



SPECIAL COURT FOR SIERRA LEONE

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Before: Justice Raja Fernando, President

Interim Registrar: Mr. Lovemore Munlo, SC

Date: 20th February 2006

PROSECUTOR **Against** **Issa Hassan Sesay**
(Case No.SCSL-04-15-CCC32)

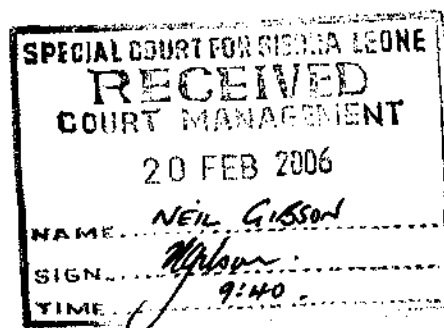
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**DECISION ON COMPLAINT PURSUANT TO ARTICLE 32 OF THE CODE OF
PROFESSIONAL CONDUCT FOR COUNSEL
WITH THE RIGHT OF AUDIENCE
BEFORE THE SPECIAL COURT FOR SIERRA LEONE**

**Office of the
Prosecutor:**
Desmond De Silva
Luc Côté

Defence Counsel:

Wayne Jordash
Sareta Ashraph



I, JUSTICE RAJA FERNANDO, PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE,

SEIZED of the Defence Complaint Regarding Public Statements by Chief Prosecutor Desmond de Silva, Former Chief Prosecutor David Crane, and Other Office of the Prosecutor Personnel, dated 25 July 2005 (the “Complaint”);

NOTING the Joint Response of the Prosecutor and Former Prosecutor to the Complaint Submitted by Counsel for essay on 25 July 2005, dated 7 September 2005 and submitted to me by the Registrar under cover of letter dated 23 September 2005 (the “Response”);

NOTING the letter from the Registrar submitting the Complaint dated 23 September 2005;

NOW DECIDE THE MATTER PURSUANT TO ARTICLE 32(F) OF THE CODE OF PROFESSIONAL CONDUCT FOR COUNSEL WITH THE RIGHT OF AUDIENCE BEFORE THE SPECIAL COURT FOR SIERRA LEONE (the “Code of Conduct for Counsel”):

I. SCOPE OF THE PRESENT DECISION

1. Pursuant to Article 32(E) of the Code of Conduct for Counsel, the Registrar shall submit the complaints submitted to him under Article 32 of the Code to the President without delay.
2. Pursuant to Article 32(F) of the Code of Conduct for Counsel, the President, upon receiving a complaint and Counsel’s response to the complaint, shall:
 - (i) reject the complaint if it is manifestly vexatious, misconceived or unfounded based on the information at its disposal;
 - (ii) offer mediation to the complainant and counsel, if appropriate;
 - (iii) if necessary, request the Registrar to designate an independent counsel to investigate the alleged misconduct; or
 - (iv) if necessary, direct the Registrar to convene a Disciplinary Panel;

- (v) direct the Registrar if necessary to appoint counsel to prosecute the complaint.
3. Accordingly, the merits of the Complaints shall not be assessed at this stage, but in a very limited way to determine whether they are “manifestly vexatious, misconceived or unfounded based on the information at disposal” pursuant to Article 32(F)(i).

II. PRELIMINARY ISSUE

4. The Code requires complaints of misconduct to be submitted to the Registrar.¹ The Registrar may request the Counsel concerned to submit a response to the complaint to him.² The Registrar is required to submit that complaint to the President without delay.³ The Code does not provide for a complainant to file a reply with the Registrar. Counsel for Sesay filed a reply with Court Management.
5. I agree that the Registrar complied with his obligations under the Code which does not provide for the filing of replies in complaint proceedings under Article 32. However, I disagree with the Registrar’s allegation that it is by mistake that the Respondents filed their Response with Court Management. Although Article 32(E) provides for a specific procedure by which complaints are submitted to the President by the Registrar, nothing in this Article nor in the Rules of Procedure and Evidence does prohibit their submission and the submission of other related documents through the Court Management Section.
6. Pursuant to Article 1(A) of the Practice Direction on Filing Documents before the Special Court for Sierra Leone (the “Practice Direction”) provides that:
- Documents to be filed before the Special Court in accordance with the Rules shall be submitted to the Court Management Section of the Special Court.
7. This regulation shall not be considered as a mere caprice of the administration, but is instrumental in the implementation of the Accused right to a fair and public

¹ Article 32(A) of the Code.

² Article 32(D) of the Code.

³ Article 32(E) of the Code.

hearing pursuant to Article 17(2) of the Statute of the Special Court. Indeed, pursuant to Article 4(B) of the Practice Direction *in fine*:

“Documents that are not filed confidentially may be used in press releases and be posted on the official website of the Special Court”

thereby granting their publicity.

8. I therefore consider that, especially since the Applicant did not require any confidentiality in his application, the respondents did not commit a mistake by filing their Response through the Court Management section. Such a practice is in conformity with the Accused right to have a public and fair hearing and shall be encouraged, despite the silence of Article 32 of the Code.

III. SUBMISSIONS

9. The present Complaint is made by the Defence team for Issa Hassan Sesay (the “Complainant”) who is one of the three Accused in the RUF Case currently being heard before Trial Chamber I. The complaint is related to various comments made to the media by the Prosecutor, the former Prosecutor and other members of the Office of the Prosecutor. A response has been filed and the matter has been referred to me under Article 32 of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (“the Code”).
10. For present purposes, I summarise the matter as follows: the essence of the Complaint is that the Prosecutor, Mr. de Silva, the former Chief Prosecutor, Mr. Crane and others within the Office of the Prosecutor (“the Respondents”) have made comments to the media about the character and culpability of Charles Taylor and defendants in the RUF and AFRC Cases currently in trial. The Complainant submits that such comments have been made on *sub judice* matters and that the comments impugn the indictees presumption of innocence until proven guilty in violation of the Code and the Statute of the Special Court.
11. The Respondents submit that the Complaint has been made in an attempt to enable the Defence to explain away the difficulties they are having garnering witnesses by blaming these difficulties on statements made by the Respondents about Charles Taylor. Further, the Respondents argue that the Complaint is procedurally flawed for a number of reasons including that it is an inappropriate procedure for seeking

guidelines on the future conduct of Prosecution Counsel. The Respondents submit that the comments made to the media do not mention Sesay or any other Accused in the RUF or AFRC trials and that there is no basis to the allegation that the comments made to the media pre-judge the guilt of Sesay or any other Accused before the Special Court. In conclusion, the Respondents request the President to reject the Complaint on the basis that it is manifestly vexatious, misconceived and unfounded and to make a finding which will enable the Respondents to apply to the Trial Chamber for sanctions against Counsel for Sesay.

12. On 23 September 2005, the Registrar sent the Complaint and Joint Response to the President. The Registrar noted that the Joint Response was mistakenly filed with Court Management, and as a consequence Counsel for Sesay mistakenly filed a Reply with Court Management. The Registrar decided not to submit the Reply to the President because the Code does not provide for a Party to submit a reply to the Registrar.

IV. APPLICABLE LAW

13. Article 17(3) of the Statute provides:

The Accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

14. Rule 46(G) of the Rules provides that:

The Registrar may set up a Code of Professional Conduct enunciating the principles of professional ethics to be observed by counsel having right of audience before the Special Court, subject to adoption by the Plenary Meeting. Amendments to the Code shall be made in consultation with representatives of the Prosecutor and Defence counsel, and subject to adoption by the Plenary Meeting. If the Registrar has strong grounds for believing that counsel has committed a serious violation of the Code of Professional Conduct so adopted, he may report the matter to the President for appropriate action under this rule.

15. Article 1 of the Code defines the terms used in the Code and it provides:

Counsel: 1) Defence Counsel; 2) Prosecution Counsel; 3) Amicus Curiae; and 4) Counsel representing a witness or any other person before the Special Court.

Prosecution Counsel: Counsel acting on behalf of the Prosecutor.

Prosecutor: The Prosecutor of the Special Court appointed pursuant to Article 4 of the Agreement.

16. Article 2 of the Code provides for the application of the Code and states:

The Code shall apply to all counsel who appear or who may appear before the Special Court or who are otherwise acting on behalf of the Prosecutor... and who thereby have the right of audience before the Special Court.

17. The Code thereafter is divided up under the headings: Obligations of Counsel,⁴ Obligations upon Defence Counsel, Conduct of Prosecution Counsel,⁵ Disciplinary Proceedings and Final Provisions. In relation to the provisions that apply to all Counsel, whether Defence or Prosecution, Article 13 of the Code provides that:

- (A) Counsel shall not publish or assist in the publication of any material concerning any current proceedings which:
 - (1) is false; or (ii) discloses any confidential information.
- (B) Counsel shall not comment on any matter which is sub judice in any case in which he is involved.

18. In relation to Prosecution Counsel specifically the Code provides for impartiality as follows:

Article 24: Impartiality

(A) Prosecution Counsel shall respect the presumption of innocence of all suspects and accused, and in particular, shall refrain from expressing a public opinion on the guilt or innocence of a suspect or an accused in public or outside the context of proceedings.

19. Article 28(A) of the Code provides:

Article 28 – Responsibility for Other Team Members

- (A) Counsel shall be responsible for the misconduct of other members of his team when counsel:
 - (i) orders or, with knowledge of the specific misconduct, approves the misconduct involved; or
 - (ii) has direct supervisory authority over the team member, and knows of the misconduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

⁴ Article 4: Non-Discrimination; Article 5: Competence, Independence and Integrity; Article 6: Integrity of Evidence; Article 7: Professional Courtesy; Article 8: Duty Towards the Special Court; Article 9: Contact with Judges; Article 10: Conduct Toward Victims and Witnesses; Article 11: Conduct Toward Others; Article 12: Counsel as Witness; Article 13: Contact with the Media.

⁵ Article 23: Scope of Prosecution; Article 24: Impartiality; Article 25: Conflict of Interest; Article 26: Confidentiality.

20. Article 32 of the Code finally provides:

Article 32– Complaints

- (A) Complaints regarding the misconduct of counsel may be submitted to the Registrar by any person.
- (B) The complaint shall be in writing or, if the complainant is unable to do so, orally before the Registrar or a member of the Registry. The complaint shall identify the complainant and counsel against whom the complaint is made, and shall describe in sufficient detail the alleged misconduct.
- (C) The complaint shall be submitted no later than six months after the alleged misconduct is brought to the attention of the complainant or six months after the complainant should have reasonably known about the existence or occurrence of the alleged misconduct.
- (D) The Registrar shall send the complaint fulfilling the requirements set out in paragraph (B) to the counsel concerned and shall, if he is of the opinion that the complaint is genuine and raises a serious issue of a breach of this Code, request him within 20 days of receiving the complaint to submit to the Registrar a response to the complaint.
- (E) The Registrar shall submit the complaint and counsel's response to the complaint to the President without delay.

[...]

21. The Code does not provide for any sanction in the event that a complaint is rejected on the grounds that it is manifestly vexatious, misconceived, or unfounded. The Rules of Procedure and Evidence, however, do make such a provision. Rule 46(C) provides that:

Counsel who bring motions, or conduct other activities, that in the opinion of a Chamber are either frivolous or constitute an abuse of process may be sanctioned for those actions as the Chamber may direct. Sanctions may include fines upon Counsel, non-payment, in whole or in part, of fees associated with the motion or its costs, or such other sanctions as the Chamber may direct.

V. DISCUSSION

22. The Complainant requests the President to take appropriate action which is particularised as directing the Registrar to draft guidelines clarifying the limits of extra-judicial comments by Counsel regarding the defendants at trial as well as

potential defendants. The Complainant notes the provisions of Article 13 which prohibits Counsel from making any comment on matters that are *sub judice* in any case in which they are involved, but is requesting additional guidelines dealing with extra-judicial comments. The Complaint gives examples of alleged comments made to the media by the Prosecutor, the Deputy Prosecutor and other members of the Office of the Prosecutor.

23. The Code does not provide for the President to direct the Registrar to issue new guidelines, but there are provisions whereby the Code may be amended. The Respondents submit that the issuance of the guidelines proposed by the Complainant would constitute an amendment or supplement to the Code which could only be issued after their adoption at the Plenary pursuant to the provisions of rule 46(G) and after hearing submissions for the Defence and Prosecution. The Respondents make no reference to Article 36 of the Code which provides a procedure for its amendment which is very similar to that procedure they suggest. The procedure laid down in article 36 permits the Registrar to amend the Code in consultation with the representatives of the Prosecutor and the Principal Defender pursuant to Rule 46(G) of the Rules and subject to adoption at the Plenary Meeting. I therefore accept that the Code and Rule 46(G) do not provide me with the power to direct the Registrar to amend the Code, but Rule 19 provides me with the power to supervise the activities of the Registry and it is within my discretion to give a direction to the Registrar, if necessary.
24. Neither the Complainant nor the Respondents refer to the provisions of article 24 of the Code. Contrary to the Complainant's assertion, there are guidelines within the Code clarifying the limits of extra-judicial comments by Counsel regarding defendants at trial as well as potential defendants. Article 24 of the Code provides that Prosecution Counsel shall respect the presumption of innocence of all suspects and accused, and in particular, shall refrain from expressing a public opinion on the guilt or innocence of a suspect or an accused in public or outside the context of proceedings. Thus the provision extends not only to accused persons in trial or before trial, but to suspects too and in that respect it is wider than the relief requested.
25. The question may arise as to whether Article 24(A) of the Code applies to the Prosecutor himself and in which proportion. Rule 46 of the Rules authorises the

Registrar to set up a Code of Professional Conduct enunciating the principles of professional ethics to be observed by Counsel having the right of audience before the Special court. The Prosecutor does not dispute that the Code applies to him as Counsel with a right of audience before the Court⁶ but he argues that he cannot be adequately to ordinary Prosecution Counsel because he rarely appears in trial proceedings and he has many additional functions, including diplomatic, judicial, investigatory police, policy and managerial functions which in other national systems are exercised by other public officials. The Respondents submit that the comments made to the media were made in performance of their diplomatic and policy functions relating to bringing-in an indicted fugitive.⁷

26. The Court was established pursuant to the Agreement between the United Nations and the Government of Sierra Leone (“the Agreement”), which Article 1(1) provides:

There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law [...].

27. The responsibilities of the Prosecutor are defined in article 15 of the Statute, the relevant aspects of which are:

1. The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. [...]

28. The Prosecution has wide powers under the Rules, such as:

Rule 39: Conduct of Investigations

In the conduct of an investigation, the Prosecutor may:

(i) Summon and question suspects, interview victims and witnesses and record their statements, collect evidence and conduct on-site investigations;

(ii) Take all measures deemed necessary for the purpose of the investigation, including the taking of any special measures to provide

⁶ Para. 25 of the Joint Response.

⁷ Para. 25 of the Joint Response.

for the safety, the support and the assistance of potential witnesses and sources;

(iii) Seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL); [...]

29. The Statute of the Special Court defines that the Court shall consist of the Chambers, the Prosecutor and the Registry.⁸ The Prosecutor, as part of the Court, has diplomatic functions as defined above in the Rules to secure the arrest and transfer of Accused. The Prosecutor's duty is wider than merely presenting the case for the Prosecution and the wider view is that the Prosecution "has a duty towards the interests of justice which transcends its role as Party to the proceedings".⁹
30. In *Prosecutor v. Barayagwiza*, Judge Shahabuddeen said of prosecuting counsel that they "ought to bear themselves rather in the character of ministers of justice assisting the administration of justice".¹⁰ This statement applies to prosecuting Counsel, but it provides some insight into the role of the Prosecution in the *ad hoc* tribunals.
31. The Code, by virtue of Article 2, applies to all Counsel who appear or who may appear before the Special Court, or who are otherwise acting on behalf of the Prosecutor. As such, it shall apply to the Prosecutor himself who remains bound by the Code from the date of its promulgation.
32. Article 24(A) of the Code is aimed at preventing prejudicial pre-trial publicity in order to protect the principle that an accused is presumed innocent until proven guilty. Examples of where this right has been violated can be found in cases before the European Court of Human Rights. In the case of *Worm v. Austria*¹¹, the European Court of Human Rights held that a violation of the right to a fair trial occurred where comments are made that may undermine the confidence of the public has in the role of the Court in the administration of justice. In the case *Alenet de Ribemont v. France*, the European Court of Human Rights found that comments made by some of the highest ranking officers in the French police to the media, in which they referred to Mr. Alenet de Ribemont without any qualification or reservation as one of the instigators of a murder, violated the presumption of

⁸ Article 11 of the Registry.

⁹ Judge Richard May & M. Wierda, *International Criminal Evidence* (2002) at 33.

¹⁰ ICTR, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-A, Separate Opinion of Judge Shahabuddeen, 31 March 2000 at 68.

¹¹ (1998) 25 E.H.R.R. 454

innocence and hence the right to a fair trial.¹² The European Court of Human Rights also ruled that the principle of the presumption of innocence was binding on the authorities in charge of the assessment of guilt but also to other authorities.¹³ Thus it is clear that extra-judicial comments, which must be considered in context,¹⁴ may in some circumstances violate the presumption of innocence and hence the right to a fair trial. The Prosecutor has a duty towards the interests of justice which transcends any obligation made to any Party, and that includes ensuring that trials are not rendered unfair through prejudicial pre-trial publicity emanating from his Office. Article 24(A) therefore applies to the Prosecutor in the discharge of his functions.

33. As regards the present application, however, it is my view that the Code already contains adequate provisions for extra-judicial comments by Counsel to the public and that any amendment would be premature. I therefore reject the Complaint on the basis that it is misconceived.

34. As regards the Prosecutor's request to make a finding which will enable the Respondents to apply to the Trial Chamber for sanctions against Counsel for Sesay, I am not sharing the view of the Prosecutor that the present application, which raises important issue related to the presumption of innocence, was frivolous or otherwise abusive and I therefore also deny that request.

FOR THE FOREGOING REASON, I

REJECT the Complaint as misconceived;

DENY the Prosecutor's request to make a finding that the Complaint was frivolous or otherwise abusive.

¹² (1995) 20 E.H.R.R. 5777 and contained in Annex 30 of the Complaint.

¹³ E.C.H.R., *Sekanina v. Austria*, 25 August 1993, Ser. A, No. 266-A. See also European Comm. H.R., 17 December 1981, No. 8361/78.

¹⁴ E.C.H.R., *Karakas and Yesilirmak v. Turkey*, 28 June 2005, No. 43925/98.

Done at Freetown this 20th day of February 2006

Fernando

Justice Raja Fernando
President

