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SCSL-04-16-T
(15326-15328)

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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER II

Before: Judge Teresa Doherty, Presiding Judge
Judge Richard Brunt Lussick
Judge Julia Sebutinde

Registrar: Lovemore Munlo

Date: 12 October 2005

PROSECUTOR Against **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-PT)

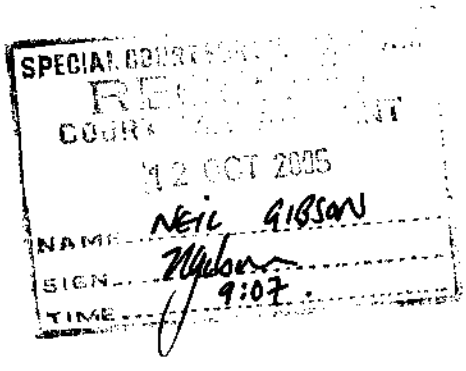
DECISION ON PROSECUTION APPLICATION FOR LEAVE TO APPEAL DECISION ON ORAL APPLICATION FOR WITNESS TF1-150 TO TESTIFY WITHOUT BEING COMPELLED TO ANSWER QUESTIONS ON GROUNDS OF CONFIDENTIALITY

Office of the Prosecutor:
Luc Côté
Lesley Taylor
James Hodes
Melissa Pack

Defence Counsel for Alex Tamba Brima:
Kojo Graham
Glenna Thompson

Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels
Pa Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
Carry Knoops
Abibola E. Manly-Spain



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TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Judge Teresa Doherty, presiding, Judge Richard Lussick and Judge Julia Sebutinde;

SEISED of the Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to testify without being compelled to Answer Questions on Grounds of Confidentiality, filed 19 September 2005 ("the Motion");

CONSIDERING the Joint Response, filed on 23 September 2005 by the Defence for all three Accused ("the Joint Response");

CONSIDERING the Prosecution's Reply to the Joint Response, filed on 27 September 2005 ("the Reply");

BEING MINDFUL of the Decision on the Prosecution's oral application for leave to be granted to Witness TF1-150 to testify without being compelled to answer any questions in cross-examination that the witness declines to answer on the grounds of confidentiality pursuant to Rule 70 (B) and (D) of the Rules, dated 16 September 2005 ("the impugned Decision");

NOTING that Rule 73(B) of the Rules provides 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 stay of proceedings unless the Trial Chamber so orders."*

NOTING therefore the general rule that decisions are without interlocutory appeal, and that only if the conjunctive conditions of exceptional circumstances and irreparable prejudice to a party in Rule 73(B) are satisfied, a Trial Chamber may grant leave to interlocutory appeal;[1]

CONSIDERING FURTHER that the Appeals Chamber has ruled that

> *"In this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgment will be corrected in due course by this Chamber on appeal".*[2]

NOTING therefore that the rationale behind the restrictive nature of Rule 73(B) is that the proceedings before the Special Court should not be heavily encumbered and consequently unduly delayed by interlocutory appeals;[3]

NOTING FURTHER that the Appeals Chambers ruled:

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[1] *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004; *Prosecutor v. Brima et al.*, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004.

[2] *The Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

[3] *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004.

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"That test is not satisfied merely by the fact that there has been a dissenting opinion on the matter in the Trial Chamber, or that the issue strikes the Trial Chamber judges as interesting or important for the development of international criminal law."[4]

CONSIDERING that in the present case the question of whether a Human Rights Officer can be compelled to reveal the sources of his or her information is not only a novel and substantial aspect of international criminal law, but is also likely to arise again with regard to other witnesses in the present case and that the interpretation by the Appeals Chamber of Rule 70 and in particular Rule 70(B) and (D) of the Rules is of fundamental importance to both the Defence and Prosecution cases and therefore constitutes "exceptional circumstances" within the meaning of Rule 73(B) of the Rules;

CONSIDERING FURTHER that correctly weighing the competing public interest of a Human Rights Officer's undertaking to protect the confidentiality of his/her sources of information and the rights of an accused constitutes "exceptional circumstances" pursuant to Rule 73(B) of the Rules;

CONSIDERING FURTHER that the impugned Decision, which compelled Witness TF1-150 to disclose the identity of his confidential source, may be capable of causing irreparable prejudice in that the Prosecution has been unable to call this witness to testify to a core issue at trial, i.e. the widespread and systematic nature of the attacks on the civilian population in Sierra Leone.

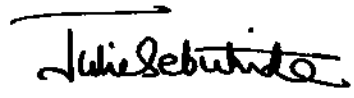
FOR THE FORGOING REASONS

THE TRIAL CHAMBER ALLOWS THE APPLICATION and grants the Prosecution leave to file an interlocutory appeal against the impugned Decision.

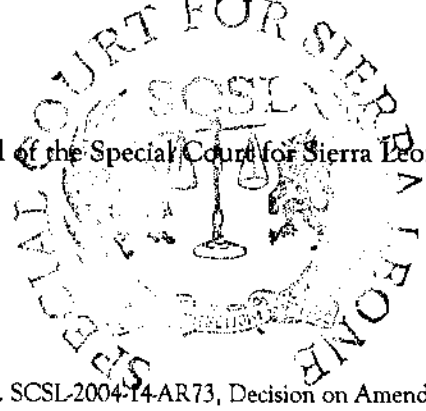
Done at Freetown, Sierra Leone, this 12th day of October 2005.

Justice Richard Lussick

Justice Teresa Doherty
Presiding Judge



Justice Julia Sebutinde



[Seal of the Special Court for Sierra Leone]

[4] *The Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

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