

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

SEIZED OF the “Prosecution Application for Leave to Appeal *Proprio Motu* Findings in Decision on Motions for Judgment of Acquittal Pursuant to Rule 98” (“Motion”), filed by the Prosecution on the 24th of October, 2005;

NOTING the “Joint Defence Response to Prosecution Application for Leave to Appeal *Proprio Motu* Findings in Decision on Motions for Judgment of Acquittal Pursuant to Rule 98”, filed by Court Appointed Counsel for Norman, Fofana and Kondewa on the 1st of November, 2005;

NOTING the “Prosecution Reply to Defence Response to Application for Leave to Appeal *Proprio Motu* Findings in Decision on Motions for Judgment of Acquittal Pursuant to Rule 98”, filed by the Prosecution on the 4th of November, 2005;

NOTING that the Prosecution stated their ground of appeal would be “that as the Defence had not in their Motions for Acquittal challenged the sufficiency of the evidence under the relevant particulars of the Indictment in relation to [...] seven locations, the Trial Chamber could not, *proprio motu*, find that there was no evidence capable of supporting a conviction in relation to those seven locations without first putting the parties on notice that it was considering the issue, and without affording the parties the opportunity to be heard on the issue”;¹

NOTING that leave to appeal is being sought pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court (“Rules”) which 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 a stay of proceedings unless the Trial Chamber so orders.

NOTING that Rule 73(B) of the Rules generally does not confer a right of interlocutory appeal but only grants leave to appeal in exceptional cases;

NOTING that the criteria of exceptional circumstances and irreparable prejudice outlined in Rule 73(B) of the Rules represent two limbs of the test and are conjunctive and must both be satisfied;²

NOTING the Chamber’s prior ruling in the case of *Prosecutor v. Sesay, Kallon and Gbao*, where the Chamber stated that:

[T]he overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant’s case must reach a level of exceptional circumstances and irreparable prejudice. Nothing short of that will suffice having regard to the restrictive

¹ Motion, para. 10.

² See, *inter alia*, *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, “Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder”, 13 February 2004, para. 10.

nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals.³

NOTING The Chamber's prior ruling in the case of *Prosecutor v. Sesay, Kallon and Gbao*, where the Chamber discussed what may amount to "exceptional circumstances" for the purpose of Rule 73(B) and stated that:

"Exceptional circumstances" may exist depending upon the particular facts and circumstances, where, for instance the question in relation to which leave to appeal is sought is one of general principle to be decided for the first time, or is a question of public international law importance upon which further argument or decision at the appellate level would be conclusive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious issues of fundamental legal importance to the Special Court for Sierra Leone in particular, or international criminal law, in general, or some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems.⁴

NOTING The Chamber's previous ruling 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";⁵

NOTING that the Prosecution submitted that exceptional circumstances exist, since the principle of the right to be heard is a fundamental issue of legal importance to the Special Court and of law in general, and also submitted that if an error as to this fundamental principle is not corrected at this stage, it may be repeated in subsequent Rule 98 proceedings;

NOTING that the Prosecution submitted that it had suffered irreparable prejudice through being denied the right to be heard, in this instance, in directing the Chamber's attention to what it believed was evidence in support of the particulars of a Count and through removal of several geographical locations from the Indictment, and that such prejudice cannot be cured in a post final judgment appeal;

CONSIDERING that the "Fofana Motion for Judgment of Acquittal" sought "entry of acquittal as to all counts of the Indictment" on the basis of the Prosecution's failure to "present evidence as to key elements of each count alleged in the Indictment";⁶

³ *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, "Decision on Prosecution Application for Leave to File an Interlocutory Appeal against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT", 1 June 2004, para. 21.

⁴ *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, "Decision on Defence Applications for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF1-141", 28 April 2005, para. 26.

⁵ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Application by the Second Accused for Leave for Interlocutory Appeal Against the Majority Decision of the Trial Chamber of 9th December 2004 on Issue of Urgent Concern to the Accused Morris Kallon, 2 May 2005, para. 20.

⁶ *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, "Fofana Motion for Judgment of Acquittal", 4 August 2005, para. 4 (emphasis added); See also, "Motion for Judgment of Acquittal of the Third Accused Allieu Kondewa" used broad language for identifying weaknesses in the evidence and at paragraph 26 stated, "given the fact that these inferences [inferences possible from circumstantial evidence, relative to the death of civilians], are rationally and reasonably drawn, it is respectfully submitted that the Panel should find that there is insufficient evidence for a finding of guilt". Similarly, paragraph 35 of their Motion, referring to Count 6 of the Indictment, states "given the fact that these inferences are rationally and reasonably drawn, it is respectfully submitted that the Panel should find that there is insufficient evidence for a finding of guilt".

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CONSIDERING that the Prosecution cannot now claim the existence of irreparable prejudice on the basis of the denial of their right to be heard on issues, of which they were put on notice;

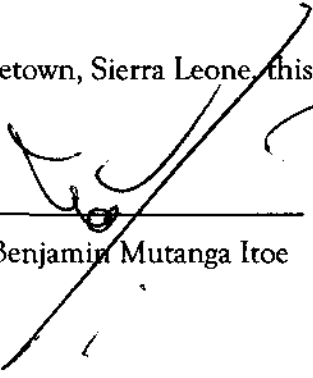
CONSIDERING that in the existing circumstances no irreparable prejudice may ensue to the integrity of the judicial proceedings that could not be cured through the final disposition of the trial, should no leave to appeal be granted;

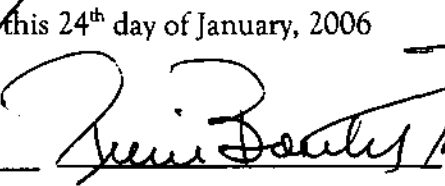
CONSIDERING furthermore, that the Prosecution have not established that exceptional circumstances exist in the present case;

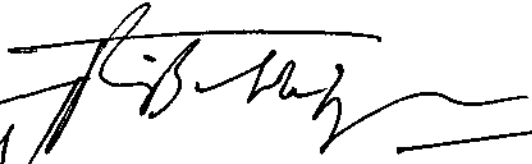
PURSUANT TO Rule 73(B) of the Rules;

THE CHAMBER FINDS that the criteria of exceptional circumstances and irreparable prejudice outlined in Rule 73(B) of the Rules are not met and DENIES the application for leave to appeal.

Done in Freetown, Sierra Leone, this 24th day of January, 2006


Hon. Justice Benjamin Mutanga Itoe


Hon. Justice Pierre Boutet
Presiding Judge,
Trial Chamber I


Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

