

TRIAL CHAMBER I (“The Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”) composed of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, Hon. Justice Bankole Thompson, and Hon. Justice Pierre Boutet;

MINDFUL of the *Decision on Motion on Issues of Urgent Concern to the Accused Morris Kallon*, rendered on the 9th of December, 2004 (“Majority Decision”);

MINDFUL of the *Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision of the 9th of December, 2004 on the Motion on Issues of Urgent Concern to the Accused Morris Kallon*, rendered on the 18th of March, 2005 (“Dissenting Opinion”);

SEIZED of the *Application by the Second Accused for Leave for Interlocutory Appeal Against the Majority Decision of the Trial Chamber of the 9th December 2004 on the Motion on Issues of Urgent Concern to the Accused Morris Kallon* filed by Defence Counsel for the Second Accused, Morris Kallon, on the 9th of April, 2005 (“Application”);

MINDFUL of the Response to the Application, filed by the Office of the Prosecutor (“Prosecution”) on the 22nd of April, 2005 (“Response”);

MINDFUL of the Defence Reply to the aforesaid Response, filed by Defence Counsel for the Second Accused, on the 25th of April, 2005 (“Reply”);

CONSIDERING that the time limits for filing of an interlocutory appeal run from the day after the filing of the complete Decision of the Trial Chamber, which includes in this instance the Dissenting Opinion;¹

PURSUANT to the provisions of Article 17 of the Statute of the Special Court (“Statute”) and 73(B) of the Rules of Procedure and Evidence (“Rules”);

HEREBY ISSUES THE FOLLOWING DECISION:

¹ *Prosecutor v. Norman et al.*, Case No: SCSL04-14-T, Decision on Prosecution Application for Leave to Appeal “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment”, 15 December 2004.

I. SUBMISSIONS OF THE PARTIES

A. The Motion

1. In its Motion, the Defence seeks leave to appeal the Majority Decision pursuant to Rule 73(B) of the Rules. In particular, the Defence submits that the “entire range of issues and processes” since the Prosecution Motion for Joinder, the Consolidated Indictment, the Amended Consolidated Indictment, the Majority Decision and the Dissenting Opinion raise “exceptional circumstances” and a probability of “irreparable prejudice”.²

2. Relying on the findings of the Dissenting Opinion, the Defence submits that, in particular, the Majority Decision did not hold that both the Consolidated Indictment and the Amended Consolidated Indictment are new indictments and therefore require complete re-arraignment of the second accused on the Amended Consolidated Indictment.³ In addition, the Defence contends that the Majority Decision is procedurally erroneous in law in that it fails to order a stay of the Original Indictment and the Consolidated Indictment, which non withdrawal is a procedural anomaly that impacts on the integrity of the entire judicial process.⁴

3. The exceptional nature of the circumstances, according to the Defence, and the great likelihood irreparable prejudice, warrant leave to the Appeals Chamber to consider such issues of law, procedure and fact involved in the application for a ruling on these issues with finality in the interest of justice and the integrity of the entire process as well as to afford the Accused his fundamental right to a fair trial.⁵

B. The Response

4. In its Response, the Prosecution submits that the Motion demonstrates neither exceptional circumstances nor irreparable prejudice and, accordingly, should be dismissed. In general, the Prosecution asserts that the difference of opinion expressed by the Dissenting

² Motion, para. 5.

³ *Id.*, paras 9-10.

⁴ *Id.*, paras 11-12.

⁵ *Id.*, para. 6.

Opinion is not of itself sufficient foundation to satisfy the twin test required by Rule 73(B) of the Rules.⁶

5. More particularly referring to the issue of non-arraignment of the Second Accused on the Consolidated Indictment and the Amended Consolidated Indictment, the Prosecution submits that a unanimous Decision of the Trial Chamber,⁷ for which leave to appeal was not sought by the Defence, previously dismissed a Motion by the Defence asserting that the Consolidated Indictment contained new allegations and found that the Second Accused benefited from the additional specificity of the Consolidated Indictment.⁸

6. As regards the issue of stay or withdrawal of the Original Indictment and the Consolidated Indictment, the Prosecution submits that the filing of the Amended Consolidated Indictment superseded and extinguished the previous Indictments and therefore contends that the Defence argument on double jeopardy is speculative and unfounded.⁹

C. The Reply

7. In its Reply, the Defence reiterates the main thrust of the submissions contained in the Motion. Specifically, the Defence submits that the non-arraignment of the Second Accused on all counts of the Amended Consolidated Indictment and the non-withdrawal of the Original Indictment and the Consolidated Indictment after the filing of the Amended Consolidated Indictments are acts that in themselves are more likely to lead to irreparable prejudice which become exceptional circumstances and thus satisfy the test contained in Rule 73(B) of the Rules and warrant the grant of leave to appeal the Majority Decision.¹⁰

II. THE MERITS OF THE MOTION

I. Introduction

14. This Motion focuses generally on the vexed question in international criminal law of how far must international criminal tribunals go in granting leave in respect of matters of an

⁶ Response, para. 12. See also para. 17.

⁷ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-PT, Decision on Motion for Quashing of Consolidated Indictment, 21 April 2004,

⁸ Response, paras 13-14.

⁹ *Id.*, paras 16-17.

interlocutory nature. Specifically, it raises the question of whether, for the purposes of Rule 73 (B) of the Rules of Procedure and Evidence of this Court, the Applicant's case for leave to appeal the interlocutory Decision of this Chamber delivered on 9th December 2004 does reach the level or threshold of exceptional circumstances and irreparable damage.

II. Applicable Jurisprudence

15. Rule 73 (B) states that:

Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.¹¹

16. In a series of recent Decisions given by this Chamber on the subject of interlocutory appeals, we enunciated the principles of law governing the issue granting leave to file an interlocutory appeals within the jurisdiction of the Special Court for Sierra Leone.

17. The said principles may be summarised as follows:

- (i) As a general rule, interlocutory decisions are not appealable;¹²
- (ii) Rule 73 (B) involves a high threshold that must be met before the Chamber can exercise its discretion to grant leave to appeal;¹³
- (iii) Rule 73 (B) specifically requires that an application for leave to appeal must show "exceptional circumstances" and "irreparable prejudice";
- (iv) The two-pronged test prescribed under the aforesaid Rule 73 (B) is conjunctive not disjunctive;¹⁴

¹⁰ Reply, paras 10-12.

¹¹ Rule 73 (B)

¹² See, for example, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-PT, Decision On Prosecution's Application For Leave To File An Interlocutory Appeal Against the Decision On the Prosecution's Motion For Joinder, 13 February 2004, para. 10.

¹³ *Id.*

¹⁴ *Id.*

- (v) The rationale behind Rule 73 (B) is to avoid international criminal trials becoming encumbered by a multiplicity of interlocutory appeals thereby causing protracted delays in such trials.¹⁵

III. Evaluation of Merits of Motion

18. Guided by the above-stated principles, the question for determination by the Chamber is whether the Applicant's case herein for leave, based entirely on the submissions set out in the Motion Paper has reached the level of exceptional circumstances and irreparable prejudice within the meaning and contemplation of Rule 73 (B).

19. The main thrust of the Defence Submissions is that the "entire range of issues and processes since the Prosecution's Motion for Joinder, the Consolidated Indictment, the Amended Consolidated Indictment, the Majority Decision and the Dissenting Opinion raise "exceptional circumstances" and a probability of "irreparable prejudice"." In support of this submission, the Applicant contends (relying on the Dissenting Opinion) that the Majority Decision is erroneous in not holding that both the Consolidated Indictment and the Amended Consolidated Indictment are new indictments, and that the Majority Decision is procedurally erroneous in law.

20. As to the merit or otherwise of submissions of this nature, the Chamber recently held that (1) a submission that the targeted ruling is erroneous is an invitation to the tribunal to whom the request for leave is addressed to examine preliminarily the substantive merit of the projected appeal, and (2) that the probability of an erroneous ruling by the Trial Chamber does not, of itself, constitute "exceptional circumstances" for the purposes of a Rule 73 (B) application.¹⁶ By parity of reasoning, we see no reason to depart from that holding in the context of the present Motion.

21. The Chamber therefore, holds that the Applicant has failed to establish "exceptional circumstances" to warrant an exercise by the Chamber of its discretion under Rule 73 (B) to grant leave for interlocutory appeal. The application is meretricious.

¹⁵ *Prosecutor v. Sesay et al.*, Case No. SCSL04-15-T, Applications for Leave to Appeal Rulings of the 3rd of February, 2005, on the Exclusion of Statements of Witness TF1-141, para 14.

¹⁶ *Id.* paras 15 and 16.

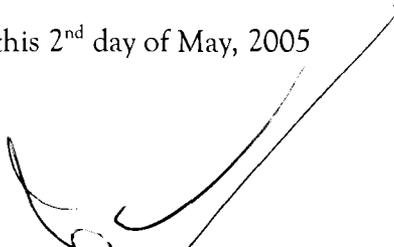
FOR THE ABOVE REASONS,

22. The Chamber accordingly dismisses the said Motion.

Done in Freetown, Sierra Leone, this 2nd day of May, 2005



Hon. Justice Pierre Boutet



Hon. Justice Benjamin Mutanga Itoe
Presiding Judge,
Trial Chamber



Hon. Justice Bankole Thompson

