

SCSL-04-16-T  
(19331-19334)



**SPECIAL COURT FOR SIERRA LEONE**

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588)

**TRIAL CHAMBER II**

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

Registrar: Lovemore G. Munlo, SC

Date: 23 November 2006

PROSECUTOR	Against	Alex Tamba Brima Brima Bazzy Kamara Santigie Borbor Kanu (Case No.SCSL-04-16-T)
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**DECISION ON PROSECUTION APPLICATION FOR LEAVE TO APPEAL DECISION ON CONFIDENTIAL MOTION TO CALL EVIDENCE IN REBUTTAL**

Office of the Prosecutor:  
Christopher Staker  
James C. Johnson  
Karim Agha  
Nina Jørgensen

Defence Counsel for Alex Tamba Brima:  
Kojo Graham  
Glenna Thompson

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

Defence Counsel for Santigie Borbor Kanu:  
Geert-Jan Alexander Knoop  
Corry Knoop  
Agibola E. Manly-Spain

**SPECIAL COURT FOR SIERRA LEONE  
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COURT MANAGEMENT**

23 NOV 2006

NAME Adeera Nsiima K.  
SIGN Nsiima A.  
TIME 16:33

**TRIAL CHAMBER II** (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”), composed of Justice Richard Lussick, Presiding Judge, Justice Teresa Doherty and Justice Julia Sebutinde;

**SEISED** of the Prosecution Application for Leave to Appeal Decision on Confidential Motion to Call Evidence in Rebuttal, filed on 17 November 2006 (“Motion”) wherein, pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”) the Prosecution applies for leave to appeal against the Trial Chamber’s Decision on Confidential Motion to Call Evidence in Rebuttal dated 14 November 2006, on the grounds that:

- (i) on the issue of “exceptional circumstances”<sup>1</sup>, the Trial Chamber’s stringent application of the law relating to the presentation of rebuttal evidence “will be a precedent that may be invoked in future trials before this court, and before other international criminal courts, and therefore is of general importance to international criminal law”<sup>2</sup>;
- (ii) on the issue of “irreparable prejudice”, the Prosecution will suffer prejudice “if it is unable to call relevant witnesses believed necessary for its case”; that “the standard for rebuttal evidence has been set so high that there may be an adverse impact on future cases”;<sup>3</sup> and that “any attempt to call rebuttal evidence at the post-judgement phase of the trial would result in undue delay.”<sup>4</sup>

**NOTING** the Trial Chamber’s Order for Expedited Filing dated 17 November 2006;

**NOTING** the Kanu Defence Response to Prosecution Application for Leave to Appeal Decision on Confidential Motion to Call Evidence in Rebuttal, filed on 21 November 2006, in which it is submitted:

- (i) that the application by the Trial Chamber of its discretionary power under Rule 85(A)(iii) to allow or preclude the presentation of rebuttal evidence, within the parameters set out by both the ICTY and ICTR jurisprudence, does not in itself constitute exceptional circumstances within the meaning of Rule 73(B)<sup>5</sup>;
- (ii) that the Prosecution in its Motion failed to delineate any issue which qualifies as “some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems”<sup>6</sup>;
- (iii) that no irreparable prejudice would be caused to the Prosecution were the Motion to be refused<sup>7</sup>;

<sup>1</sup> See Motion paras. 7-15.

<sup>2</sup> See Motion paras. 8-10.

<sup>3</sup> See Motion para. 16.

<sup>4</sup> See Motion, para. 17.

<sup>5</sup> See Kanu Response, para. 2.

<sup>6</sup> See Kanu Response, para. 4; see also *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-357, Decision on Defence Application for Leave to Appeal Ruling of the 3<sup>rd</sup> February 2005 on the Exclusion of Statement of Witness TFI-141, 28 April 2005, paras. 25, 26.

<sup>7</sup> See Kanu Response, p. 5, “In conclusion”.





NOTING that neither the Brima Defence nor the Kamara Defence has filed a response to the Motion;

NOTING the Prosecution Reply to Kanu Response to Prosecution Application for Leave to Appeal Decision on Confidential Motion to Call Evidence in Rebuttal, filed on 22 November 2006;

RECALLING the Trial Chamber's Decision on Confidential Motion to Call Evidence in Rebuttal dated 14 November 2006 ("Decision") whereby the said Motion brought by the Prosecution was dismissed in its entirety;

NOTING that Rule 73(B) of the Rules of Procedure and Evidence ("Rules") 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;*

NOTING therefore that Rule 73(B) of the Rules does not confer a general right of appeal, but that leave to appeal may be granted by the Trial Chamber in cases where the conjunctive conditions of exceptional circumstances and irreparable prejudice to a party are both satisfied;

ADOPTING the restrictive test applied by Trial Chamber I that: "[T]he overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant's case must reach a level of exceptional circumstances and irreparable prejudice. Nothing short of that will suffice having regard to the restrictive nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals";<sup>8</sup>

CONSIDERING that the Appeals Chamber has ruled that "[i]n this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgment will be corrected in due course by this Chamber on appeal";<sup>9</sup>

FINDING that:

1. taking into account that *what constitutes 'exceptional circumstances' must necessarily depend on, and vary with, the circumstances of each case*<sup>10</sup>, the Decision does not create any precedent of general importance to the Special Court or to international law generally;
2. the Prosecution has not established that the Decision would cause such prejudice to the Prosecution case as could not be cured by the final disposal of the trial including post-judgement appeal;

<sup>8</sup> *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 February 2004.

<sup>9</sup> *The Prosecutor v. Norman, Kondewa, Fofana*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

<sup>10</sup> See *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-357, Decision on Defence Application for Leave to Appeal Ruling of the 3<sup>rd</sup> of February, 2005 on the Exclusion of Statement of Witness TFI-141, dated 28 April 2005, para. 25, cited in Motion at para. 5.







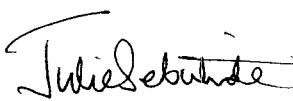
CONCLUDING THEREFORE that the criteria of exceptional circumstances and irreparable prejudice prescribed by Rule 73(B) have not been met;

DISMISSES THE MOTION.

Done at Freetown, Sierra Leone, this 23<sup>rd</sup> day of November 2006.

  
Justice Teresa Doherty

  
Justice Richard Lussick  
Presiding Judge

  
Justice Julia Sebutinde

