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SPECIAL COURT FOR SIERRA LEONE

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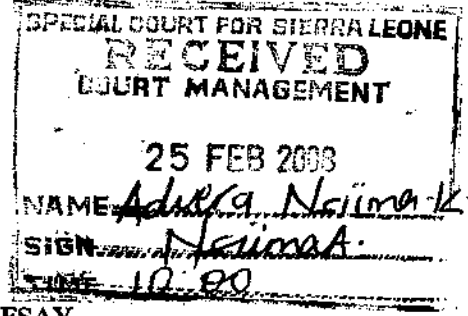
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TRIAL CHAMBER I

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

Registrar: Herman von Hebel

Date: 25th of February 2008



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

Public Document

**DECISION ON PROSECUTION APPLICATION FOR LEAVE TO APPEAL DECISION ON
THE SESAY DEFENCE MOTION REQUESTING THE LIFTING OF PROTECTIVE
MEASURES IN RESPECT OF CERTAIN PROSECUTION WITNESSES**

Office of the Prosecutor:
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Reginald Fynn
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Defence Counsel for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Charles Taku
Kennedy Ogeto

Court Appointed Counsel for Augustine Gbao:
John Cammegh
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TRIAL CHAMBER I ("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,

SEIZED of the Application for Leave to Appeal the Decision (9th November 2007) on Prosecution Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses, filed confidentially by the Office of the Prosecutor ("Prosecution") on the 12th of November 2007 ("Application");

NOTING the Addendum to the Application, filed confidentially by the Prosecution on the 13th of November 2007 ("Addendum");

NOTING the Response to the Motion filed publicly by the Defence for the First Accused, Issa Hassan Sesay ("Defence") on the 19th of November 2007 ("Response");

NOTING the Prosecution reply, filed publicly on the 26th of November 2007 ("Reply");

NOTING the Prosecution Corrigendum to its reply filed publicly on the 26th of November 2007 ("Corrigendum");

PURSUANT to Rules 26bis, 54 and 73 of the Rules of Procedure and Evidence ("Rules");

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. INTRODUCTION

1. On the 9th of November 2007, this Chamber issued its Decision on Sesay Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses ("Impugned Decision"), granting the Defence Motion and ordering the Prosecution to disclose to the Defence the unredacted statements of the witnesses listed in the Motion.¹

¹ See Impugned Decision, Section IV.

2. In addition, consistent with its more recent jurisprudence in the case of *Prosecutor v. Norman*², the Chamber also Ordered that, *inter alia*:

the Defence shall inform the Witnesses and Victims Section of their intention, if any, to interview any of the witnesses listed in the Motion. The Witnesses and Victims Section, upon being informed beforehand of the location of the witness, shall contact the witness and inform him of the Defence's intention to interview him or her and of his or her right not to consent or give the interview. Should the witness consent to the interview, the Witnesses and Victims' Section shall inform the Defence as to the location for the interview.³

II. SUBMISSIONS OF THE PARTIES

A. The Application

3. Pursuant to Rule 73(B), the Prosecution seeks leave to appeal the Impugned Decision on the basis of alleged errors by the Trial Chamber. The Prosecution submits that these errors constitute exceptional circumstances and might cause irreparable prejudice to the Prosecution.⁴

4. The Prosecution submits that the Trial Chamber erred in law, or alternatively erred in the exercise of its discretion in (i) failing to strike the correct balance between the rights of the Accused and those of protected witnesses which would have permitted less intrusive methods of witness contact to be considered; (ii) failing to strike the correct balance between the rights of the Accused and those of the Prosecution, which include the Prosecution's right to present the best evidence in separate proceedings; (iii) failing to give effect to the plain language of Rule 68; (iv) failing to apply the correct test when varying protective measures; (v) concluding that a finding that the Defence showing of the materiality of Rule 68 information is sufficient to allow the Defence access to non-Rule 68 information concerning which the Defence has made no showing. And, correspondingly, concluding that a showing of the materiality of Rule 68 information constitutes good cause to non-Rule 68 information under Rule 66(A)(ii); and (vi) failing to consider existing protective measures which provide for contact to be made with witnesses with the involvement of the Prosecution rather than through WVS alone.

5. The Prosecution further states that the issue of disclosure of the unredacted statements of protected witnesses who have information relevant to both the RUF defence and the Taylor

² See *Prosecutor v. Norman, Fofana and Kondewa*, SCSL04-14-T, Decision on Joint Defence Motion regarding the Propriety of Contacting Defence Witnesses, 20 June 2006 ("Norman Decision").

³ Impugned Decision, Section IV.

⁴ Application, paras. 2-3.

prosecution is one of general principle, involving a serious issue of legal importance that needs to be decided for the first time before the Special Court and that a disclosure of the unredacted statements of such protected witnesses will potentially interfere with the interests of justice; factors which dictate a necessity that the issue should be decided by the Appeals Chamber as a matter of urgency.⁵

B. The Defence Response

6. The Defence submits that there are no exceptional circumstances, nor any errors of law in the Trial Chamber's Decision, and that the Prosecution would not suffer irreparable prejudice if the Application is denied.⁶

7. The Defence further submits that the Trial Chamber correctly opines that there exists a "clearly established principle" that "notwithstanding any protective measures, unredacted statements must be disclosed by the Prosecution under Rule 68 where "the identity [of the witnesses who made the statement] is inextricably connected with the substance of the statements".⁷

8. The Defence also submits that the "prejudice" that the Prosecution claims is nothing more than a speculative insinuation that lacks any evidential basis⁸

C. Prosecution Reply

9. The Prosecution submits that ICTR Rule 68(D) specifically provides for an application by the Prosecutor for the relief from disclosing "information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State..." The Prosecution further submits that there is no equivalent in the Rules of the Special Court, but that difference is accounted for by the content of the obligation created by Rule 68 of the Special Court, which is a limited obligation, namely "to make a statement... disclosing to the defence the existence of evidence known to the Prosecutor..." It is not the obligation created by Rule 68 of the ICTR. The obligation created by the Special Court's Rules has in fact been complied with because Rule 68 information has already been extracted from statements and given to the Accused.⁹

⁵ Application, para. 3.

⁶ Response, para. 8

⁷ Ibid., para. 9.

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III. APPLICABLE LAW

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10. In this Chamber's view, it is settled law that Rule 73(B) of the Rules establishes the standard which governs appeals on motions for interlocutory relief. Our relevant jurisprudence on this issue is ample and extensive.

11. Interpreting Rule 73(B), the Trial Chamber has held that leave to appeal may be given only in exceptional circumstances and to avoid irreparable prejudice to a party. We reiterate that 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.¹⁰

12. Elucidating this principle, the Chamber has consistently held that interlocutory decisions generally cannot be appeal, and that Rule 73(B) requires that a high threshold be met before the Court can grant leave to appeal,¹¹ 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."¹²

13. The Chamber also recalls, by way of further guidance, its definition of "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 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.¹³

14. As to the requirement of "irreparable prejudice", We have opined that this expression refers to prejudice that "may not be remediable by appropriate means within the final disposition of trial."¹⁴

⁸ *Ibid.*, para. 16.

⁹ Reply, para. 3.

¹⁰ 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 9th of December 2004 on Issue of Urgent Concern to the Accused Morris Kallon, 2 May 2005, para. 17; *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.

¹¹ *Prosecutor v. Sesay, Kallon and Gbao*, 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 TF-141, 28 April 2005, para. 17.

¹² *Ibid.* at para. 18.

¹³ *Ibid.* at para. 26.

¹⁴ *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

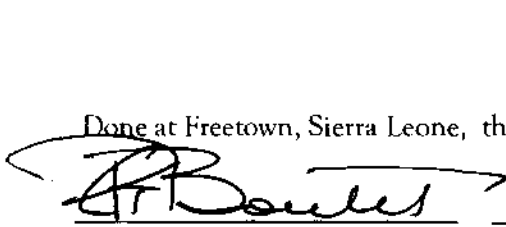
15. Endorsing the legal standard enunciated by this Chamber for granting or refusing applications for interlocutory appeals, the Appeals Chamber had this to say:

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.¹⁵

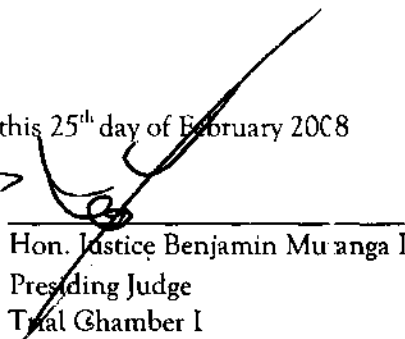
16. Guided by the foregoing restatement of the applicable law, and considering the Application made by the Prosecution, the seriousness and exceptional nature of the issues raised therein, the Chamber is satisfied that both prongs of the test have been satisfied. The Chamber is of the opinion that this matter clearly raises an issue of fundamental legal importance to the Special Court for Sierra Leone and for international criminal law generally, which has not been previously addressed by the Appeals Chamber. Furthermore, the Chamber is of the view that the Prosecution could suffer irreparable prejudice if the matter were not determined expeditiously at the appellate level.

FOR THESE REASONS the Application for Leave to Appeal is granted.

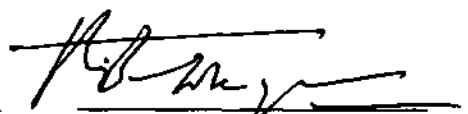
Done at Freetown, Sierra Leone, this 25th day of February 2008



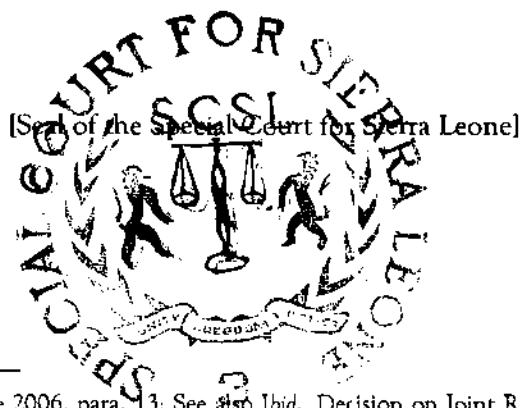
Hon. Justice Pierre Boutet



Hon. Justice Benjamin Mung'anya Itoe
Presiding Judge
Trial Chamber I



Hon. Justice Bankole Thompson



[Seal of the Special Court for Sierra Leone]

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.

¹⁵ *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.