

SCSL-04-16-T
(15109-15115)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Robin Vincent

Date filed: 27 September 2005

PROSECUTOR

Against

Alex Tamba Brima
Brima Bazzy Kamara
Allieu Kondewa
(Case No. SCSL-04-16-T)

**PROSECUTION REPLY TO JOINT DEFENCE RESPONSE TO 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**

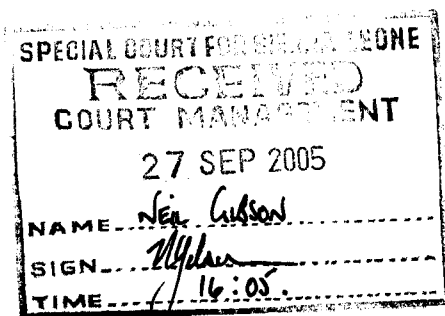
Office of the Prosecutor:

Luc Côté
Lesley Taylor
Nina Jørgensen
Melissa Pack

Defence Counsel for Alex Tamba Brima
Glenna Thompson
Kojo Graham

Defence Counsel for Brima Bazzy Kamara
Andrew Daniels
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu
Geert-Jan Alexander Knoops
Carry Knoops
Abibola E. Manly-Spain
Amadu Koroma



I. INTRODUCTION

1. The Prosecution files this Reply to the “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” (“Defence Response”) filed on 23 September 2005.
2. In its Response, the Defence argues that the applicability of Rule 73(B) has not been proved by the Prosecution. With regard to the ‘exceptional circumstances’ limb of the test, the Defence argues that:
 - a) the alleged errors of law are not a relevant determining factor;
 - b) no error of law was made;
 - c) an application for leave to appeal should not go into the substance of the arguments;
 - d) the fact that the matter is of significance to international criminal law is not sufficient in itself.
3. With regard to the ‘irreparable prejudice’ limb of the test, the Defence argues that:
 - a) the issue could have been raised at an earlier stage and since it is unlikely that any appeal, if leave is granted, would be decided before the end of the Prosecution case, the argument that the witness could not be called to testify is irrelevant;
 - b) the argument that organizations would be unwilling to cooperate is unconvincing as it was not the organization itself that made the request not to be compelled to answer questions on grounds of confidentiality.

II. ARGUMENT

Exceptional Circumstances – Errors of Law

4. In reply to the Defence argument that no reason has been provided as to why in this particular case the alleged errors of law would play a role in the assessment of exceptional circumstances,¹ the Prosecution points to paragraph 22 of its application in

¹ Defence Response, para. 6.

which, with reference to the purpose of Rule 70, it argues that the Rules can only ensure the smooth functioning of proceedings if their correct interpretation is not in doubt. The alleged misinterpretation of a Rule is highly relevant to the assessment of whether exceptional circumstances exist as it may lead to repeated misinterpretations on subsequent occasions or in subsequent cases. With respect to the alleged error in balancing the public interest attaching to the work of human rights officers with the rights of the accused to a fair trial, the Prosecution points to paragraph 25 of its application in which it submits that “the necessity for the correct identification of the competing public interests arising when human rights officers are called as witnesses before international tribunals amounts to exceptional circumstances given the importance of such testimony, both in the instant case and at large”. The Prosecution submits that certainty as to which interests must be weighed against each other is vital to ensuring fair and consistent results and in upholding the fundamental right to a fair trial.

5. The correct interpretation of Rule 70 and the formulation of the appropriate balancing exercise cannot be left to be established in a final appeal against judgment. By analogy, as Trial Chamber I commented when granting leave to appeal in connection with the doctrine of judicial notice, “the Chamber is of the opinion that these submissions raise issues that are of a serious nature that justifies a decision by the Appeals Chamber which would serve the interests of justice by providing guidelines for the application of the principles...”.² The Prosecution submits that the issues relating to confidentiality of sources and the applicability of the relevant rules and principles are of a serious nature and justify the intervention of the Appeals Chamber to serve the interests of justice by providing guidelines for the application of the law.
6. In paragraphs 12-21 of its application, the Prosecution sets out in skeleton form its arguments as to why Rule 70 is applicable and why the Milošević Rule 70 Decision³ is relevant. Paragraphs 23-27 deal with the formulation of the balancing exercise. The Prosecution reiterates its submission that the Trial Chamber erred in law in its determinations on these matters.

² *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-231, Decision on Joint Request for Leave to Appeal Against Decision on Prosecution’s Motion for Judicial Notice, 19 October 2004, para. 25.

³ *Prosecutor v. Milošević*, IT-02-54-AR108bis & AR 73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, (“Milošević Rule 70 Decision”).

7. The Prosecution submits that it is insufficient for the purpose of showing exceptional circumstances merely to state that an error of law has been made. The party making such an assertion must provide a foundation in order to persuade the Trial Chamber that it may have erred and that the issue is one that must be clarified at the interlocutory stage by the Appeals Chamber. Thus, the Prosecution submits that where errors of law are alleged, it is entitled to describe the basis for the alleged error in order to produce a concise and yet persuasive statement as to why exceptional circumstances have been shown.
8. The Prosecution notes that the written Dissenting Opinion of Justice Doherty was filed on 22 September 2005⁴ and the analysis therein supports the Prosecution's assertion that the majority erred in law.

Exceptional Circumstances – Issue of Fundamental Legal Importance

9. The Prosecution notes that the Defence agrees that the matter under consideration is one of significance to international criminal law.⁵ The Prosecution disagrees that it has not explained why the issue should also fall under the Rule 73(B) requirement of exceptional circumstances as paragraphs 29 and 30 of the application set out the Prosecution's argument in detail and demonstrate how the matter falls within the categories listed in the quoted passage from a Trial Chamber I decision.⁶ These categories include issues of fundamental legal importance to the Special Court for Sierra Leone or international criminal law in general and in this respect the issue of the extent to which human rights officers who testify before international tribunals may claim confidentiality in respect of their sources is novel and in need of an authoritative statement of the law.
10. The Prosecution does not dispute that the Decision in the ICTY case of *Prosecutor v Simic*⁷ is authority for the proposition that international law recognizes a privilege against

⁴ *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T, Dissenting Opinion of Justice Doherty on the Prosecution's Oral Application for Leave 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 Rule 70(B) and (D) of the Rules, 22 September 2005.

⁵ Defence Response, para. 14.

⁶ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Decision on Defence Applications for Leave to Appeal Rulings of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para. 26.

⁷ *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; Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness (released as public document by Order dated 1 October 1999), 27 July 1999.

testifying that attaches to employees or former employees of the International Committee of the Red Cross. The case was cited to demonstrate that while there is international jurisprudence on the question of immunity from testifying, there is no such jurisprudence on the question of disclosure of names of confidential sources once immunity has been waived. The Prosecution was not attempting to suggest that the *Simic* decision was of broader application than is in fact the case, and in any event, such a suggestion would not have been pertinent to the Prosecution's specific submission on this point.

11. Equally, the Prosecution did not intend to diminish the significance of the confidential decision of Trial Chamber I on similar issues to those now before Trial Chamber II. The argument is that there has been no previous jurisprudence of an international criminal tribunal exactly on point that could guide either Chamber and no decision at the appeal level, and consequently the Special Court is the first international criminal tribunal to rule on a matter of fundamental legal importance to all such tribunals. The Prosecution therefore submits that an issue of such magnitude and significance requires an authoritative statement and binding decision from the Appeals Chamber that can also guide other international criminal tribunals should a similar question arise elsewhere.

Irreparable Prejudice

12. The Prosecution's arguments as to irreparable prejudice are no less relevant simply because the Prosecution case may be completed before any eventual decision of the Appeals Chamber. The fact of irreparable prejudice caused by the inability to call a key witness does not become moot simply because the appeals procedure may last longer than the anticipated presentation of evidence for the Prosecution. Rule 85 sets out a sequence for the presentation of evidence that may, upon application by a party, be interrupted if "directed by the Trial Chamber in the interests of justice". Rule 54 also allows a Trial Chamber to issue such orders as may be necessary for the conduct of the trial. Therefore, the Prosecution would not be precluded from applying to reopen its case to call Witness TF1-150 in the event of an Appeals Chamber decision in its favour, or from seeking to have admitted into evidence his statements or reports.
13. The Defence states that it is of the opinion that the issue of the confidentiality of sources could have been raised by the Prosecution at an earlier stage. The Prosecution submits

first, that this is irrelevant to the question of irreparable prejudice as the prejudice flows from the inability to present the evidence of the witness, and this remains the case whether the witness is local or needs to be flown in from abroad. Second, even if the issue had been raised prior to the judicial recess, it would not have been realistic to expect a decision until the trial session reopened, which is what happened in any event, and the parties are obliged to have their witnesses ready to testify.⁸ Third, it was anticipated that an application for leave to appeal the decision of Trial Chamber I on the same issue would have been made prior to the current application so as to obtain further guidance, and indeed an eventual decision of the Appeals Chamber, before raising the matter in these proceedings.

14. The Defence contests the Prosecution submission that it may be difficult to secure the cooperation of humanitarian organizations in other cases before the Special Court, arguing that it was not the organization itself which made the request on behalf of its former employer not to be compelled to answer questions. The Prosecution submits that the issue here is not how best to interpret the UN waiver of immunity, but rather the question of principle whether a human rights worker may be compelled to breach a duty of trust imposed upon him in his interaction with a third party and how this may affect the willingness of such human rights workers to testify. The Prosecution's argument is that humanitarian organizations may be less willing to cooperate based on the negative experience of human rights workers before international criminal tribunals who can be forced to risk contempt of court action if they refuse to reveal the names of sources that provided information under conditions of confidentiality. At the very least, waivers of immunity, in such instances where an organization is entitled to immunity, in the future might contain specific conditions to protect employees against breaches of confidentiality owed to third parties which would be unacceptable to a court that has found that a witness may be compelled to reveal the identities of confidential sources. This in itself could prevent important testimony from coming before international criminal tribunals.

⁸ It may be noted that the same witness was brought to testify in this case on a previous occasion and due to matters beyond the control of the Prosecution he was unable to be heard, see Transcript of 9 June 2005.

III. CONCLUSION

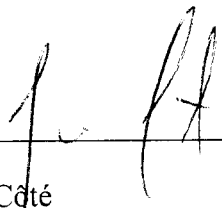
15. The Prosecution submits that it has demonstrated both exceptional circumstances and irreparable prejudice. As stated in its application for leave to appeal, exceptional circumstances have been shown by a combination of factors including errors of law and the assertion, which is not disputed by the Defence, that the issue is one of importance to international criminal law. Irreparable prejudice has been caused by the inability to present the evidence of TF1-150 and while the prejudice could still be cured at the interlocutory stage, a final appeal against judgment would be too late.

16. For these reasons, the Prosecution respectfully requests leave to appeal the Majority Decision that TF1-150 could be compelled to answer questions relating to the sources of his information.

Filed in Freetown,

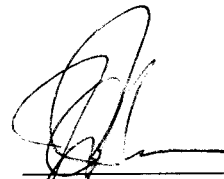
27 September 2005

For the Prosecution,



Luc Côté

Chief of Prosecutions



Lesley Taylor

Senior Trial Attorney