

**SPECIAL COURT FOR
SIERRA LEONE**

Case No. SCSL-2004-16-T

Before: Justice Teresa Doherty, Presiding
Justice Julia Sebutinde
Justice Richard Lussick

Registrar: Robin Vincent

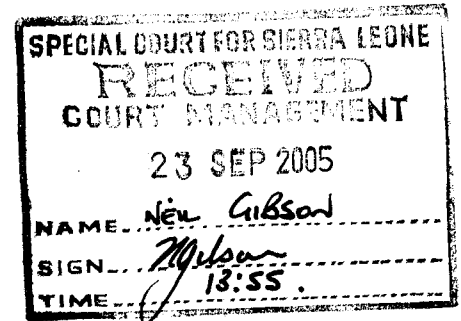
Date filed: 23 September 2005

THE PROSECUTOR

against

ALEX TAMBA BRIMA**BRIMA BAZZY KAMARA**

and

SANTIGIE BORBOR KANU

**JOINT DEFENCE RESPONSE TO 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 Coté
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Defence Counsel for Kanu:

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Defence Counsel for Brima:

Kojo Graham
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Defence Counsel for Kamara:

Andrew Daniels
Mohamed Pa-Momo Fofanah

I INTRODUCTION

1. On 19 September 2005, the Prosecution filed its “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” (“**Application**”) against the “Decision on the Prosecution’s Oral Application for Leave to Appeal 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 Grounds of Confidentiality Pursuant to Rul 70(B) and (D) of the Rules” (“**Decision**”). The Defence herewith files its “Joint Defence Response to 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” (“**Response**”) to the Prosecution Application.
2. As regards the relevant facts for this Response, the Defence refer to the facts as set out in paras. 2 – 6 of the Application.
3. The Defence herewith wishes to oppose the Prosecution Application, and does so on the following grounds.

II LEGAL ARGUMENT

4. As set out in Rule 73(B) of the Rules of Procedure and Evidence (“**Rules**”), the Prosecution needs to show both exceptional circumstances and irreparable prejudice. As indeed already indicated by the Prosecution, both limbs of this Rule need to be established separately from each other.¹ The Defence contends that applicability of this Rule has not been proved by the Prosecution.

¹ See para. 9 of the Application.

2.1 Exceptional Circumstances

5. It is the Defence submission that the Application has not sufficiently established that exceptional circumstances in fact exist in the underlying situation. In paras. 7 and 11 – 31 of the Application, the issue of exceptional circumstances is argued. We will rebut the Prosecution arguments in the order as presented in the Application.

2.1.1 Alleged Errors of Law

Alleged Errors of Law No Relevant Determining Factor

6. In the **first place**, the Application mentions that several errors of law were made in the Decision, which warrant the existence of exceptional circumstances. As indicated in the Application itself, errors of law do not in themselves constitute exceptional circumstances.² It is stated in the same paragraph that “they are a relevant factor in this assessment.” No reason is provided as to why in this particular case the alleged errors of law would play a role in the assessment of exceptional circumstances.
7. The Defence respectfully contends that the Application only sets out the substance of the argument as to why the Prosecution is of the opinion that this Rule 70 should have been applied to the particular case. No argument, however, is made as to why this alleged wrong application of Rule 70 should amount to exceptional circumstances in the sense of Rule 73(B) of the Rules.

² See para. 11 of the Application.

No Error of Law Was Made

8. In the **second place**, the Defence holds that there was no error of law made by the Trial Chamber. The Defence opposes the Prosecution contention that Rule 70 and the decision in the *Milosevic* case³ were misinterpreted by the Trial Chamber and moreover that the Trial Chamber did not err in law in balancing the public interest of the work of human rights officers with the accused's right to a fair and public trial. Moreover the Defence argues that these alleged errors in law, even if they were considered to be errors of law – *quod non* – then they would not, neither in themselves nor in combination with the other arguments put forward in this respect, amount to the high threshold of establishing exceptional circumstances. The Defence is of the opinion, however, that this is not the right place to put forward substantial arguments relating to the substance of the Trial Chamber's decision, and in this regard refers to the arguments as presented in court relating to this matter,⁴ especially now that the Prosecution does not in its Application bring forward any new arguments relating to this matter.

Application Leave to Appeal Should Not Go into the Substance of the Arguments

9. The Defence contends in the **third place** that provision 6(d) of the Practice Direction on Certain Appeals before the Special Court of 30 September 2004 has not been taken into account as the Application goes into great detail in explaining these alleged errors of law, whilst this provision states that a "concise statement as to why it is contended that the applicable criteria for the granting of leave to appeal under the provision relied upon have been met."
10. The major part of the Application has been spent on describing the Prosecution's substantial arguments in this respect. The Defence contends that the Application should not go into the substance of the arguments, but should rather be a concise

³ *Prosecutor v. Milosevic*, IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002.

⁴ See Transcript of 14 September 2005, when the Defence arguments were presented in court session.

statement as to why the Prosecution is of the opinion that exceptional circumstances exist.

2.1.2 Issue of Fundamental Legal Importance

11. In para. 7 under (c) and paras. 28 – 31 of the Application, the Prosecution sets out that this concerns an issue of general principle importance and thus amounts to exceptional circumstances.
12. One preliminary remark is provided in this respect. In para. 29 of the Application, the Prosecution states that “[i]nternational law has recognized a privilege against testifying that attaches to certain humanitarian organizations.” The Defence wishes to submit that in the *Simic* case, this privilege was only attached to workers from the organization of the International Committee of the Red Cross, which organization under customary international law has this position of absolute confidentiality, and not (all) other organizations having employees working in the human rights field. It is the Defence submission that the *Simic* case in that respect is misrepresented in the Application.⁵
13. As regards the argument put forward in this respect, the Defence disagrees with the Prosecution contention that this matter relates to a general principle “which has not been specifically determined by the existing international tribunals,”⁶ as in all fairness, Trial Chamber I already decided on this matter. The outcome of this debate was the same, although the Prosecution suggests that “different approaches” lead to different decisions. However, neither the Defence nor the Trial Chamber can verify this, since the decision made in Trial Chamber I was made in closed session.

⁵ See *Prosecutor v. Simic et al.*, Case No. IT-95-9, Decision Denying Request for Assistance in Securing Documents and Witnesses from the International Committee of the Red Cross, 7 June 2000.

⁶ Para. 29 of the Application.

14. The Defence does agree however that this matter is one of significance to international criminal law.⁷ The Application only mentions this fact, and does not provide any arguments as to why this should then fall under the Rule 73(B) requirement of exceptional circumstances, other than providing a quotation of a Trial Chamber I decision.⁸ However, and this also goes for the argument set out in our previous paragraph, not has been established why this matter needs to be resolved at the interlocutory level. The Defence holds that simply the fact that a matter is of general importance does not fulfill the requirement of exceptional circumstances as laid down in Rule 73(B) of the Rules.

2.2 Irreparable Prejudice

15. In paras. 32 – 33 of the Application, the Prosecution sets out its argument for the alleged existence of irreparable prejudice.

16. **First** is referred to the fact that “the Prosecution has been unable to call this witness to testify to an important issue at trial (...).”⁹ The Defence questions the relevance of this argument at this stage. The Prosecution in its Application did not indicate whether it will still be in a position to call this witness in the current trial, especially given the estimated time lapse which would take place, if leave would be granted, and if the appeal would then be granted. The Defence estimates this will take too much time, and by the time a decision will be made on this matter – assuming leave would be granted – the Defence estimates that the Prosecution case will have finished by then anyway.

17. This matter is brought forward by the Defence, because it is of the opinion that this matter could have been raised by the Prosecution at an earlier stage. This particular witness TF1-150 had been called by the Prosecution in the case against the CDF before Trial Chamber I, and this same matter underlying in this case was

⁷ *Id.*

⁸ See para. 28 of the Application.

⁹ Para. 32 of the Application.

raised in that trial, and decided upon by Trial Chamber I.¹⁰ This was, according to the information of the Defence, well before the start of this Trial Chamber's summer recess of this year. The Defence submits that the Prosecution could at that point in time have raised this issue to the Trial Chamber by way of motion. Not only would then the issue have been resolved before the witness had actually been flown again to Sierra Leone, but also would there have been more time to have this issue resolved by the Appeals Chamber, in case the Trial Chamber would grant leave to appeal. By only raising this matter at so late a stage in the proceedings, the Defence contends that it is at least to say highly unlikely that a final decision will be taken before the end of the Prosecution case. Therefore, the relevance of the first argument set out in the Application in this respect, has not been shown.

18. The **second** argument, namely that it may be difficult for the Prosecution to secure the cooperation of humanitarian organizations, is also contested by the Defence. As can be seen from Annexure 1 to the Application,¹¹ and as also has been extensively referred to during the hearing of the underlying motion, it was not the organization itself which made the request not to be compelled to answer. The organization was of the opinion, as shown by the letter, that the information would be provided in closed session.¹² Therefore, the argument that organizations would be unwilling to further cooperate with the Special Court is unconvincing in the humble opinion of the Defence.

III CONCLUSION

19. For the reasons set out above, the Defence opposes the Prosecution Application, given that neither exceptional circumstances, nor irreparable prejudice have been

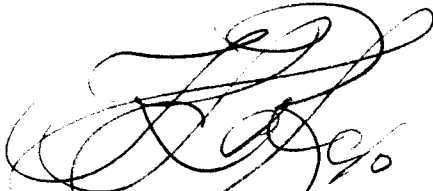
¹⁰ The decision by Trial Chamber I was taken in closed session, however, the Prosecution makes reference to it during the oral hearing on this motion on 13 September 2005.

¹¹ Letter of UN Assistant Secretary-General for Legal Affairs Mr. Ralph Zacklin to Mr. Crane of 23 May 2005.

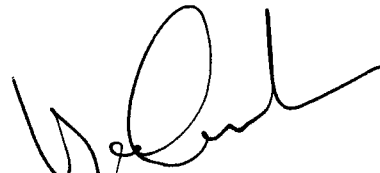
¹² See specifically para. 3 of p. 2 of this letter.

established. The requirements of Rule 73(B) have therefore not been met, and the Application should be denied.

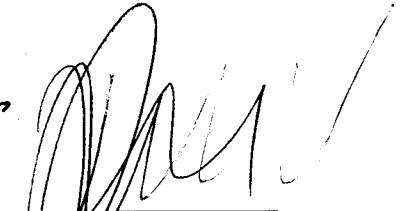
Respectfully submitted,
On 23 September 2005



Geert-Jan Alexander Knoops



Kojo Graham



Andrew Daniels