

891)

SCSL-04-15-T  
(32016-32028)

32016



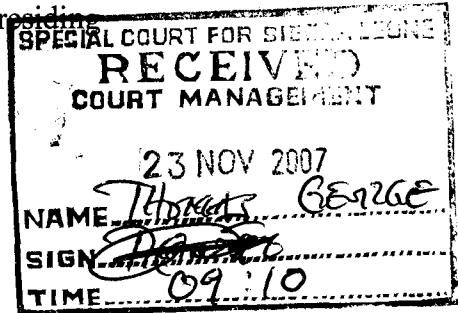
**SPECIAL COURT FOR SIERRA LEONE**  
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

**OFFICE OF THE PROSECUTOR**

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding  
Hon. Justice Bankole Thompson  
Hon. Justice Pierre Boutet

Registrar: Mr. Herman Von Hebel

Date filed: 23 November 2007



**THE PROSECUTOR**

**Against**

**Issa Hassan Sesay  
Morris Kallon  
Augustine Gbao**

Case No. SCSL-04-15-T

**PUBLIC**

**PROSECUTION SUBMISSION ON RULE 16 OF THE RULES OF PROCEDURE AND EVIDENCE**

Office of the Prosecutor:  
Pete Harrison  
Vincent Wagona

Court Appointed Defence Counsel for Sesay  
Wayne Jordash  
Sareta Ashraph

Court Appointed Defence Counsel for Kallon  
Shekou Touray  
Charles Taku  
Kennedy Ogetto  
Lansana Dumbuya

Court Appointed Defence Counsel for Gbao  
John Cammegh  
Prudence Acirokop

## I. INTRODUCTION

1. On 22 November 2007, the Trial Chamber asked the parties to deliver written submissions on the application of Rule 16 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“Rules”).
2. Rule 16 has functional equivalents at both the ICTY and the ICTR, but the equivalent Rules at the other two International Tribunals are significantly more comprehensive. The Rules from the three International Tribunals provide as follows:

| SCSL  | ICTY   | ICTR   |
|---|--|--|
| <p><b>Rule 16: Absence and Resignation</b></p> <p>(A) If a Judge is unable to continue sitting in a proceeding, trial or appeal which has partly been heard for a short duration and the remaining Judges are satisfied that it is in the interests of justice to do so, those remaining Judges may order that the proceeding, trial or appeal continue in the absence of that Judge for a period of not more than five working days.</p> <p>(B) If a Judge is, for any reason, unable to continue sitting in a proceeding, trial or appeal which has partly been heard for a period which is or is likely to be longer than five days, the President may designate an alternate Judge as provided in Article 12(4) of the Statute.</p> <p>i. If an alternate Judge is not available as provided in Article 12(4) of the Statute, and the remaining Judges are satisfied that it would not affect the decision either way, the remaining Judges may continue in the absence of that Judge.</p> <p>ii. Where a trial or appeal</p> | <p><b>Rule 15 <i>bis</i> Absence of a Judge</b></p> <p>(A) If</p> <p>(i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and</p> <p>(ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so,</p> <p>those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days.</p> <p>(B) If</p> <p>(i) a Judge is, for illness or urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and</p> <p>(ii) the remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case</p> | <p><b>Rule 15 <i>bis</i> Absence of a Judge</b></p> <p>(A) If</p> <p>(i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and</p> <p>(ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so,</p> <p>those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days.</p> <p>(B) If</p> <p>(i) a Judge is, for illness or urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and</p> <p>(ii) the remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case</p> |

| SCSL   | ICTY   | ICTR  |
|--|--|---|
| <p>chamber proceeds in the absence of one Judge, in the event that the decision is split evenly a new proceeding, trial or appeal shall be ordered.</p> <p>(C) If a Judge is, for any reason, unable to sit in a proceeding, trial or appeal which has not yet been heard but has been scheduled, the President may designate an alternate Judge as provided in Article 12 (4) of the Statute.</p> <p>(D) A Judge who decides to resign shall give notice of his resignation in writing to the President, who shall transmit it to the Secretary-General of the United Nations and the Government of Sierra Leone.</p> | <p>continue in the absence of that Judge, then</p> <p>(a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied it is in the interests of justice that they be disposed of notwithstanding the absence of that Judge, and</p> <p>(b) the remaining Judges of the Chamber may adjourn the proceedings.</p> <p>(C) If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the remaining Judges of the Chamber shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of all the accused, except as provided for in paragraphs (D) and (G).</p> <p>(D) If, in the circumstances mentioned in the last sentence of paragraph (C), an accused withholds his consent, the remaining Judges may nonetheless decide whether or not to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision</p> | <p>continue in the absence of that Judge, then</p> <p>(a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied it is in the interests of justice that they be disposed of notwithstanding the absence of that Judge, and</p> <p>(b) the Presiding Judge may adjourn the proceedings.</p> <p>(C) If, by reason of death, illness, resignation from the Tribunal, non-reelection, non-extension of term of office or for any other reason, a Judge is unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the Presiding Judge shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused, except as provided for in paragraph (D).</p> <p>(D) If, in the circumstances mentioned in the last sentence of paragraph (C), an accused withholds his consent, the remaining Judges may nonetheless decide to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would</p> |

| SCSL | ICTY  | ICTR  |
|------|---|---|
|      | <p>is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken from the decision to continue proceedings with a substitute Judge or the Appeals Chamber affirms that decision, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made.</p> <p>(E) For the purposes of paragraphs (C) and (D), due consideration shall be given to paragraph 6 of Article 12 of the Statute.</p> <p>(F) Appeals under paragraph (D) shall be filed within seven days of filing of the impugned decision. When such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless</p> <p>(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or</p> <p>(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from the filing of the written decision.</p> <p>(G) If, in a trial where a reserve Judge has been assigned in accordance with Rule 15 <i>ter</i>, a Judge is unable to continue</p> | <p>serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken or the Appeals Chamber affirms the decision of the Trial Chamber, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made.</p> <p>(E) Appeals under paragraph (D) shall be filed within seven days of filing of the impugned decision. When such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless</p> <p>(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or</p> <p>(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from the filing of the written decision.</p> <p>(F) In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.</p> |

| SCSL | ICTY  | ICTR |
|------|---|------|
|      | <p>sitting and a substitute Judge is not assigned pursuant to paragraphs (C) or (D), the trial shall continue with the reserve Judge replacing the Judge who is unable to continue sitting.</p> <p>(H) In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.</p> |      |

3. The Rules of all three Tribunals state that a trial may continue in the absence of a judge for not more than five working days, and this is not in issue. The use of the permissive form, “may,” carries on throughout Rule 16 of the Special Court.
4. At both the ICTY and the ICTR the Rules specifically provide that a trial can continue in the absence of a judge for longer than five days where the accused consent, and where the accused withholds consent the trial may continue before the Chamber, with a substitute judge, if the Trial Chamber unanimously determines that it is in the interest of justice to do so. Such a decision of the Trial Chamber is subject to appeal directly to a full bench of the Appeals Chamber.

## II. INTERPRETING THE STATUTE AND THE RULES

5. The Statute of the Special Court for Sierra Leone (“Statute”) is silent on what, if any, measures should be invoked in the event a Judge of a Trial Chamber is unable to continue sitting. However, the composition of the Chambers is legislated by Article 12 of the Statute:

### Article 12

#### Composition of the Chambers

1. The Chambers shall be composed of not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows:
  - a. **Three judges shall serve in the Trial Chamber, of whom**

**one shall be a judge appointed by the Government of Sierra Leone**, and two judges appointed by the Secretary-General of the United Nations (hereinafter “the Secretary-General”). [emphasis added]

b. Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.

2. Each judge shall serve only in the Chamber to which he or she has been appointed.

3. The judges of the Appeals Chamber and the judges of the Trial Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.

4. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

6. Although alternate Judges are contemplated by the Statute, no alternate Judge was appointed to Trial Chamber I and the Statute only refers to the circumstance where the alternate Judge has been “present at each stage of the Trial.” Article 12 differs from Rule 16 in the use of the mandatory “shall”: “Three judges *shall* serve in the Trial Chamber, of whom one *shall* be appointed by the Government of Sierra Leone...”<sup>1</sup> [italics added]

7. The Rules are a form of subordinate legislation, provision for their existence is granted by Article 14 of the Statute and the capacity to amend the Rules is also authorized by Article 14. Rules are drafted to serve the function of carrying out the purpose of the Statute in a fair and efficient manner.<sup>2</sup> Though the Special Court for Sierra Leone

---

<sup>1</sup> Mandatory language may, nonetheless, be directory: “The ‘language of a statute, however mandatory in form, may be deemed directory whenever legislative purpose can be best carried out by [adopting a directory] construction’ (82 *Corpus Juris Secundum* (Brooklyn 1990), pp. 871-872, stating also, at p. 969 that “a statute may be mandatory in some respects, and directory in others”, also see *Craies in Statute Law*, 7<sup>th</sup> ed. (London, 1971), pp. 62, 249-250, and 260-271),” quoted in Khan and Dixon, *Archbold International Criminal Courts: Practice, Procedure and Evidence*, 2005, p. 169, para. 5-49.

<sup>2</sup> See Khan and Dixon, *Archbold International Criminal Courts: Practice, Procedure and Evidence*, 2005, p. 157, para. 5-19: “The Rules of Procedure and Evidence of both ad hoc Tribunals and the ICC are meant to give effect to

("SCSL") began operation with the same rules as the ICTR, many of them have been amended by the SCSL judges, in some cases removing detailed provisions from the ICTR versions and thus allowing greater flexibility for SCSL Trial Chambers. Nonetheless, Rule 16(B)(i) does include a special provision permitting a Trial Chamber to continue a proceeding in the absence of a Judge for more than five working days where "the remaining Judges are satisfied that it would not affect the decision either way...."

8. The phrase "would not affect the decision either way," when read in the context of the entire Rule, takes on the meaning "would not affect the *fairness* of the decision" because Rule 16(B)(ii) already contemplates a split decision:

Where a trial or appeal chamber proceeds in the absence of one Judge, in the event that the decision is split evenly a new proceeding, trial or appeal shall be ordered.

9. The test cannot be whether the two remaining Judges are *ad idem* on all issues, that would require prejudging the case before it has concluded and would ignore the result specifically provided for in Rule 16(B)(ii), a split decision. The test that should be applied is whether the two judges are satisfied that the absence of the third Judge would not affect the fairness of the decision.
10. The above comments are consistent with the language of the Statute. Unanticipated circumstances arise, illness, death, and other events, which prevent functions from being carried out. The obligations created by the Statute are that, when constituted, a Trial Chamber shall be composed of three Judges, one of whom shall be appointed by the Government of Sierra Leone. A Rule which allows for a trial to continue in the absence of a Judge, where that Judge is unable to continue, is not inconsistent with that provision.
11. The Rules of the ICTY and ICTR stipulate that an alternate Judge be appointed when a Judge will be absent for more than five working days, and then provide for further scenarios, including circumstances where the accused consents to the trial continuing with the alternate Judge and where consent is withheld.
12. Rule 16 provides no such qualification. The life span of the SCSL was always intended to be limited, and the Rules are an expression of the need to establish a Tribunal that

---

their Statutes. The Statutes have primacy, however, as the constitutive instruments establish the Tribunals and the ICC. The Rules of Procedure and Evidence are meant to facilitate the achievement of the Statutes objectives."

fairly and efficiently serves justice. Where accused persons consent to a trial continuing before two Judges pursuant to Rule 16(B), there is no apparent prejudice. Their appellate remedies remain unchanged and their Article 17 right to a fair hearing and to be tried without undue delay is complied with.

13. Where a Judge is absent for less than five working days Rule 16(A) states that if the remaining Judges are satisfied that it is in the interests of justice to do so, then the remaining Judges may order the trial to continue.
14. Rule 16(A) is silent on what steps must be completed by the absent Judge before he can resume his or her functions. No provision is made for having the absent Judge certify that he or she has read the transcript of the days they were absent, nor is any other requirement imposed. This is no different from Rules 15 *bis* of the ICTY and ICTR. It is expected that Judges who have absented themselves from the trial would undertake all measures to inform themselves of the proceedings that took place in their absence.
15. Rule 16(B) of the SCSL does not impose any obligations on the Judge who was absent for more than five working days. However, the logic is the same as with Rule 16(A). Any person qualified to be a Judge pursuant to Article 13 of the Statute, defined as a person “of high moral character, impartiality and integrity,” would be expected to fully apprise themselves of the proceedings that took place in their absence.
16. In the event a Judge is absent, for any reason, from the trial for a period of more than five working days, and within a reasonable period of time is able to resume sitting, then he or she should be permitted to resume sitting and that Judge ought to take all measures to apprise him or herself of the matters heard and considered during their absence. Where the absent Judge is unable to resume sitting, then the remaining Judges may continue the trial in the absence of that Judge pursuant to Rule 16(B).

#### **IV. CONCLUSION**

17. The Prosecution deemed it necessary to look beyond Rule 16 to provide assistance to the Trial Chamber. The following comments are offered:
  - a) Rules are generally understood to be subordinate legislation to the governing Statute, and where they are inconsistent the Statute prevails;
  - b) Article 12 of the Statute states that “Three judges shall serve in the Trial Chamber, of whom one shall be a judge appointed by the Government of Sierra



Leone...;”

- c) Rule 16(A) of the SCSL and Rules 15 *bis* (A) of the ICTY and ICTR permit a trial to continue for not more than five working days in the absence of a Judge, and none of those Rules stipulate what steps must be complied with before the absent judge can resume sitting;
- d) Rule 16(B) permits the Trial Chamber to exercise a discretion to continue sitting in the absence of a Judge for more than five working days where the remaining Judges are satisfied that the absence of the Judge would not affect the decision either way;
- e) the meaning of Rule 16(B) is made clearer by Rule 16(B)(ii) which contemplates a split decision. The test to be applied under Rule 16(B) is not whether the decision in the trial would be the same whether or not a Judge is absent, but whether the absence of the Judge would affect the fairness of the decision;
- f) the Rules are silent on whether a Judge is entitled to resume sitting after being absent for more than five working days. It is suggested that it would be more in keeping with Article 12 of the Statute that the absent Judge be permitted to resume sitting, in the event they are able to do so within a reasonable period of time, upon undertaking all measures to apprise him or herself of the proceedings that took place in his or her absence; and
- g) the accused’s right to a fair hearing and to be tried without undue delay is of significant importance. In exercising their discretion of whether to continue the proceeding in the absence of a Judge for more than five working days, the remaining Judges should weigh whether or not the accused consent to such a course of conduct. Any consent must be an informed consent to the satisfaction of the Trial Chamber.

Filed in Freetown, 23 November 2007

For the Prosecution,



Pete Harrison

INDEX OF AUTHORITIES

**I. STATUTE AND RULES**

1. Statute of the Special Court for Sierra Leone, Articles 12, 13 and 14.
2. Rules of the Special Court for Sierra Leone, Rule 16

**II. OTHER AUTHORITIES**

1. Khan and Dixon, *Archbold International Criminal Courts: Practice, Procedure and Evidence*, 2005, pp. 157 and 169.

32026

# Archbold

International Criminal Courts  
Practice,  
Procedure and Evidence

The Rules of Procedure and Evidence of both ad hoc Tribunals and the ICC are meant to give effect to their Statutes. The Statutes have primacy, however, as the constitutive instruments establishing the Tribunals and the ICC. The Rules of Procedure and Evidence are meant to facilitate the achievement of the Statutes objectives. Rules of Procedure and Evidence cannot, however, extend the powers of a Tribunal or court beyond those envisaged by the Statute (see *Prosecutor v. Mrkšić et al.*, Decision on the Motion for Release by the Accused Slavko Dorkmanovic, October 22, 1997, para. 40; *Prosecutor v. Tadić*, Decision on the Defence Motion for interlocutory appeal on jurisdiction, October 2, 1995, para. 4).

It has been explained that “the relation of rules of practice to the work of justice is intended to be that of a handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only rules of general procedure, as to be compelled to do what will cause injustice in the particular case.” *In re Coles and Ravenshear* ([1907] 1 KB 1, at 4, referred to and approved of in *Prosecutor v. Barayagwiza*, Decision (Prosecutor’s Request for Review or Reconsideration), Separate Opinion of Judge Shahabuddeen, March 31, 2000, para. 53). Whilst *Coles and Ravenshear* concerned rules of civil procedure, Judge Shahabuddeen argued that “with proper caution, the idea inspiring it applies generally to all rules of procedure to temper the tendency to rely too confidently, or too simplistically, on the maxim *dura lex, sed lex*”. He concluded that such an approach would not “necessarily collide . . . with the general principle regulating the interpretation of penal provisions and believe that it represents the view broadly taken in all jurisdictions”.

5-20

### C. OBJECT AND PURPOSE

The first principle encapsulated in Article 31(1) of the Vienna Convention is that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of a treaty in their context and in light of their object and purpose.

5-21

#### (1) Object

The primary aims of the ICTY and the ICTR were to punish serious violations of international humanitarian law committed on those territories, thereby contributing to national reconciliation and the restoration and maintenance of peace (see S/Res/955 (1994), November 8, 1994; also see *Prosecutor v. Tadić*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, August 10, 1995, para. 18). The Trial Chamber in *Delalic et al.*, Judgment, November 16, 1998, para. 170 explained

5-22

“The interpretations of the provisions must, therefore, take into consid-

whilst the parties must prove the facts. The *iura novit curia* principle is normally applied in international judicial proceedings (see, e.g. *Lotus* case, *PCIJ*, Judgment No. 9, September 7, 1927, Series A, No. 10, p. 31; *Military and Paramilitary Activities against Nicaragua*, 27 June 1986, ICJ Reports 1986, pp. 24–26, para. 29). However, the principle should not be followed in proceedings before international criminal courts, where the rights of the individual accused are at stake. It would also violate Article 21(4)(a) of the ICTY Statute, which provides that an accused shall be informed “promptly and in detail”, of the “nature and cause of the charge against him” (see *Prosecutor v. Kupreškić et al.*, Judgment, January 14, 2000, para. 740).

### (12) Mandatory or Directory construction

The “language of a statute, however mandatory in form, may be deemed directory whenever legislative purpose can be best carried out by [adopting a directory] construction” (82 *Corpus Juris Secundum* (Brooklyn 1990), pp. 871–872, stating also, at p. 969 that “a statute may be mandatory in some respects, and directory in others”, also see *Craies in Statute Law*, 7th ed. (London, 1971), pp. 62, 249–250, and 260–271).

5-49

### (13) Effect of Rome Statute on the ad hoc Tribunals and Special Courts

Article 10 of the ICC Statute provides that nothing in it shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law other than for the ICC Statute itself. Article 10 was included to emphasise that the ICC regime was not intended to hinder the development of customary international law. That the ICC Statute, including the Finalised Draft Elements of the Crimes and the Finalised Draft Rules of Procedure and Evidence will inform the jurisprudence of the ad hoc Tribunals and the Special Courts for Sierra Leone and East Timor to a considerable extent, can hardly be denied. Nor is this impermissible. In *Prosecutor v. Furundžija*, Judgment, December 10, 1998, para. 227, the Trial Chamber observed that

5-50

“[t]he Rome Statute of the International Criminal Court may, in many areas, be regarded as indicative of the legal views, *i.e. opinio juris* of a great number of States. Resort may be had *cum grano salis* to these provisions to help elucidate customary international law. Depending upon the matter at issue, the Rome Statute may be taken to restate, reflect, or clarify customary international law. It is not possible to say that in some cases it creates new