc* tribunals has been enforced by relevant third party States.[20] However, this has not prevented these institutions from issuing subpoenas, nor should it. The Trial Chamber may request the assistance of a third party State to serve and enforce a subpoena issued by the Trial Chamber. The Defence argument assumes without justification such a third party State would refuse such a request.

13. Additionally, the Defence state that when a previous subpoena was issued by the Trial Chamber, the witness in question had indicated that he would comply with a subpoena if one were issued. The Defence then misstates the situation regarding Ms. Campbell when it alleges that "in the present case, Ms. Campbell has made it clear that she is not willing to appear".[21] Whilst Ms. Campbell has stated publicly that she does not want to be involved with the case, there has been no evidence that she would not comply with a subpoena, should a subpoena be issued by the Trial Chamber.

That the potential subject of a subpoena is a "public figure" is no bar to the issuance of a subpoena:

14. Finally, the Defence states in the introduction to its Response but notably does not return to in the body of its submissions that "Naomi Campbell's only utility would be

[19] Response, paras. 2 and 15 – 17.
[20] See by way of example, *Prosecutor v. Bagosora*, "Decision on Bagosora Motion for Additional Time for Closing Brief and on Related Matters", 2 May 2007, at paras. 5 and 7 where the Trial Chamber notes that despite its order (of 11 September 2006) to subpoena General Marcel Gatsinzi (who at that time was the Minister of Defence of the Government of Rwanda) the presentation of the evidence by all parties had been completed by 12 December 2006 and that "other than noting that General Gatsinzi was unwilling to testify as a Bagosora witness in Arusha, the Chamber can do nothing more at this time".
[21] Response, para. 17.

to bring unwarranted media attention to proceedings".[22] Whether a witness is or is not a public figure is irrelevant. Witnesses with evidence relevant to these important proceedings should be treated equally regardless of whether or not they are public figures. Ms. Campbell is a material witness to the event in question as it was to her that the Accused chose to give the diamond he supposedly did not have.

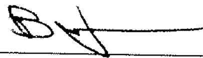
III. CONCLUSION

15. For the reasons given above, the Defence arguments as set out in the Response should be rejected. For the reasons stated above and in the Motion, the Prosecution has satisfied the legal test and the request for a subpoena ought to be granted by the Trial Chamber.

Filed in The Hague,

7 June 2010,

For the Prosecution,



Brenda J. Hollis
The Prosecutor

[22] Response, para. 3.

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