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SCSL-2003-07-PT-067  
(1075-1080)

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**SPECIAL COURT FOR SIERRA LEONE**

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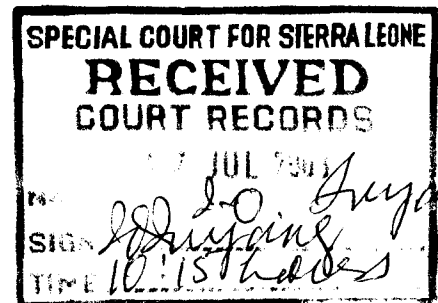
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**THE TRIAL CHAMBER**

**Before:** Judge Bankole Thompson, Presiding Judge  
Judge Pierre Boutet  
Judge Benjamin Mutanga Itoe

**Registrar:** Robin Vincent

**Date:** 17<sup>th</sup> day of July 2003



**The Prosecutor against**

**Morris Kallon**  
(Case No.SCSL-2002-07-PT)

**DECISION ON THE APPLICATION FOR LEAVE TO SUBMIT AMICUS CURIAE BRIEFS**

**Office of the Prosecutor:**  
Luc Côté, Chief of Prosecutions

**Defence Counsel:**  
James Oury  
Steven Powles

**THE SPECIAL COURT FOR SIERRA LEONE (“the Special Court”),**

**SITTING AS** the Trial Chamber (hereinafter referred to as “the Chamber”) composed of Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet, and Judge Benjamin Mutanga Itoe;

**BEING SEIZED** of two (2) preliminary motions filed on the 16<sup>th</sup> day of June 2003 by Counsel for Morris Kallon pursuant to Rule 72 of the Rules of Procedure and Evidence of the Special Court, to wit: “A Preliminary Motion Based On Lack Of Jurisdiction/Abuse Of Process: Amnesty Provided by Lomé Accord” and “A Preliminary Motion Based On Lack Of Jurisdiction: Establishment of Special Court Violates Constitution of Sierra Leone;”

**BEING ALSO SEIZED** of the instant Defence Office Motion, filed on the 19<sup>th</sup> day of June 2003, requesting leave of the Trial Chamber to submit *Amicus Curiae* briefs on the issues of jurisdiction raised in the aforementioned preliminary motions, and of the Prosecution’s Response filed on the 27<sup>th</sup> day of June, 2003 to the Defence Office aforesaid Motion, and the Defence Reply filed on the 30<sup>th</sup> day of June 2003;

**CONSIDERING** the Statute of the Special Court (“the Statute”) and the Rules of Procedure and Evidence (“the Rules”), specifically Rules 45 and 74 of the Rules;

**WHEREAS** acting on the Chamber’s Instruction, the Court Management Section notified the parties on the 8<sup>th</sup> day of July 2003 that the Motion, the Response and the Reply would be considered and determined on the basis of the Written Submissions of the parties **ONLY** pursuant to Rule 73 of the Rules;

**NOTING THE SUBMISSIONS OF THE PARTIES**

*The Defence Office Motion*

1. The Defence Office seeks leave of the Special Court to make submissions as *Amicus Curiae* on the jurisdictional issues raised in the preliminary motions on lack of jurisdiction filed by Counsel for Morris Kallon who stands indicted before the Special Court on various counts of crimes against humanity, war crimes and other serious violations of international humanitarian law. In support of its Motion, the Defence Office avers that the International Criminal Tribunal for the former Yugoslavia (“the ICTY”) and the International Criminal Tribunal for Rwanda (“the ICTR”) have both invited *amicus curiae* submissions, pursuant to Rule 74 of their Rules of Procedure and Evidence on a range of issues as set out in paragraph 4 of the Motion.

2. Analogising the role of the Defence Office of the Special Court to the role of the *amicus curiae* appointed by the Trial Chamber of the ICTY in the *Milosevic* Case, the Defence Office submits that its role within the Special Court institutional framework is

comparable to that of the said *amicus curiae* in that case in the sense that “it retains the right and duty to make submissions to assist in the proper determination of the case”.

3. The Defence Office submits further that the jurisdictional issues raised in the preliminary motions under reference, to wit, whether the establishment of the Special Court violates the Sierra Leone Constitution and the Lomé Accord are of fundamental importance requiring careful deliberation after the fullest debate and that the Defence Office has the relevant expertise in Sierra Leone law and international criminal law to assist in resolving these issues.

### *The Prosecution Response*

4. The Prosecution’s Response is set out *in extenso* in these paragraphs extracted from their Written Submissions:

(i) When providing “advice, assistance and representation” to suspects and accused, and the Defence Office acts for a party to proceedings before the Court, and that it is evident that a lawyer cannot act as legal representative for a party and at the same time make submissions before the Court as an independent third-party *amicus curiae* or intervenor.

(ii) In this case, although the Defence Office is not presently acting for the Accused, it is a former legal representative of the Accused, and for the Defence Office now to make submissions in the case in an independent capacity, in which it might contradict positions or arguments taken by the Accused, would be a potential conflict with the duties owed by a legal representative to a former client;

(iii) Even in cases where the Defence Office does not act for an Accused, it still has the function and duty to support Defence counsel generally. In the performance of that function, the Defence Office can provide to Defence counsel any arguments or authorities that it believes could be of assistance to the Defence. Defence counsel can then decide for themselves whether or not they wish to advance those arguments or authorities in the proceedings. If Defence counsel do not wish to advance a particular argument or authority on behalf of their client, the Defence Office should not seek independently to put it before the Chamber by adopting the guise of an *amicus curiae* or third party intervenor. The role of the Defence Office is to assist Defence counsel, not to act as a second Defence team presenting its own arguments in a case independently of, and in addition to, the Accused’s own lawyer;

(iv) Where an accused is represented by Defence Counsel, the Defence Office has no standing to present submissions in the case. The position may be different in a case where the Accused has no legal representation at all. For instance, the Defence Office Application refers (at para. 5) to the example of the *Milosevic* case before the

International Criminal Tribunal for the Former Yugoslavia, in which the Trial Chamber asked the Registrar to designate three counsels to appear before it as *amicus curiae*. In that case, the accused had informed the Registrar that he had no intention of engaging a lawyer to represent him, and the Trial Chamber considered the appointment of *amicus curiae* to be desirable and in the interests of securing a fair trial. In the present case, however, the Accused is represented by Defence counsel.

(v) In other cases in which organizations have been permitted to file *amicus curiae* submissions before the International Tribunals, the organizations concerned have been third parties independent of the Registry or the Tribunal in question. Given the role of the Defence Office, as part of the Registry of the Special Court, of either representing Accused or supporting and assisting those who do not represent Accused, the Defence Office is not in a position to make genuinely independent submissions as a third party *amicus curiae*.

***The Defence Office Reply:***

5. The Defence Office Reply is summed up as follows:
  - (i) Its role is more complex and is metamorphosing depending on the circumstances of a particular case;
  - (ii) Its role is not confined to providing initial legal advice and representation only;
  - (iii) Nothing in the Rules of Procedure and Evidence of the Court precludes the Defence Office from filing *amicus curiae* submissions;
  - (iv) The Defence Office has the duty of “ensuring rights of accused persons” where important matters of law which on issues like jurisdiction arise;
  - (v) The Prosecution has not in their Response demonstrated the alleged potential conflict that would arise from the Defence Office position in performing the function of *amicus curiae*;
  - (vi) The Prosecution has not cited clear jurisprudence that only third-party independent entities are entitled to make *amicus curiae* submissions.
6. The Defence Office concludes by requesting directives from the Chamber as to its role and in making submissions on general questions of law as jurisdiction.

**AFTER HAVING DELIBERATED AS FOLLOWS:**

7. The Chamber recalls that the question of *amicus curiae* submissions is governed by Rule 74 of the Rules which states that:

*A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, Organization or person to make submissions on any issue specified by the Chamber;*

8. The Chamber notes that the above provision, in clear and unambiguous language, confers on the Special Court a discretionary authority to invite or grant leave to any state, organization or person to make submissions on any issue specified by "any Chamber of the Special Court. From the plain language of the said Rule, such a discretionary power is not intended to be exercised lightly. Hence the qualification that its exercise must be predicated upon a prior judicial determination that the *amicus curiae* submissions contemplated are "desirable for the proper determination of the case." This is the governing criterion.

9. Upon a careful consideration of the jurisprudence of other sister international criminal tribunals, particularly the ICTR, the Chamber's finding is that leave to appear as *amicus curiae* has been granted mainly on the following grounds:

(a) that one has strong interests in or views on the subject matter before the Court (see *Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium, 6 June 1998);

(b) that it is desirable to enlighten the Tribunal on the events that took place (see *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Order Granting Leave for Amicus Curiae to Appear, 12 February 1998);

(c) that it may be useful to gather additional legal views with respect to the legal principles involved, not with respect to the particular circumstances of this or any other case (see *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on the Kingdom of Belgium's Application to File and Amicus Curiae Brief and on the Defence Application to Strike out the Observation of the Kingdom of Belgium Concerning the Preliminary Response by the Defence, 9 February 2001);

10. Instructively, the aforementioned grounds do follow logically from, and can be subsumed under the broad criterion of "for the proper determination of the case" as provided in Rule 74. In the context of the instant Motion, however, the Chamber recalls that the Defence Office seeks leave to make *amicus curiae* submissions on three main grounds: (a) that, as in *Milosevic* case, "it retains the right and duty to make submissions to assist the proper determination of the case," (b) that it is "desirable for the proper determination of the case that the Chamber should have the benefit" of such submissions; and (c) that

because of its "historical significance as the first "public defender's office" to be established in an international court or tribunal, that it is in the interests of justice" for leave to be granted.

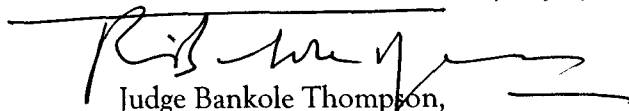
11. First, the Chamber wishes to observe that the analogy between the role of the *amicus curiae* in the *Milosevic* case and that of the Defence Office, as alleged, is inapposite and uninformative. In the *Milosevic* case, the accused refused legal representation and insisted on self-representation. Furthermore, it was at the Chamber's initiative that the Registrar was instructed to appoint an *amicus curiae* not in response to an application. Second, as regards the instant Motion, all the accused in respect of whom preliminary motions based on lack of jurisdiction have been filed are fully represented by permanent counsel. Significantly, in this connection, the Chamber wishes to emphasize that once a defence counsel has been appointed, the Defence Office of the Special Court, as presently organized and structured is, and in terms of its future evolution, will remain, a legal resource support unit for the permanent pool of defence counsel representing suspects and accused persons, essentially researching common legal issues such as jurisdiction in conjunction with the latter. It would, therefore, be highly undesirable for the proper determination of the cases of these accused for the Defence Office to perform the role of a third party intervenor or *amicus curiae* though, in the view of the Chamber, it is not disputed that the Defence Office does, as it claims, retain "the right and duty to make submissions to assist in the proper determination of the case" involving Morris Kallon. Thirdly, the Chamber holds that it is extremely doubtful whether the Defence Office can properly be characterized as "an organisation or person" within the meaning of Rule 74.

12. Based on the foregoing analysis, the Chamber considers that the Motion brought by the Defence Office is misconceived and meretricious.

**BASED ON THE ABOVE REASONING**

**DENIES** leave to the Defence Office to make submissions as *amicus curiae* on the jurisdictional issues raised in the preliminary motions pending before the Court.

Done at Freetown, this 17<sup>th</sup> day of July 2003

  
Judge Bankole Thompson,  
Presiding Judge

