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SCSL-2003-08-PT
(3257-3264)

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SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Presiding Judge Designated Pursuant To The Practice Direction On The Procedure Following a Request By a State, the Truth and Reconciliation Commission, Or Other Legitimate Authority To Take A Statement From A Person In The Custody of the Special Court for Sierra Leone.

Registrar: Robin Vincent

Date: 29th day of October, 2003

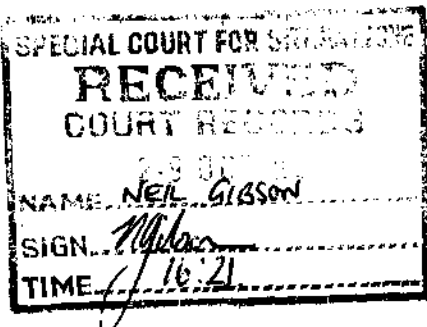
The Prosecutor Against: Samuel Hinga Norman
(Case No. SCSL-2003-08-PT)

DECISION ON THE REQUEST BY THE TRUTH AND RECONCILIATION COMMISSION OF SIERRA LEONE TO CONDUCT A PUBLIC HEARING WITH SAMUEL HINGA NORMAN

Office of the Prosecutor:
Desmond De Silva, QC, Deputy Prosecutor
Alain Werner

Truth and Reconciliation Commission:
Howard Varney
Ozonnia Ojielo
Franklyn B. Kargbo
Gavin Simpson

Defence Counsel:
Blyden Jenkins-Johnston
Sulaiman Banja Tejan-Sie



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THE SPECIAL COURT FOR SIERRA LEONE ("the Court")

SITTING AS, Judge Bankole Thompson, Presiding Judge and designated pursuant to the Practice Direction on the Procedure Following a Request by a State, The Truth and Reconciliation Commission, or other Legitimate Authority to take a statement from a Person in the Custody of the Special Court for Sierra Leone adopted on the 9th day of September, 2003 as amended on the 4th day October, 2003 pursuant to Rule 33 (D) of the Rules of Procedure and Evidence of the Special Court ("the Rules");

BEING SEIZED of the Truth and Reconciliation Commission for Sierra Leone "Request to conduct a public hearing with Chief Samuel Hinga Norman" filed on the 9th day of October 2003 pursuant to the aforementioned Practice Direction (the "TRC");

NOTING that the aforesaid Request concerns Samuel Hinga Norman, a person, presently in the custody of the Special Court pursuant to a seven (7) count Indictment preferred against him on the 7th day of March, 2003 with approval of the Special Court for various offences falling within the jurisdiction of the said Court;

CONSIDERING that the said Request is one which, according to the Practice Direction, falls within the jurisdiction of the Presiding Judge of the Trial Chamber for determination, and subject to appeal to the President of the Special Court;

NOTING that the purpose of the Request is to facilitate the object and functions of the Commission contained in Sections 6 and 7 of the Truth and Reconciliation Commission Act, 2000 which include "holding sessions, some of which may be public, to hear from the victims and perpetrators of any abuses of violations from other interested parties";

CONSIDERING that the Truth and Reconciliation Commission "perceives Samuel Hinga Norman," an Accused presently indicted before the Special Court "to have played a central role in the conflict in Sierra Leone";

CONSIDERING ALSO that the Special Court is seized of an indictment charging the Accused with seven (7) counts of various offences within the jurisdiction of the Special Court as hereinbefore stated, but that the Court is, in law, obliged **NOT** to draw any conclusions about his role in the said conflict until the issue has been properly adjudicated before the said Court and therefore **CANNOT**, at this stage form any perception as that entertained by the **TRC and upon which the aforementioned Request is premised;**

EMPHASIZING that the jurisdiction to try the Accused for offences falling within the jurisdiction of the Court is exclusive to the Court and not shared concurrently with any other institution, national or international, and that the Court as, an International Criminal Tribunal, cannot properly, in law, delegate this exclusive jurisdiction to any other entity or institution; and that any purported delegation of such authority would compromise its autonomy and the integrity of the trial of the Accused;

CONSIDERING FURTHER the paramount need of the Special Court in protecting the procedural and substantive due process rights of the Accused, as long as he remains in the custody (actual or constructive) of the Special Court; and has not been adjudged guilty;



NOTING the Response of the Defence to the Request of the TRC, filed on the 14th day of October, 2003;

ALSO NOTING the Response of the Prosecution to the Request of the TRC, filed on the 21st day of October, 2003;

WHEREAS acting on the Designated Judge's Instructions, the Chamber advised the parties on the 22nd day of October, 2003 of a brief oral hearing preceding the determination of the merits of the Request;

NOTING THE SPECIFIC SUBMISSIONS OF THE PARTIES

The TRC Request

1. (a) By the instant Request, the TRC seeks an Order of the Special Court "to conduct a public hearing with Chief Samuel Hinga Norman JP, currently held as an awaiting trial prisoner at the detention facility of the Special Court".

(b) At the oral hearing on the 24th day of October, 2003, Mr Varney for the TRC handed out written submissions in response to the Prosecutor's written representations and highlighted several main points. He noted the urgency of the situation as the TRC is approaching the end of its lifespan in December 2003 and that the Defence and TRC had adopted a unified position on the TRC's request. He, first responded to the Prosecution objection that a public hearing would be contrary to the interests of justice, noting that any claim that a hearing would be *sub judice* was without factual basis and jurisprudential support, and that the professionalism of the judges of the Special Court renders such a claim irrelevant. Furthermore, that the Prosecutor's claim that to allow a hearing would be contrary to public policy and the interests of justice ignored the role of the courts as guardians thereof, by which a proportional assessment could be made of the right of all Sierra Leoneans to participate in the TRC process without discrimination. Mr. Varney also submitted that there was no basis to the Prosecution claim that the institution of justice would be weakened by a TRC hearing and that no objections were raised at the time the Practice Direction was issued by the Special Court.

(c) Second, responding to the Prosecution's objection that the integrity of the proceedings before the Special Court would be compromised by providing Chief Norman with a public forum in which to stir up public sentiment and intimidate witnesses, noted that there are already strict protective measures in place for witnesses and there is no basis for suggesting that Chief Norman would disclose their identities in a public hearing, nor that he possesses the knowledge of their identities at all. While there are many factors that may cause witnesses to fear participating in the Court proceedings, any suggestion of the TRC process being used as a forum for subtle intimidation is purely speculative.

(d) Finally, Counsel submitted that TRC's hearing processes do not threaten the fragile peace in Sierra Leone; rather that its contribution to establishing a public understanding of the conflict itself helps secure a sustainable peace. Furthermore, the TRC hearings conducted to date have not had any destabilising effect. The TRC objected to all of the conditions suggested by the Prosecutor as alternative measures in the event that hearings were to proceed, on the basis that they were contrary to the essential purpose and spirit of its work which is founded on transparency and accountability. Access by the press and public broadcasts are essential to this purpose and spirit. In

conclusion, Counsel argued that national practice now recognises a right to testify before it, and that at the international level Truth and Reconciliation Commissions have become an important part of the right of victims to an effective remedy.

The Defence Response

2. In his written Response, the Defence Counsel for Samuel Hinga Norman stated thus:

“My instructions are to state that consequent upon the Request SHN001 submitted on 7th October 2003 by the Truth and Reconciliation Commission to conduct a public hearing with my Client. Chief Samuel Hinga Norman hereby agrees to such public hearing being conducted by the said Commission, and indicates his willingness to answer questions on the subject areas as set out in paragraph 18 of the said request, subject to the *caveat* contained in the provisions of paragraph 17 thereof”

In his oral submission, Mr Jenkins-Johnston for the Defence noted that his main concern was that Chief Norman should have the same right as other citizens to tell his story to the TRC. He echoed the TRC's submissions regarding the Prosecutor's concern for the integrity of the proceedings. He also stated that the Order of 26 May 2003 by Judge Thompson made more than adequate provision for the protection of witnesses and their identities had been suppressed during the disclosure process. Furthermore, the Practice Direction of the Court made additional provisions, which he submitted went beyond the powers of the Registrar under the Statute of the Court in that it seeks to restrict the mandate of the TRC. In addition, he suggested that the Prosecutor's alternative conditional measures indicated a reluctance to work together with the TRC, as did the Prosecutor's 'veiled threat' that any statement Chief Norman made before the TRC may be used against him during the Court proceedings. He also indicated that Chief Norman understood the scope of the TRC request, was willing to testify publicly and deserved the opportunity to do so that is afforded to all Sierra Leoneans under the *Truth and Reconciliation Commission Act*.

The Prosecution's Response

3. The Prosecution's main submission was that both the interests of justice and the integrity of the proceedings before the Special Court might be put at risk by granting the Request. According to the Prosecution, applying the *sub judice* notion to the projected TRC hearing, it would not appear to be in the interest of justice to have the Accused plead his case in public when he will be entitled to a fair and public trial in due course. It was also submitted that the act of having the Accused testify might well have an adverse effect on victims and potential witnesses. The Prosecution also contended that the public hearing before the TRC might put "in peril the fragile equilibrium which exists in Sierra Leone today" from the perspective of the security situation. In his oral representations, Mr. Desmond de Silva for the Prosecution submitted that Chief Norman's opportunity to tell his story would take place during his trial on oath. He noted that the Prosecutor was anxious for the TRC to fulfil its mandate. Nevertheless, the Prosecutor has a duty to ensure the integrity of the judicial process is preserved, as well as the perception thereof. He contended that the risk that Chief Norman would present a public version of events to the TRC that was later contradicted under oath would render the entire process farcical. According to him, checks and balances were necessary to ensure that the proper place for litigating Chief Norman's liability remained in the Court. To this extent, he submitted that Chief Norman as an indictee is in a different position from ordinary citizens of Sierra Leone, and each indictee would need to be

considered on a case by case basis. In this case, he concluded, Chief Norman still has a large group of supporters. The alternative conditions proposed by the Prosecutor would balance this consideration without diminishing the ability of the TRC to fulfil its mandate.

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4. Paragraph 5 of the Practice Direction on the procedure following a request by a State, the Truth and Reconciliation Commission, or other legitimate authority to take a statement from a person in custody of the Special Court for Sierra Leone provides as follows:

“ In the event that the detainee agrees to the questioning (such agreement having been signed in writing by the detainee and confirmed by the detainee’s counsel) the Registrar shall inform the parties and place the request before the Presiding Judge. The Presiding Judge shall instruct the parties and the detainee’s counsel on the procedures to be followed on making representations concerning the request. After such representations are made, the Presiding Judge shall grant approval (conditional or otherwise) if the said judge is satisfied that the detainee agrees to the questioning and has been fully advised in terms of paragraph 4 above. In such circumstances, the request for questioning will only be rejected if the Presiding Judge is satisfied that a refusal is necessary in the interests of justice or to maintain the integrity of the proceedings of the Special Court. An appeal against rejection shall be decided by the President if it is made expeditiously and jointly by the detainee and the requesting authority.”

5. The aforesaid Practice Direction was adopted pursuant to Rule 33 (D) of the Rules of Procedure and Evidence of the Special Court which is in these terms:

“The Registrar may, in consultation with the President of the Special Court, issue Practice Directions addressing particular aspects of the practice and procedure in the Registry of the Special Court and in respect of other matters within the powers of the Registrar.”

6. In conformity with the provisions of the above Direction, as Presiding Judge of the Trial Chamber, I became seized of the instant Request following a reference to me by the Registrar of the Special Court on the 15th day of October, 2003, and later of the agreement in writing of Samuel Hinga Norman, the detainee in question, signed by his Counsel, Blyden Jenkins-Johnston Esquire and by himself and filed on the 14th day of October, 2003 and also of the Prosecutor’s Response filed on the 21st day of October, 2003.

7. In further conformity with the said Practice Direction, the parties were advised to attend an oral hearing before me in Chambers on the 24th day of October , 2003 at 10:30 a.m. for the purpose of making brief representations in support of their respective written positions. The oral hearing did take place on the scheduled date. At the said hearing, the parties argued strenuously in support of their respective written positions, as reflected in paragraphs 1, 2, and 3 above.

8. Having meticulously examined both the written submissions and oral representations of the parties, I am satisfied that the detainee Samuel Hinga Norman did agree to the questioning, and was fully advised in terms of paragraph 4 of the Practice Direction. Being thus satisfied, I have applied my mind sufficiently and diligently to the two alternative judicial options open to me in evaluating

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the merit of the Request: (i) to approve the Request, or (ii) to refuse it if *“satisfied that a refusal is necessary in the interests of justice and to maintain the integrity of the proceedings of the Special Court;”* the Decision being subject to appeal.

9. Pre-eminently mindful of the compelling need to protect the procedural and substantive due process rights of the Accused, as long as he remains in the custody (actual or constructive) of the Special Court, and convinced that it is the unquestionable expectation of the international community that Judges of the Special Court should discharge their judicial functions independently and impartially free from pressures (institutional, societal, political or otherwise) (Article 13 (1) of the Court’s Statute), I have decided to adopt the second option based on the key judicial considerations articulated in the succeeding paragraphs (10-16). To this end, it is refreshing to note the Commission’s submission, in response to the Prosecution’s objection, that *“proceedings before the Special Court are conducted by professional judges, whose insusceptibility to extraneous influences and considerations is well recognised in law.”*

10. The first consideration is that the Request of the Commission to conduct a public hearing with the Accused on, as the Request indicates, the centrality of his role in the conflict that took place in Sierra Leone a decade ago *clashes fundamentally with, and has grave ramifications for, the cardinal principle of criminal law that a person accused of crime is presumed innocent until convicted. Even after conviction, he has the chance of proving that his conviction, barring a guilty plea, was a miscarriage of justice through the machinery of appeal.* Almost every international convention, treaty or instrument on the subject of human rights and related themes has elevated this principle to the level of a fundamental human right, notably, the *Universal Declaration of Human Rights* (Article 11(1)). It is this principle that lies at the core of the adversarial procedure of the Special Court. In other words, the presumption of innocence (as it is succinctly or quaintly characterized) enjoys primacy within the Special Court’s adversarial normative framework for the adjudication of crimes (Article 17 (3) of the Court’s Statute).

11. The second consideration is that according to the records, the instant Request was filed for the purpose of facilitating the *“the object and functions of the Commission contained in Sections 6 and 7”* of the Truth and Reconciliation Commission Act, 2000 (see paras. 5, 6, and 7 of the Request). *Paragraph 7 is pre-eminent.* It empowers the Commission to hold *“sessions some of which may be public, to hear from victims and perpetrators of any abuses or violations”* or from other interested parties (emphasis added). It is evident from paragraph 7 that there are three categories of persons that may statutorily testify before the Commission. They are:

- (i) victims of abuses and violations;
- (ii) perpetrators of abuses and violations; and
- (iii) interested parties.

12. In this regard, the records further reveal that the Accused is being invited to testify as a *“perpetrator of abuses and violations”*. This inference is supported by two assertions upon which the Request is predicated. *The first is that the Accused did play a central role in the conflict in Sierra Leone; the second is that the Commission perceives that the Accused played a central role in the conflict in Sierra Leone. It seems disingenuous to suggest that the Accused played a central role in the conflict as a “victim” or is being invited to testify as an “interested party.” “Contrastingly, from the perspective of the Special Court, at this point in time, the issue of the alleged centrality of the Accused’s role in the conflict is a highly contentious, and as yet, unsubstantiated issue as evidenced by the plea of not guilty to each count in the Indictment against the Accused.* I find, therefore, that the perception of the Commission that the Accused did play a central role in the conflict as a perpetrator of abuses and violations prior

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to his testimony before the Commission is inconsistent with the presumption of innocence, the key doctrine that undergirds the adversarial scheme of the Special Court. To reinforce this finding, it is important to note that on a contextual reading of the whole of the Truth and Reconciliation Commission Act, 2000, *the inference is irresistible that the word "perpetrator" has a restrictive connotation with reference only to persons who committed abuses and violations during the conflict and are willing to confess their guilt.* The word, therefore, cannot properly be applied to an "indictee" who has pleaded not guilty to each of the seven (7) counts in the indictment in respect of which he is awaiting trial before the Special Court. The Truth and Reconciliation Commission Act, 2000 is predicated upon the notion of restorative justice which aims at the reconciliation of *self-confessed perpetrators, victims, and the state as a whole.* Once a person has been indicted, he does not fall within the statutory ambit of the Act.

13. Further, it may be recalled that there are two key applications of the presumption of innocence, as a doctrine in direct contraposition to the presumption of guilt. Firstly, it refers to the treatment of suspects and accused persons before and during the trial that, in the expectation of society, such persons be accorded respect for their innocence and human dignity. Secondly, it refers to the logistics of proof in criminal cases as to which party bears the persuasive burden of proof. The general operative principle in domestic and international criminal tribunals alike is that the Prosecution bears the burden of proving the guilt of the accused "beyond reasonable doubt". *By contrast, an institution before which an accused appears to testify that already characterizes the accused as a 'perpetrator' logically places the burden of disproving his guilt or proving his innocence on the accused and deprives him of a fundamental human right guaranteed by the Universal Declaration of Human Rights.* This may endanger the rights of any such accused to a fair and impartial trial in due course.

14. Still another consideration is that there are two competing and conflicting societal interests involved here. One is the widely accepted societal interest that all persons accused of criminal conduct are entitled to a fair and public trial *so that, in the ultimate analysis, the guilty may be punished and the innocent vindicated without moral blemish.* The other is the TRC's institutional role in developing and establishing the historical record of the decade-long conflict in Sierra Leone, *an equally valid and legitimate societal interest.* The consistent and accepted judicial trend, nationally and internationally, wherever a conflict arises between some compelling societal or institutional interest and the due process entitlement of an accused person to a fair and public trial, is to resolve the conflict in favour of society's interest in an accused person's right to a fair and public trial. *In short, the accused's right to a fair and public trial always prevails.* This hallowed judicial tradition is even upheld whenever this right clashes with other equally cherished rights in modern democratic societies. *In the context of the instant Request, to yield to the institutional interest of the TRC would, in my considered judgement, certainly jeopardize the Accused' right to a fair and public trial and would constitute an unprincipled departure from a well-established and widely acknowledged judicial practice.* It is certainly not in the supreme interest of the Sierra Leone society for a person presumed innocent of crimes in respect of which he stands indicted (and not yet tried) to be given, as it were, a licence to incriminate himself elsewhere by the very forum to which he looks for protection of his due process rights and ultimate vindication. In an imperfect world, as distinct from the ideal world, where there is a clash of competing and conflicting interests, one must give way to the other.

15. A further consideration is that the presumption of guilt infringes three (3) main basic due process rights of a person charged with criminal behaviour: (i) the presumption of innocence, (ii) the privilege against self-incrimination; and (iii) the right to remain silent. The International Covenant on Civil and Political Rights, 1966 guarantees to everyone charged with criminal offence

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the right “*not to be compelled to testify against himself or to confess to guilt*” (Article 14 (3) (g)). In the overarching scheme of things, it is the duty of International Judges to safeguard the interest of the International Community that persons charged with international crimes are accorded what may properly be characterized as “super due process rights” in vindicating themselves regardless of national considerations, however compelling. On the issue of “super due process rights” for persons accused of international crimes, it should be observed that one perception of international criminal justice is that it does not afford indictees adequate procedural justice due largely to the horrendous nature and enormity of the crimes in respect of which they are indicted. And so, the suggestion from the Prosecution, in the context of the instant proceeding, that they would reserve their option to investigate further crimes if the Accused were to testify before the Commission was not necessary and does not accord with our profession’s respect for the doctrine of fundamental fairness.

16. In conclusion, consistent with my reasoning in the foregoing paragraphs and for the reasons adduced, *I should point out that I do take full cognisance of the strong desire of the Accused to testify before the Commission, a process which, as the records disclose, he initiated. It may be that, in the final analysis, such a desire should prevail as an exercise of free-will and personal autonomy in the context of Mill’s Principle of Liberty. But even then in modern democracies, the doctrine of the rule of law always dictates recourse to the courts to resolve difficult issues of conflicting and competing interests.* Therefore, I would be grossly remiss, if not derelict, in my judicial duty if I failed to place on record my strong judicial reservations about the proposed course of action, on the part of the Accused. *Having done so in the foregoing paragraphs, I cannot judicially see my way clear towards acceding to the said Request being satisfied that it will jeopardize the interests of justice and the preservation of the integrity of the proceedings of the Special Court. It is incontrovertible that what is at stake here is the Accused’s right to a fair and impartial trial before the Special Court where he can enjoy ample opportunity, with all the judicial guarantees and procedural safeguards, to vindicate himself. Nothing should be done to deprive him of that opportunity or unduly burden prematurely the exercise of that right.*

THE REQUEST IS ACCORDINGLY DENIED.

Done at Freetown

29th day of October 2003



Judge Bankole Thompson
 Presiding Judge, Trial Chamber, Designated under
 Practice Direction Adopted on the 9th day of September, 2003-
 As amended on the 4th day of October, 2003

Seal of the Special Court