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SCSL-04-16-T
(19311 – 19319)

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

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 17 November 2006

THE PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu

Case No. SCSL-04-16-T

PUBLIC

APPLICATION FOR LEAVE TO APPEAL DECISION ON CONFIDENTIAL MOTION TO CALL EVIDENCE IN REBUTTAL

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I. INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("**Rules**"), the Prosecution hereby applies for leave to appeal against the Trial Chamber's Decision on Confidential Motion to Call Evidence in Rebuttal ("**Decision**") of 14 November 2006.[1]
2. The Prosecution filed its Motion for Leave to Call Evidence in Rebuttal ("**Motion**") on 16 October 2006,[2] seeking to call rebuttal witnesses falling into two categories: (1) witnesses to rebut the alibi evidence of the First Accused and (2) witnesses to rebut other evidence in the Defence case that could not have been anticipated. The Brima and Kanu Defence filed individual responses within the time limit[3] and the Prosecution filed individual replies.[4]

II. TEST FOR GRANTING LEAVE TO APPEAL

3. Rule 73(B) of the Rules provides that leave to appeal may be granted in exceptional circumstances and to avoid irreparable prejudice to a party. The two conditions – exceptional circumstances and irreparable prejudice – are conjunctive, and both must be satisfied if an application for leave to appeal is to be granted.
4. The Appeals Chamber has held that: "The underlying rationale for permitting such appeals is that certain matters cannot be cured or resolved by final appeal against judgement."[5] The restrictive nature of Rule 73(B) has repeatedly been emphasized in the decisions of the Special Court and the principles of law governing the issue of granting leave to file an interlocutory appeal within the jurisdiction of the Special Court were

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[1] *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-582, "Decision on Confidential Motion to Call Evidence in Rebuttal", 14 November 2006.
[2] *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-569, "Motion for Leave to Call Evidence in Rebuttal", 16 October 2006.
[3] *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-574, "Confidential Kanu-Defence Response to Prosecution Motion for Leave to Call Evidence in Rebuttal", 19 October 2006; SCSL-04-16-T-575, "Confidential Brima-Response to Prosecution Motion for Leave to Call Evidence in Rebuttal", 20 October 2006.
[4] *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-578, "Confidential Prosecution Reply to Brima Response to Prosecution Motion for Leave to Call Evidence in Rebuttal", 25 October 2006; SCSL-04-16-T-579, "Confidential Prosecution Reply to Kanu Response to Prosecution Motion for Leave to Call Evidence in Rebuttal", 25 October 2006.
[5] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T-319, "Decision on Prosecution Appeal against the Trial Chamber Decision of August 2004 Refusing Leave to File an Interlocutory Appeal", 17 January 2005, para. 29; see also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T-357, "Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141", 28 April 2005, para. 21.

recently consolidated and summarised by Trial Chamber I.[6] This Trial Chamber has adopted the restrictive test applied by Trial Chamber I and the rationale that "criminal trials must not be heavily encumbered and consequently *unduly* delayed by interlocutory appeals".[7]

5. However, Trial Chamber I has also stated that it "has studiously refrained from embarking on any comprehensive or exhaustive definition of 'exceptional circumstances' primarily because the notion is one that does not lend itself to a fixed meaning. Nor can it be plausibly maintained that the categories of 'exceptional circumstances' are closed or fixed...what constitutes 'exceptional circumstances' must necessarily depend on, and vary with, the circumstances of each case."[8] Furthermore:

> "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 conducive to the interests of justice, or where the course 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".[9]

6. While individual factors such as an error of law or a strong dissenting opinion are unlikely in themselves to amount to exceptional circumstances, a combination of relevant factors has the potential to meet the high standard.

III. ARGUMENT

A. Exceptional Circumstances

7. The Trial Chamber's statement of the applicable law and the criteria for the admission of rebuttal evidence reflects the jurisprudence developed by the ICTY and ICTR and the

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[6] See e.g. *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T-669, "Decision on Application by First Accused for Leave to Appeal against the Decision on their Motion for Extension of Time to Submit Documents pursuant to Rule 92bis", 17 July 2006.

[7] *Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-T-483, "Decision on Joint Defence Request for Leave to Appeal from Decision on Defence Motions for Judgement of Acquittal pursuant to Rule 98 of 31 March 2006", 4 May 2006, p.2, emphasis added.

[8] See *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-357, "Decision on Defence Application for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statement of Witness TF1-141", 28 April 2005, para 25;

[9] Ibid., para 26.

Prosecution does not take issue with the legal framework set out by the Trial Chamber. The Trial Chamber has a clear discretion under Rule 85(A)(iii) to allow or preclude the presentation of rebuttal evidence. However, the Prosecution submits that exceptional circumstances arise from the Trial Chamber's reasoning and the manner in which it applied its discretion in evaluating the proposed rebuttal case. These circumstances will be considered both generally and more specifically in relation to the two categories of proposed rebuttal evidence.

General circumstances

8. First, the Trial Chamber's application of the law is so stringent as to suggest that rebuttal evidence could practically never be permitted. This has ramifications for the development of international law and raises a serious issue of fundamental legal importance to the Special Court. It points to the need for the parameters of the exercise of a Trial Chamber's discretion in the context of a motion for rebuttal to be considered by the Appeals Chamber.

9. Secondly, the Trial Chamber appeared to abandon the flexible approach to the standard of admissibility of evidence considered to be inherent in Rule 89(C) that has been the practice before the Special Court.[10] Moreover, the Trial Chamber failed to consider, in the context of the need to ensure that the "trial proceeds expeditiously, *without unfairness* and needless consumption of time",[11] the need to ensure that the standard of admissibility for rebuttal evidence is not so strict as to compel the Prosecution to seek to admit "an over-abundance of evidence in its case-in-chief in order to avoid the risk of foreclosure of evidence deemed critical by the Prosecution at the rebuttal stage".[12] On the basis of the Trial Chamber's Decision, the Prosecution may feel compelled in future cases to be over-cautious in preparing its lists of witnesses to ensure that defences that might be anticipated are rebutted in the case-in-chief. This will cause a lengthening of proceedings

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[10] See, for example, *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-AR65, "Fofana – Appeal Against Decision Refusing Bail", 11 March 2005 at paras. 22-24; *Prosecutor v. Sesay, Kallon, Gbao*, "Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker", 23 May 2005 paras. 3-7; *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-714, "Decision on Fofana Request to Admit Evidence Purusant to Rule 92bis", 9 October 2006, para. 15.

[11] Decision, para. 31, emphasis added.

[12] *Prosecutor v Orić*, IT-03-68-T, "Decision on the Prosecution Motion with Addendum and Urgent Addendum to present Rebuttal Evidence pursuant to Rule 85(A)(III)", Trial Chamber, 9 February 2006.

and may lead to an avoidable consumption of time. The impact of the Trial Chamber's Decision in this respect gives rise to exceptional circumstances.

10. Thirdly, it is submitted that in the Decision, the Trial Chamber took an approach of undertaking a detailed search for existing Prosecution evidence that related to the subject-matter in relation to which rebuttal evidence was sought, apparently on the basis that rebuttal evidence in relation to a particular issue would be unnecessary if evidence had already been presented on that issue. In adopting this approach, it is submitted that the Trial Chamber failed to take into account its broader truth-finding function. Rule 90(F) establishes that evidence should be presented in a manner that is effective for the ascertainment of the truth. If the Prosecution knows that a particular matter is in issue when presenting its case, it knows that it has to present adequate evidence in relation to that issue in order to discharge its burden of proof. If the Prosecution does not know that a matter is in issue, it will not have the opportunity to do this. Thus, where an issue arises during the Defence case that could not have been anticipated by the Prosecution, the question should not be whether or not evidence relevant to that issue has already been presented. Rather, the question should be whether the Prosecution could previously have reasonably foreseen that this matter would be in issue, such that it can be said to have had an adequate opportunity to address that issue during the Prosecution case. If the Prosecution has not had an adequate opportunity to do so, the fact that there may already be some evidence in relation to that issue should not deprive the Prosecution of an opportunity to call rebuttal evidence. The Prosecution submits that the approach taken in the Decision goes to the fundamental question of the nature and purpose of rebuttal evidence, and how fairness to both parties is to be balanced with the need to ensure expeditious trials. The Decision 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.

First category of evidence - alibi

11. The Prosecution submits that the Trial Chamber's decision undermines the importance of Rule 67(A)(ii)(a) which places an obligation on the Defence, prior to the commencement of trial, to provide the Prosecution with the details of a defence of alibi. This rule of

procedure serves an important function in guiding the Prosecution in terms of the selection of evidence necessary for its case-in-chief. If a defence of alibi were to fall within the realm of evidence that could reasonably be anticipated as part of an accused's refutation of all the charges against him, then Rule 67(A)(ii)(a) would serve little purpose.

12. As noted in the *Semanza* case, while the Rule does not limit the right of an accused to rely on a defence of alibi even if notice is not provided, a Trial Chamber is mandated to ensure that trials are fair, and fairness requires that the Prosecution be permitted to refute the alibi.[13] Indeed, in circumstances in which there has been late, incomplete or no notice of the defence of alibi, rebuttal evidence has tended to be permitted precisely because in the absence of adequate and timely notice, the defence of alibi could not reasonably have been foreseen. The possibility of bringing rebuttal evidence cannot, as suggested in paragraph 40 of the Decision, be replaced by the opportunity to carry out investigations and cross-examine defence witnesses regarding the alibi once notice has been provided. It is submitted that this suggestion reflects a misunderstanding of Rule 67(A)(ii)(a). Cross-examination is not a substitute for the calling of witnesses. The Prosecution acknowledges that prior to the defence case, it had some notice that the Defence would be raising an alibi defence in relation to crimes committed in Kono District and the north-eastern and central areas of Sierra Leone during the period February to 8 July 1998 and between 8 July 1998 and October 1998. However, it does not follow from the mere fact that the Accused denied individual or command responsibility for crimes committed during the period 22 December 1998 to January 1999 that the Prosecution was on notice of a potential alibi.[14] The Trial Chamber failed to distinguish the situation where no, or no adequate notice of an alibi defence has been provided, from other situations in which an application to call rebuttal evidence is made. The corresponding failure to address the purpose and impact of Rule 67(A)(ii)(a) in this context gives rise to exceptional circumstances.

13. While in relation to the time frames where some alibi notice was provided, the Prosecution would have been in a position to request further particulars during its case-

[13] *Prosecutor v Semanza*, ICTR-97-20-T, "Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence", 27 March 2002, para. 10.
[14] See Decision, para. 41.

in-chief, the obligation under Rule 67(A)(ii)(a) rests on the Defence. It is submitted that it is inappropriate for the Trial Chamber to shift the responsibility completely to the Prosecution (see paragraph 42 of the Decision). Even if it were open to the Prosecution to seek further particulars, it remains the case that where inadequate and/or late notice of an alibi is provided to the Prosecution, it is the Defence and not the Prosecution that is in breach of its obligations under the Rules. The Prosecution should not be penalised for a breach of the Rules by the Defence, especially where this results in the exclusion of relevant evidence that might be necessary to establish the truth.

14. Regarding the period from October 1998 to January 1999 where no alibi notice was provided prior to the commencement of the Defence case, in particular in relation to the Freetown invasion, it is submitted that the Trial Chamber again misinterprets the purpose of Rule 67(A)(ii)(a) in stating that because the First Accused denied being in command of the AFRC/RUF during that period, "the Prosecution should reasonably have anticipated Brima's denial that he was responsible for alleged crimes committed during the period in question, in order to address the issue during its case-in-chief". The evidence brought during the Prosecution case-in-chief did not specifically address the alibi because no alibi notice had been provided. Therefore, precisely because the alibi relates to a "fundamental part of the case which the Prosecution is required to prove in relation to the charges brought in the Indictment", evidence in rebuttal should have been permissible and the Trial Chamber's application of the law gives rise to exceptional circumstances.

Second category of evidence

15. In relation to the second category of evidence, in its assessment as to whether the evidence could have been foreseen, the Trial Chamber failed to consider the effect of the failure by the Defence to cross-examine Prosecution witnesses on issues related to the evidence that arose during the presentation of the Defence case. The line between foreseeable and unforeseeable evidence and the definition of evidence arising *ex improviso* are matters that should be determined by the Appeals Chamber in order to provide guidance on this important issue. For example, the question concerning the alleged signing of a ledger was never put to John Petrie. Moreover, the question of payments to witnesses did not arise during the Prosecution's case-in-chief and it was not

suggested to a Prosecution insider witness that he was paid to testify against the Accused. To the extent that "the credibility of the Prosecution witnesses and investigators" has been called into question, this is a serious allegation that the Prosecution legitimately sought leave to rebut. It is not a question of bolstering the credibility of a single witness where an attempt has been made to undermine the credibility of witnesses in *toto*.

B. Irreparable Prejudice

16. The Prosecution inevitably suffers prejudice if it is unable to call relevant witnesses believed to be necessary for its case. However, prejudice is also suffered in a broader sense because the standard for rebuttal evidence has been set so high that there may be an adverse impact on future cases. Furthermore, in future cases, the Prosecution may feel compelled to call an abundance of evidence in its case-in-chief to ensure that no stone is left unturned in terms of possible defence evidence. This will result in longer proceedings and may lead to unfairness, which is precisely what the Trial Chamber sought to avoid.

17. If the Prosecution were to bring this appeal at the post-judgement phase, and were to succeed at that stage, this might require the case to be remitted to the Trial Chamber to hear the rebuttal evidence and to revise its judgement accordingly. The resulting delays would cause irreparable prejudice to the expeditiousness of these proceedings.

IV. CONCLUSION

18. The Prosecution submits that it has satisfied the requirements under Rule 73(B) for leave to appeal to be granted.

Filed in Freetown,
17 November 2006

For the Prosecution,

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Index of Authorities

1. *Prosecutor v Orić*, IT-03-68-T, "Decision on the Prosecution Motion with Addendum and Urgent Addendum to present Rebuttal Evidence pursuant to Rule 85(A)(III)", Trial Chamber, 9 February 2006.

http://www.un.org/icty/oric/trialc/decision-e/060209.htm

2. *Prosecutor v Semanza*, ICTR-97-20-T, "Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence", 27 March 2002, para. 10.

http://69.94.11.53/ENGLISH/cases/Semanza/decisions/270302.htm