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SCSL-04-16-7  
(15131-15139)

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**SPECIAL COURT FOR SIERRA LEONE**

**Case No. SCSL-2004-16-T**

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

**Registrar:** Robin Vincent

**Date:** 30 September 2005

**PROSECUTOR**

**Against**

**ALEX TAMBA BRIMA  
BRIMA BAZZY KAMARA  
SANTIGIE BORBOR KANU**

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**REGISTRAR'S REPRESENTATIONS ON THE MOTION OF THE ACCUSED  
KANU FOR TEMPORARY PROVISIONAL RELEASE**

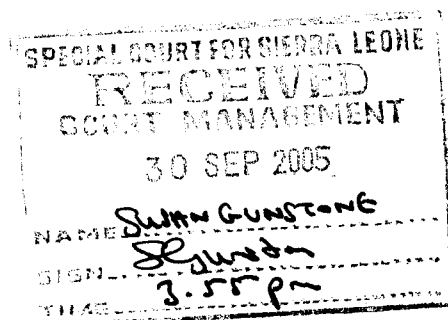
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**Office of the Prosecutor:**

Luc Côté  
Lesley Taylor

**Defence Counsel for Santigie Borbor  
Kanu:**

Geert-Jan Alexander Knoops  
Carry Knoops  
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A. Koroma



**I. Introduction**

- 1. The Registrar’s written representations to the Motion of the Accused Kanu for Temporary Provisional Release to Allow the Accused to Visit his Mother’s Grave dated 7 September 2005 (“the Motion”) are filed pursuant to the Order of the Presiding Judge dated 22 September 2005.
- 2. The Order recites that the Presiding Judge considers that the Trial Chamber needs guidance on issues relating to security during a potential visit by the Accused to his mother’s grave. The Registrar respectfully submits that the Motion raises a number of additional issues of importance, primarily relating to the interpretation of Rules 64 and 65 of the Rules of Procedure and Evidence (“the Rules”). In order to assist the Trial Chamber in its deliberations, the Registrar seeks leave of the Court to make representations, pursuant to Rules 27 and 33, on a number of issues arising under the Motion.
- 3. The Motion is made under Rule 65(A) of the Rules which allow for an accused once detained to be granted bail upon an order of a Judge or Trial. The Accused submits that the Rule applies to his application for temporary provisional release.
- 4. The Registrar submits that the Motion is not properly one which is made under Rule 65(A) as it is not a request for bail. The Motion is in reality an application for special measures of detention under Rule 64 of the Rules.
- 5. The Registrar respectfully submits that the Motion should be dismissed as the Trial Chamber does not have jurisdiction with respect to special measures of detention under Rule 64.

**II. Detention Regime**

- 6. The Warrants of Arrest and Order for Transfer and Detention issued by the Court order the Registrar, inter alia, to remand the Accused into the custody of the Special Court Detention Facility or such other Detention Facility as determined by the President under Rule 57 (Procedure after Arrest).

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7. An accused, once transferred to the Special Court, is detained in custody pursuant to Rule 64 (Detention on Remand). Rule 65 (Bail) provides that an accused may be granted bail only upon an order of a Judge or Trial Chamber.
  8. The functions of the Registrar include responsibility for the administration and servicing of the Special Court (Article 16(1) of the Statute and Rule 33(A)). Rule 33(C) provides as follows:
 

“The Registrar, mindful of the need to ensure respect for human rights and fundamental freedoms and particularly the presumption of innocence, shall, with the approval of the Council of Judges, adopt and amend rules governing the detention of persons awaiting Trial or Appeal or otherwise detained by the Special Court and ensure conditions of detention.”
  9. On 7 March 2003 the Rules Governing the Detention of Persons Awaiting Trial or Otherwise Detained on the Authority of the Special Court for Sierra Leone (“the Rules of Detention”) were adopted.
  10. Rule 3 of the Rules of Detention provides that, under the authority of the Registrar, the Chief of Detention has sole responsibility for all aspects of the daily management of the Detention Facility.

### III. Rules 64 and 65

11. The distinction between special measures of detention under Rule 64 and the grant of bail under Rule 65 was considered by the then President Hon. Justice Robertson in *Prosecutor v Norman* in a decision dated 26 November 2003<sup>1</sup> (“the *Decision on Conditions of Detention*”). The Accused Norman issued a Motion under Rule 64 for “modification of the conditions of detention” in which he sought orders that he be released from detention and placed under a form of “house arrest” under various conditions. President Robinson held that the application could not be entertained under Rule 64 and concluded that it should be made under Rule 65 as an application for conditional bail.<sup>2</sup>

<sup>1</sup> *Prosecutor v Norman*, SCSL 03-08-PT, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003.

<sup>2</sup> Paragraph 16 of the *Decision on Conditions of Detention*.

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12. It is submitted that the Registrar's power to order special measures of detention under Rule 64 enables allows the Registrar to order that an accused be detained outside the Detention Facility (as defined in Rule 2) in any part of Sierra Leone, for any period. Under a special measure of detention the accused remains in the custody of the Court as, at all times, the accused continues to be subject to the control of the Chief of Detention, under the authority of the Registrar.
  13. As stated by President Robinson in *Decision on Conditions of Detention*, "[i]t will henceforth be right under amended Rule 64 where the Registrar's power to order 'special measures' cannot be interpreted as a power to order conditional release or any measure which places a detainee outside the 24 hour control of the Head of Detention."<sup>3</sup>
  14. Special measures for detention ordered by the Registrar are to be distinguished from a grant of bail under Rule 65. An order of a Judge or Trial Chamber granting bail releases the accused from the custody of the Court. The liberty of the accused, once released from custody, is however subject to any conditions imposed under Rule 65(D).<sup>4</sup>
  15. The Motion refers to authorities of the International Criminal Tribunal for the former Yugoslavia (the "ICTY" or "Tribunal") concerning motions for provisional release under Rule 65 of the ICTY Rules, the equivalent of Rule 65 of the Court. As is clear from *Prosecutor v Dusan Fustar*<sup>5</sup> and *Prosecutor v Blagoje Simic*<sup>6</sup>, the orders made for provisional release under ICTY Rule 65 released the accused from the custody of the Tribunal into the custody of other persons or detaining authorities. Further, each of the orders of the Tribunal granted the accused his liberty, subject to restrictions on where accused could remain in the Republika Srpska and his contact with certain persons and communications. The accused was also required to report to local police.

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<sup>3</sup> Paragraph 13 of the *Decision on Conditions of Detention*. See also paragraphs 3 and 7.

<sup>4</sup> See paragraph 7 of the *Decision on Conditions of Detention*.

<sup>5</sup> Case No IT-02-65-PT, Decision on Defendant Dusan Fustar's Emergency Motion Seeking a Temporary Provisional Release to Attend the 40-day Memorial of His Father's Death, ICTY Trial Chamber, 11 July 2003.

<sup>6</sup> Case No. IT-95-9-A, Decision on Motion of Blagoje Simic Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for His Father, ICTY Appeals Chamber, 21 October 2004.

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16. The Motion does not seek the release of the Accused from the custody of the Court. Paragraph 15 contemplates that the Accused all times be accompanied by security officers and handcuffed. Such measures do not involve the Accused having any liberty but rather contemplate the Accused remaining under the control of persons acting on the instructions of the Chief of Detention. Such measures constitute “special measures of detention” under Rule 64.
  17. On the basis of the foregoing, it is respectfully submitted that the Motion should be dismissed as the Trial Chamber does not have jurisdiction with respect to special measures of detention under Rule 64.

#### **IV. Interpretation of Rule 64**

18. In view of the uniqueness of the request by the Accused, the Registrar seeks to put forward submissions regarding his powers to make an order for special measures of detention under Rule 64.
19. It is submitted that an order may be made under Rule 64 on the motion of the Registrar or upon a request of any person with a legitimate interest in the detention of an accused, for example, an accused, the Prosecutor, defence counsel or the Chief of Detention.
20. It is noted that the Accused, through his defence team, sought the permission of the Registrar to attend the funeral of his mother on 2 September 2005 (See Exhibit 3 to the Motion). No explanation is put forward in the Motion as to why the Accused or his defence team did not request the Registrar to give permission for the Accused to visit his mother’s grave.
21. The Registrar has the discretion to determine whether it is necessary to make an order under Rule 64. The Registrar submits that the need for special measures of detention would depend on the particular circumstances of the situation, including the security and good order of the Detention Facility, the health and safety of the accused, and the rights and freedoms of the accused. Of particular importance in determining the need for special measures and how they might be implemented, would be the assessment by the Registrar of relevant security considerations, for

example the risk that an accused, either alone or with the assistance of others, might attempt to escape from custody if detained outside the Detention Facility.

22. President Robinson in the *Decision on Conditions of Detention* considered the requirement under a previous version of Rule 64 that an order for special measures of detention be endorsed. "In order to protect the detainee, if subjected to them without consent, the Registrar is required to seek judicial endorsement within 48 hours of imposing the measure."<sup>7</sup>
23. Where the accused does not consent to the Registrar's order, it is submitted that Rule 64 contemplates that the order for special measures be put before the President for endorsement after the order is issued by the Registrar and, depending on the terms of the order, this may occur after the order has been executed.

#### IV. Power to review decisions relating to detention

24. It is noted in the Motion that it was too late to request a judicial review of the decision of the Registrar to refuse the request of the Accused to attend his mother's funeral.<sup>8</sup> The Registrar seeks to make representations regarding the proposition in the Motion that the decisions of the Registrar, or any person acting under his authority, concerning the detention of an accused may be the subject of a judicial review.

25. The Rules of Detention expressly provide for the exercise of judicial authority by the President in certain circumstances. Under Rule 22, the President may order an inquiry into the circumstances of the death, serious illness or serious injury of an accused. Rule 24 provides that a detainee may appeal to the President a decision by the Registrar to monitor the detainee's cell by video surveillance equipment. Rule 47 allows the Registrar, inter alia, to prohibit, regulate or set conditions for communications by or visits to a detainee (paragraph (A)) and to make arrangements for the interception of communications by any or all of the

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<sup>7</sup> Paragraph 6 of the Decision.

<sup>8</sup> Paragraph 13 of the Motion.

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 detainees (paragraph (B)). Paragraph (G) provides that a detainee may request the President to reverse a decision made by the Registrar under Rule 47.

26. There is no other provision in the Rules of Detention, the Statute or Rules which give a Judge or Trial Chamber jurisdiction to review decisions of the Registrar regarding the detention of an accused. President Robinson in the *Decision on Conditions of Detention*, after recalling the President's role under the Rules of Detention, noted that "[t]hese are serious situations where it is right that the President, as head of the Special Court, should oversee the Registrar. Otherwise, judges are not involved in administrative detention matters unless they impact significantly upon the right under Article 17(4)(b) of the Statute to adequate preparation of the defence, when they may be raised by motion before the Trial Chamber judges who are best placed to make such a determination."<sup>9</sup>
27. On 1 March 2005, Trial Chamber I issued a Decision on a Confidential Motion on a Detention Issue.<sup>10</sup> The Trial Chamber concluded that "it may, in limited circumstances in the interests of justice, review decisions of the Registrar where they may affect fundamental trial rights of an accused and hence negatively impact on the statutory requirements of Article 17(2) of the Statute and Rule 26bis of the Rules to ensure a fair and expeditious trial."<sup>11</sup>
28. The Trial Chamber held that it did not have jurisdiction to entertain the Motion as it was of the opinion that the Motion concerned an issue related to the right of the accused to a private and family life, but did not affect or concern any fair trial rights for the accused.
29. The Registrar respectfully submits that there is no jurisdiction for the Trial Chamber to review any order for special measures of detention made pursuant to Rule 64. The Rule expressly provides that such an order shall be placed before the President for endorsement.
30. Further, the Registrar submits that the inherent jurisdiction of the Trial Chamber to review the administrative decisions of the Registrar concerning the detention of

<sup>9</sup> Paragraph 5 of the *Decision on Conditions of Detention*.

<sup>10</sup> Case Nos. SCSL-04-14,15,16-T, Decision on Confidential Motion on Detention Issue, Trial Chamber I, 1 March 2005 ("the *Decision on Detention Issue*").

<sup>11</sup> Paragraph 17 of the *Decision on Detention Issue*. See also paragraphs 4 to 6 of the Separate Concurring Opinion of Justice Bankole Thompson on the Decision on Confidential Motion on Detention Issue.

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an accused, including any decision not to order special measures of detention, is limited to those decisions which affect the rights of the accused to a fair trial under Article 17(4) the Statute.

Respectfully submitted,

On 30 September 2005

A handwritten signature in black ink, consisting of several overlapping loops and a trailing flourish, positioned above a horizontal dotted line.

Andrew Collingwood, Acting Registrar



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### **List of Authorities**

1. *Prosecutor v Norman*, Case No. SCSL 03-08-PT, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003.
2. *Prosecutor v Dusan Fustar*, Case No IT-02-65-PT, Decision on Defendant Dusan Fustar's Emergency Motion Seeking a Temporary Provisional Release to Attend the 40-day Memorial of His Father's Death, ICTY Trial Chamber, 11 July 2003. Available at <http://www.un.org/icty/cases-e/index-e.htm>.
3. *Prosecutor v Blagoje Simic*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simic Pursuant to Rule 65(1) for Provisional Release for a Fixed Period to Attend Memorial Services for His Father, ICTY Appeals Chamber, 21 October 2004. Available at <http://www.un.org/icty/cases-e/index-e.htm>.
4. *Prosecutor v Norman and others*, Case Nos. SCSL-04-14,15,16-T, Decision on Confidential Motion on Detention Issue, Trial Chamber I, 1 March 2005.