

793



30074

**SPECIAL COURT FOR SIERRA LEONE**

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995

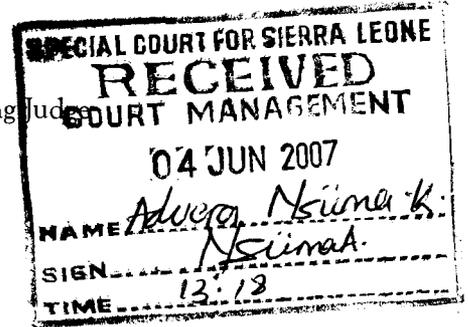
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

**TRIAL CHAMBER I**

Before: Hon. Justice Bankole Thompson, Presiding Judge  
 Hon. Justice Pierre Boutet  
 Hon. Justice Benjamin Mutanga Itoe

Registrar: Herman von Hebel, Acting Registrar

Date: 4 June 2007



PROSECUTOR **Against** ISSA HASSAN SESAY  
 MORRIS KALLON  
 AUGUSTINE GBAO  
 (Case No. SCSL-04-15-T)

Public Document

**DECISION ON DEFENCE APPLICATION FOR LEAVE TO APPEAL 2<sup>ND</sup> MARCH 2007  
 DECISION**

Office of the Prosecutor:

James C. Johnson  
Peter Harrison

Defence Counsel for Issa Hassan Sesay:

Wayne Jordash  
Sareta Ashraph

Defence Counsel for Morris Kallon:

Shekou Touray  
Charles Taku  
Melron Nicol-Wilson

Court Appointed Counsel for Augustine Gbao:

Andreas O'Shea  
John Cammegh

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

**SEIZED** of the “Application for Leave to Appeal 2<sup>nd</sup> March 2007 Decision”, filed by the Defence Counsel for the First Accused, Issa Hassan Sesay (“Sesay Defence”), on the 5<sup>th</sup> of March 2007;

**NOTING** the “Prosecution Response to Sesay Defence Application for Leave to Appeal 2<sup>nd</sup> March 2007 Decision”, filed by the Office of the Prosecutor (“Prosecution”), on the 15<sup>th</sup> of March 2007;

**NOTING** further the “Defence Reply to Prosecution Response to Application for Leave to Appeal 2<sup>nd</sup> March 2007 Decision”, filed by the Sesay Defence, on the 20<sup>th</sup> of March 2007;

**PURSUANT** to Rules 73(B), 106 and 120 of the Rules of Procedure and Evidence (“Rules”);

**HEREBY DECIDES:**

## I. INTRODUCTION

1. On the 4<sup>th</sup> of August 2006, the Defence for the three Accused, Issa Sesay, Morris Kallon and Augustine Gbao, respectively, announced their intentions to move for a judgement of acquittal under Rule 98 of the Rules.<sup>1</sup> Oral arguments were heard on the 16<sup>th</sup> of October 2006, prior to which written skeletal arguments were filed by each of the Defence Teams in response to an Order of the Chamber.<sup>2</sup>

2. On the 25<sup>th</sup> of October 2006, the Chamber orally rendered its RUF Rule 98 Decision (“Rule 98 Decision”),<sup>3</sup> in which it dismissed the motions for judgement of acquittal. It did, however, find that there was either no evidence, or an insufficient amount of evidence, capable of supporting a conviction in relation to several geographical locations pleaded in the Indictment.

<sup>1</sup> Rule 98 of the Rules provides that:

If, after the close of the case for the prosecution there is no evidence capable of supporting a conviction on one or more counts of the indictment the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties enter a judgment of acquittal on those counts.

<sup>2</sup> *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, Order for Expedited Filing, (TC), 8 November 2006.

<sup>3</sup> RUF Transcript, 25 October 2006 (“Rule 98 Decision”).

3. On the 7<sup>th</sup> of November 2006, the Sesay Defence filed its “Sesay Defence Request for Clarification on Rule 98 Decision” (“Request for Clarification”), seeking the following clarifications of the Rule 98 Decision:

- a. the significance of specific paragraphs of the RUF Indictment;
- b. the probative value of evidence of crimes committed in locations not specified in the Indictment;
- c. the probative value of evidence of crimes in locations near other locations specified in the Indictment; and
- d. the definition of time periods such as “about the month of February 1999” and “between [a date] and [another date]” when pleaded in the Indictment.

4. The Prosecution filed its “Prosecution Response to Sesay Defence Request for Clarification on Rule 98 Decision” on the 13<sup>th</sup> of November 2006 (“Prosecution Response to Request”). It argued that the Request for Clarification should be dismissed because it raised issues that had not been raised in the Rule 98 Decision; was a challenge to the form of the Indictment, which had already been dealt with in the Form of the Indictment Decision,<sup>4</sup> and was, in certain respects, so vague as to be incapable of an answer.<sup>5</sup> The Prosecution therefore argued that the Request for Clarification went beyond the scope of a request for clarification and that it should have been dismissed on these grounds.<sup>6</sup>

5. On the 2<sup>nd</sup> of March 2007, the Chamber issued its “Decision on Defence Request for Clarification on Rule 98 Decision” (“Impugned Decision”).<sup>7</sup> It held that, aside from clerical errors, the Court does not have the jurisdiction, at either the trial or the appellate level, to clarify its decisions after they have been delivered.<sup>8</sup> It held that the exceptional review jurisdiction conferred upon the Court with respect to its decisions is not designed to be utilised as a “clarification mechanism or device.”<sup>9</sup> The Chamber held further that even if it did possess such a jurisdiction, the clarifications sought by the Defence in its Request for Clarification, relate essentially to or, constitute

<sup>4</sup> *Prosecutor v Sesay*, SCSL-2003-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, (TC), 13 October 2003.

<sup>5</sup> Prosecution Response to Request, paras 4, 8, 17, 18, 23.

<sup>6</sup> *Ibid*, paras 4 and 26.

<sup>7</sup> *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Defence Request for Clarification on Rule 98 Decision, (TC), 2 March 2007 (“Impugned Decision”).

<sup>8</sup> *Ibid*, para 5.

<sup>9</sup> *Ibid*.

The page contains several handwritten marks: a large stylized signature on the left, the initials 'KSI' in the center, and another signature on the right.

30077

matters that could have formed the bases of grounds of appeal.<sup>10</sup> The Chamber therefore concluded that owing to its lack of a clarification jurisdiction or an appellate jurisdiction in respect of its previous decisions, the Request for Clarification was misconceived.<sup>11</sup> The Chamber consequently dismissed the Request for Clarification.<sup>12</sup>

6. On the 5<sup>th</sup> of March 2007, the Sesay Defence filed its “Application for Leave to Appeal 2<sup>nd</sup> March 2007 Decision” (“Application”), which forms the basis of this decision, in which it seeks leave to appeal the Impugned Decision under Rule 73(B) of the Rules.<sup>13</sup> On the 15<sup>th</sup> of March 2007, the Prosecution filed its “Prosecution Response to Sesay Defence Application for Leave to Appeal 2<sup>nd</sup> March 2007 Decision” (“Response”). The Sesay Defence filed its “Defence Reply to Prosecution Response to Application for Leave to Appeal 2<sup>nd</sup> March 2007 Decision” on the 20<sup>th</sup> of March 2007 (“Reply”).

## II. SUBMISSIONS OF THE PARTIES

### A. Application

7. The Sesay Defence argues that the Chamber has previously clarified its own Decisions.<sup>14</sup> It refers to the fact that the Chamber provided a clarification (“Norman Clarification Decision”)<sup>15</sup> of its Norman Rule 98 Decision.<sup>16</sup> It argues further that the counsel in that case brought an application for clarification because they were directed to do so by the Chamber.<sup>17</sup> It argues that the Chamber did not even consider issues of jurisdiction, exceptional review jurisdiction or clerical errors in its Norman Clarification Decision.<sup>18</sup> It consequently submits that the Chamber is empowered with the

---

<sup>10</sup> *Ibid*, para 6.

<sup>11</sup> *Ibid*, para 7.

<sup>12</sup> *Ibid*, para 8.

<sup>13</sup> Rule 73(B) 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.

<sup>14</sup> Application, para 1.

<sup>15</sup> *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, (TC), 3 February 2006, (“Norman Clarification Decision”).

<sup>16</sup> *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, (TC), 21 October 2005 (“Norman Rule 98 Decision”).

<sup>17</sup> Application, para 1.

<sup>18</sup> *Ibid*, para 8.



jurisdiction to review its own decisions by virtue of the fact that it has done so in the past. It argues further that it also has the inherent power to do so.<sup>19</sup>

8. The Sesay Defence argues that there is nothing to distinguish the Request for Clarification from the Joint Motion upon which the Norman Clarification Decision was given.<sup>20</sup> It argues that the Chamber's failure to treat the accused in this case equally to the accused in the CDF case constitutes exceptional circumstances for the purposes of granting leave to appeal under Rule 73(B). In addition, it will also cause irreparable prejudice to the First Accused because it will deprive him of his right to be properly informed of the charges against him.<sup>21</sup> The requirements of Rule 73(B) have, therefore, been met and the Chamber should grant the Application.

**B. Prosecution Response**

9. The Prosecution argues that the Chamber has the jurisdiction to clarify an earlier decision, provided that it clarified what was decided in the original decision.<sup>22</sup> The Request for Clarification was not a genuine motion for clarification because it sought "clarification" of matters that had not been dealt with in the Rule 98 Decision, or which had previously been decided by the Trial Chamber.<sup>23</sup> The requested clarification would, therefore, have amounted to an addition to, or modification of, the Rule 98 Decision.<sup>24</sup>

10. The Prosecution argues that the finding in the Impugned Decision that there is no clarification jurisdiction applies only to requests for clarification that go beyond the original decision and therefore beyond the scope of clarification.<sup>25</sup>

11. The Prosecution argues that there is therefore no discrepancy between the manner in which the Chamber treated the Request for Clarification and the Joint Motion. In the Norman Clarification Decision the Chamber gave a clarification of the practical consequences of one of its specific findings in the Norman Rule 98 Decision. In this case, the Sesay Defence was seeking rulings

<sup>19</sup> *Ibid*, para 9.

<sup>20</sup> Application, para 10 referring to the *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T, Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 4 November 2005 ("Joint Motion").

<sup>21</sup> *Ibid*, para 17.

<sup>22</sup> Response, paras 9-10.

<sup>23</sup> *Ibid*, para 14.

<sup>24</sup> *Ibid*, para 15.

<sup>25</sup> *Ibid*, para 16.

on matters that had not been dealt with in the Rule 98 Decision. The two cases are therefore distinguishable and there has been no difference of treatment.<sup>26</sup>

12. The Prosecution argues that the finding in the Impugned Decision that there is no clarification jurisdiction must be understood in this context. The Prosecution argues that the Request for Clarification invoked more than the power of the Trial Chamber to clarify a Rule 98 Decision, but also the power to review a Rule 98 Decision. It argues that under Rule 120 of the Rules, an application for review can only be brought before the Appeals Chamber.<sup>27</sup> The Prosecution argues that when it held that “the exceptional clarification jurisdiction conferred upon the Court with respect to its decisions is certainly not designed to be utilized as a ‘clarification mechanism or device’”, what the Chamber meant was that it was not to be used as a “review mechanism of device”.<sup>28</sup> It argues further that the purport of the Decision is that the clarifications requested in the Request for clarification relate to matters of substance going beyond mere “clerical issues” and that they therefore “...relate essentially to, or constitute matters that could have formed the bases of grounds of appeal.” The Prosecution argues that it is on this basis that the Chamber considered that it lacked the jurisdiction to provide clarification.<sup>29</sup>

13. The Prosecution also argues that the Defence’s argument that it will suffer irreparable prejudice because it will not be informed of the case against it is without merit.<sup>30</sup> It argues that the primary purpose of Rule 98 is not to inform the Accused of the case against him, but to ensure judicial economy by proceeding only with those accounts on which sufficient evidence has been adduced. The Indictment, the case summary and the evidence led at trial are the means by which the accused is informed of the case against him. A Rule 98 decision only gives an accused knowledge of the remaining counts against him.<sup>31</sup>

**C. Defence Reply**

14. The Defence argues that the Prosecution’s explanation for the Trial Chamber’s failure to exercise its clarification jurisdiction is incorrect because it fails to recognise that the Trial Chamber

<sup>26</sup> *Ibid*, para 17.

<sup>27</sup> *Ibid*, para 15.

<sup>28</sup> *Ibid*, para 16.

<sup>29</sup> *Ibid*, para 16.

<sup>30</sup> *Ibid*, para 21.

<sup>31</sup> *Ibid*.

held that it did not possess such a jurisdiction.<sup>32</sup> It confuses the question of the existence of such jurisdiction, with the question of how it ought to be properly exercised.<sup>33</sup> With regards to the first question, the Chamber possesses this jurisdiction, in the interests of justice and fairness. This was demonstrated by the Chamber's exercise of this jurisdiction in the Norman Clarification Decision. Its failure to do so in this case is inconsistent and partisan and amounts to an exceptional circumstance for the purposes of the granting of leave to appeal under Rule 73(B).<sup>34</sup>

15. The Defence argues that, with regards to the second question, the Chamber has the jurisdiction to clarify any issue and not simply those which are proximate to the original decision. It argues that the Rule 98 procedure concerned every substantive paragraph of the Indictment and that any subsequent question concerning the meaning or effect of the remaining charges in the Indictment concerns the consequences of the Rule 98 Decision.<sup>35</sup> It argues that, in any event, the Request for Clarification arises directly from the Rule 98 Decision.<sup>36</sup>

16. The Defence argues further that the Reply disputes the Prosecution's assertion that the purpose of the Rule 98 procedure is judicial economy.<sup>37</sup> It argues that due process considerations form the basis of the Rule 98 procedure: the accused has the right to remain silent; if the Prosecution has not brought forward sufficient evidence on any particular count, then the accused should not be in a position where he has to defend himself in anyway.<sup>38</sup> It argues further that even if the purpose of the Rule 98 procedure is judicial economy, this is not inconsistent with it knowing which specific allegations remain part of the Prosecution's case and the breadth of the Indictment as presently pleaded and that the clarifications which it has requested would fulfil these objectives.<sup>39</sup>

17. Finally, the Defence argues that the answers which it is seeking will have to be answered after completion of the Defence case and that to do so now would be fair to the Accused and would provide greater specificity, which would narrow the case and ensure judicial economy. Not providing the clarifications at this stage would leave the First Accused in the dark and would result in him only

<sup>32</sup> Reply, para 5.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, para 9.

<sup>36</sup> *Ibid.*, para 10.

<sup>37</sup> *Ibid.*, para 11.

<sup>38</sup> *Ibid.* The Defence referred in this regard to remarks made by Judge Agius in *Prosecutor v Oric*, IT-03-68-T, Trial Transcript, 4 May 2005, p. 7848-49.

<sup>39</sup> Defence Reply, para 12.

being properly informed of the charges against him when the Chamber delivers its verdict, which would cause irreparable prejudice.<sup>40</sup>

III. APPLICABLE LAW

18. Rule 73(B) of the Rules establishes the standard which governs appeals on motions for interlocutory relief. The relevant jurisprudence of this Chamber in this regard is extensive.

19. According to Rule 73(B), the Trial Chamber may give leave to appeal in exceptional circumstances and to avoid irreparable prejudice to a party. The standard is conjunctive, as can be deduced from both the plain and literal interpretation of the Rule and this Chamber’s settled jurisprudence on the subject.<sup>41</sup>

20. The principles upon which this Chamber is empowered to act in determining whether or not to grant interlocutory applications for leave to appeal derive from Rule 73(B) and its underlying rationale of the need to avoid international criminal trials becoming encumbered by a multiplicity of interlocutory appeals which could cause such trials to be delayed.<sup>42</sup>

21. Thus guided, the Chamber has consistently held that interlocutory decisions generally cannot be appealed, and that Rule 73(B) requires that a high threshold be met before the Court can grant leave to appeal,<sup>43</sup> the rationale behind this Rule being “only to allow appeals to proceed in very limited and exceptional situations. In effect, it is a restrictive provision.”<sup>44</sup>

22. By way of further guidance, the Chamber has defined “exceptional circumstances” for the purposes of Rule 73(B) in these terms:

“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

<sup>40</sup> *Ibid*, para 13.

<sup>41</sup> See, for instance, *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 the 9<sup>th</sup> of December 2004 on Issue of Urgent Concern to the Accused Morris Kallon, 2 May 2005, para. 17 (“Kallon Application for Leave to Appeal”); *Ibid.*, Decision on Application for Leave to Appeal the Ruling (2 May 2005) on Sesay-Motion seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor, 15 June 2005, para. 15.

<sup>42</sup> Kallon Application for Leave to Appeal, *ibid*, para. 17.

<sup>43</sup> *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Defence Applications for Leave to Appeal Ruling of the 3<sup>rd</sup> of February, 2005 on the Exclusion of Statements of Witness TF-141, 28 April 2005, para. 17.

<sup>44</sup> *Ibid.*, para. 18.



30082

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.<sup>45</sup>

23. As regards the requirement of “irreparable prejudice”, this Chamber has previously held that the expression refers to prejudice that “may not be remediable by appropriate means within the final disposition of trial.”<sup>46</sup>

24. Endorsing the legal standard for granting or denying applications for interlocutory appeals by this Chamber, pursuant to Rule 73(B), the Appeals Chamber had this to say:

The underlying rationale for permitting [interlocutory] appeals is that certain matters cannot be cured or resolved by final appeal against judgement. However, most interlocutory decisions of a Trial Chamber will be capable of effective remedy in a final appeal where the parties would not be forbidden to challenge the correctness of interlocutory decisions which were not otherwise susceptible to interlocutory appeal in accordance with the Rules.<sup>47</sup>

#### IV. DELIBERATION

##### A. Exceptional Circumstances

25 Guided by the foregoing principles of law, the Chamber takes the view that the contention of the Defence that the Chamber’s failure to treat the instant application and the application which was the subject matter of the Norman Clarification Decision equally constitutes exceptional circumstances is untenable, given the Chamber’s definition of “exceptional circumstances” for the purposes of a Rule 73(B) application. The Chamber accordingly holds that the first prong of the Rule 73(B) test has not been satisfied.

##### B. Irreparable Prejudice

26 Having found no showing of exceptional circumstances in support of the Defence Motion for leave to appeal as prescribed by the conjunctive test set out in Rule 73(B) this Chamber does not deem it necessary to examine the merits of the Defence submission relative to the alleged irreparable prejudice.

<sup>45</sup> *Ibid.*, para. 26.

<sup>46</sup> *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decisions on Motion by the First and Second Accused for Leave to Appeal the Chamber’s Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone, 28 June 2006, para. 13; See also *ibid.*, Decision on Joint Request for Leave to Appeal against Decision on Prosecution’s Motion for Judicial Notice, 19 October 2004, para. 23.

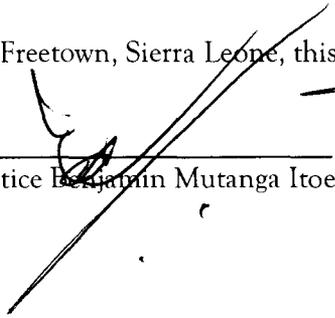
<sup>47</sup> *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution Appeal Against The Trial Chamber Decision of August 2004 Refusing Leave to File An Interlocutory Appeal, 17 January 2005, para. 29.

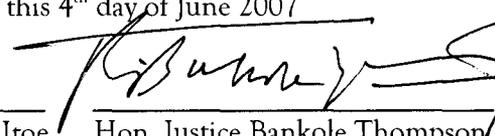
9. RB7

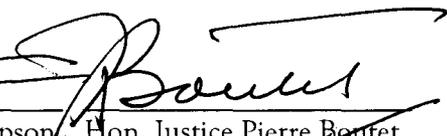
Based on the foregoing considerations, the Chamber finds no merit in the Defence application for leave to appeal;

**THE CHAMBER HEREBY DENIES** the Application.

Done at Freetown, Sierra Leone, this 4<sup>th</sup> day of June 2007

  
\_\_\_\_\_  
Hon. Justice Benjamin Mutanga Itoe

  
\_\_\_\_\_  
Hon. Justice Bankole Thompson  
Presiding Judge  
Trial Chamber I

  
\_\_\_\_\_  
Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]

