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SCSL-04-14-AR73(B)

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SPECIAL COURT FOR SIERRA LEONE

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THE APPEALS CHAMBER

Before: Justice Raja Fernando, Presiding,
Justice George Gelaga King,
Justice Emmanuel Ayoola,
Justice Renate Winter,
Justice Geoffrey Robertson, QC

Interim Registrar: Mr. Lovemore Munlo, SC

Date: 26 May 2006

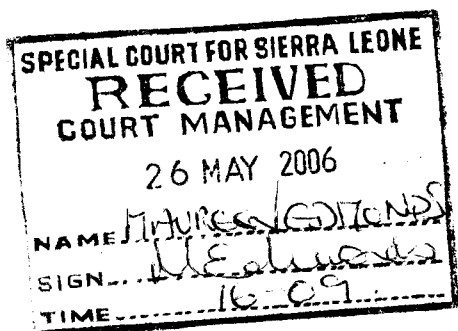
PROSECUTOR Against Hinga Norman
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-2004-14-AR73(B))

**DECISION ON PROSECUTION APPEAL AGAINST CONFIDENTIAL DECISION
ON DEFENCE APPLICATION CONCERNING WITNESS TF2-218**

Office of the Prosecutor:
James C. Johnson,
Nina Jørgensen, Adwoa Wiafe

Defence Counsel for Hinga Norman:
Dr. Bu-Buakei Jabbi, John Wesley-Hall Jr.,
Ibrahim Yillah, Clare Da Silva
Defence Counsel for Moinina Fofana:
Victor Koppe, Arrow J. Bockarie, Michiel
Pestman, Andrew Ianuzzi

Defence Counsel for Allieu Kondewa:
Charles Margai, Yada Williams, Ansu Lansana,
Martin Michael



THE APPEALS CHAMBER (“Appeals Chamber”) of the Special Court for Sierra Leone (“Special Court”) composed of Justice Raja Fernando, Presiding Judge, Justice Gelaga King, Justice Emmanuel Ayoola, Justice Renate Winter, and Justice Geoffrey Robertson, QC;

BEING SEISED OF the “Prosecution Appeal against Confidential Decision of 8 June 2005 on Defence Application Regarding Witness TF2-218” (the “Appeal”) filed by the Prosecution on 7 December 2005 pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court (“Rules”);

NOTING that the Defence did not respond to this Appeal;

CONSIDERING the “Confidential Decision on Defence Application Regarding Witness TF2-218” rendered on 8 June 2005 (the “Impugned Decision”) and the Confidential Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe on the Impugned Decision filed on 19 September 2005;

CONSIDERING the “Confidential Decision on Prosecution Application for Leave to Appeal Confidential Decision on Defence Application Regarding Witness TF2-218” rendered by Trial Chamber II on 30 November 2005 (the “Decision Granting Leave to Appeal the Impugned Decision”) and the Dissenting Opinion of Hon. Justice Bankole Thompson filed on the same day;

NOW DETERMINES THE MOTION ON THE BASIS OF THE WRITTEN SUBMISSIONS

1. The issue in this appeal is identical to that in the AFRC appeal,¹ namely whether a witness who has provided information to the Prosecution pursuant to Rule 70(B) can be compelled to disclose the identity of sources. This Court unanimously concluded that he

¹ *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-AR73, Prosecution Appeal against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality filed by the Prosecution on 19 October 2005.

could not be so compelled by virtue of Rule 70(D).² The reasoning for that conclusion applies precisely to the issue in this appeal, and we will not repeat it. We deal in this decision only with the ground advanced by the Trial Chamber majority which did not feature in the AFRC decision, namely that the confidentiality invoked by the witness under Rule 70(D) had been waived by the United Nations itself.

2. The matter arose on 7 June 2005, in the course of the cross-examination of UN witness in closed session. He was asked by Defence Counsel to identify the source for some of his statements. He explained that he had given an undertaking to protect this source's identity, since the source was a person who might be open to reprisals if it became known that he or she had been assisting the United Nations. The witness made clear that he was taking this position both as a matter of conscience and because routine source-revelation would undermine his reporting work.

3. The Trial Chamber heard argument as to whether it should direct the witness to answer. It was much affected by its interpretation of a letter from the Assistant Secretary-General for Legal Affairs of the United Nations to the Prosecutor, wherein the United Nations waived its treaty-created immunity so as to enable this employee to "testify freely", on the one condition that he was permitted to do so in closed session. The Trial Chamber I majority (Hon. Justices Boutet and Thompson) interpreted the UN letter as a waiver of any privilege belonging to the witness, including any privilege to withhold the name of sources for his evidence. It ordered the witness to answer, on that ground and because it decided that Rule 70 had no application to the situation at all. This majority decision was delivered on 8 June 2005.

4. The witness maintained his refusal to answer, but does not appear to have been formally held in contempt. A powerful dissent was entered by Hon. Justice Itoe, who (like

² *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-AR73, Decision on Prosecution Appeal against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006.

the majority) found Rule 70 inapplicable but decided that the confidentiality promised to the source outweighed the Defence need for the information. Regrettably, this dissent was not filed until 19 September 2005, more than three months later. This Appeal Chamber has already ruled that the practice of filing individual decisions long after they should have been appended to the decision of the Chamber is incorrect and should cease.³

5. The primary reason for Trial Chamber I's decision in this case was that :

[T]he confidentiality interest in the said information was waived by the Secretary General through the United Nations Letter and that the claim of privilege by Witness TF2-218 not to disclose the name of his informant is legally impermissible and that Witness TF2-218 shall disclose the name of the informant in closed session.

6. There is a distinction in law between a privilege (i.e. an exemption from disclosing confidential information but not from providing other evidence or participating in the trial process) and an immunity, which is an exemption from giving any evidence at all or otherwise participating in the trial. "A privilege concerns the right of a party to refuse to disclose certain confidential communications to a tribunal or other person; not the right to refuse to attend before that tribunal and to give any evidence whatsoever."⁴ Immunity relates to the compellability of a witness and is determined by reference to the status of the witness. Privilege relates to the admissibility of evidence given by the compellable witness and is determined by reference to the confidential character of the evidence. The textbook position is that:

Once the witness has entered the witness box ... the witness must answer all questions put unless excused or unless the refusal to answer is based upon a privilege conferred by law. Competence

³ Doc. No. SCSL-04-16-AR73-441: *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-AR73, Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris As Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, 8 December 2005, para. 19-26.

⁴ J D Heydon, *Cross on Evidence* (2004, 7th Australian Ed.).

and compellability therefore attach to the witness and not to the evidence the witness may give.⁵

7. The Treaty referred to in the UN letter, namely Section 18(A) of Article V of the Convention on the Privileges and Immunities of the United Nations (the “Convention”), clearly refers to an immunity. It provides that:

Officials of the United Nations shall:

- a. Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

It is therefore clear that under Section 18(A) the witness enjoys, because of his status as a UN official, an immunity and not a privilege.

8. In this case the immunity was waived by the letter pursuant to Section 20 of Article V of the Convention, which provides that:

The Secretary General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity will impede the course of justice and can be waived without prejudice to the interests of the United Nations.

This waiver of immunity had the effect of rendering the witness compellable. However, this waiver had no impact on the admissibility of the subsequent evidence that the witness would give and hence had no effect upon any privilege that attached to that evidence.

9. Trial Chamber I erred in law in interpreting the UN letter as a waiver of the privilege. Hence we uphold this appeal both on the ground that the trial court misinterpreted Rule 70 and on the additional ground that it erred in finding that the Secretary General’s letter waived not only the immunity from testifying but all privileges which might personally attach to the testimony.

⁵ *Ibid*, [13001].

10. The Appeals Chamber further notes that one judge dissented from the decision to grant leave. For the reasons set out by the majority, the Appeals Chamber considers that both criteria for granting leave to appeal were fulfilled pursuant to Rule 73(B). In this case, granting leave was particularly important because the witness, who refused to obey the order of the majority of the Trial Chamber, may have been in jeopardy of being held in contempt.

11. In addition, the Appeals Chamber is also concerned that the Impugned Decision and related dissent were never made public. Because the issue had been argued in closed session, it was apparently thought that the decision must also remain confidential. The Appeals Chamber finds that, in the interests of justice, a redacted version of these important decisions should be made public.

FOR THESE REASONS, THE APPEALS CHAMBER

ALLOWS the Prosecutor's appeal;

QUASHES the impugned decision and grants the Prosecution's confidential application for leave to be granted to witness TF2-218 to testify without being compelled to answer questions in cross-examination that the witness declines to answer on grounds of confidentiality pursuant to Rule 70 (B) and (D) of the Rules; and

ORDERS that a redacted version of the Impugned Decision and related dissent be made public.

Done in Freetown, this 26th of May 2006

Justice Raja Fernando
Presiding Judge,

Justice George Gelaga King

Justice Emmanuel Ayoola

Justice Renate Winter

