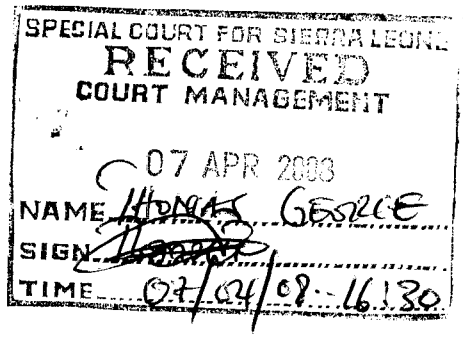
(1074)

SCSL-04-15-T
(25524 — 25569)

SPECIAL COURT FOR SIERRA LEONE
TRIAL CHAMBER I

25524



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

Registrar: Mr. Herman Von Hebel

Date filed: 7 April 2008

THE PROSECUTOR **against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL -2004-15-T

PUBLIC

REPLY WITH CONFIDENTIAL ANNEX A TO PROSECUTION RESPONSE TO KALLON MOTION TO EXCLUDE EVIDENCE OUTSIDE THE SCOPE OF THE INDICTMENT

Office of the Prosecutor:

Peter Harrison
Reginald Fynn

Counsel for Issa Sesay:

Wayne Jordash
Sareta Ashraph

Counsel for Morris Kallon:

Charles Taku
Kennedy Ogetto
Lansana Dumbuya
Tanoo Mylvaganam

Court-Appointed Counsel for Augustine Gbao:

John Cammegh
Scott Martin

INTRODUCTION

1. On 14 March 2008, the Second Accused, Morris Kallon filed a motion seeking the exclusion from the record of evidence supporting allegations of which he was not put on notice.[1] On 31 March 2008, the Prosecution filed a response thereto seeking dismissal of the Motion on (i) procedural and (ii) substantive grounds.[2] The Defence hereby files its reply, ("the Reply"). Annex A of the Response lists the purported disclosures of material facts adduced in the evidence which the Motion submits is subject to exclusion, ("the Impugned Evidence"). Annex A, appended hereto, responds accordingly.

THE REPLY

(1) Procedural Matter: The Motion is Timely Made

2. The Response contends that the Motion is out of time.

3. The Motion raises objections to the admission of evidence.[3] The Prosecution accepts that objections can be raised to the admission of evidence at the time it is tendered.[4] Therefore, it accepts that interlocutory objections to the admission of evidence are permitted and cannot claim that the objections raised by the Motion are preliminary objections. Interlocutory objections to the admission of evidence based in non-disclosure are entertained on a regular basis in all criminal litigation proceedings.[5]

4. Preliminary motions contemplated by Rule 72(B)(ii) seek the dismissal of the Indictment by reason of defects alleged therein. The Motion does not. There is a clear conceptual difference. On that basis also, reference to the Gbao decision is irrelevant.[6]

---

[1] *P v. Sesay et al.*, SCSL-04-15-1057, Kallon Motion to Exclude Evidence Outside the Scope of the Indictment With Confidential Annex A, 14 March 08, ("the Motion").

[2] *P v. Sesay et al.*, SCSL-04-15-1066, Prosecution Response With Confidential Annex A to Kallon Motion to Exclude Evidence Outside the Scope of the Indictment With Confidential Annex A, 31 March 08, ("the Response"), at para 1.

[3] The Response, at para 5-8.

[4] The Response, at para 4.

[5] See *P v. Furundzija*, IT-95-17/1-A, Judgment, 21 July 00, at para 61; cited with approval by the *Ntabakuze* Decision, at para 18.

[6] The Response, at para 6; citing *P v. Sesay et al.*, SCSL-04-15-T-944, Decision on Gbao Request for Leave to Raise Objections to the Form of the Indictment, 17 Jan. 08.

5. The Response seeks to establish that where the Accused did not object at the time the evidence was tendered he is automatically precluded from doing so later on in the trial, stating that "at the ICTR, where an accused fails to object at the time the evidence is tendered the onus shifts to the accused to demonstrate prejudice", citing a decision in *Bagosora,* ("the *Ntabakuze* Decision").[7] This is a completely misconceived interpretation of the decision which is, in fact, cited *verbatim* elsewhere in the Response.

6. In light of that decision, in which it was ordered to reconsider its previous decision in relation to the burden of proof, Trial Chamber I of the ICTR made the following finding: "[t]he Chamber finds that the Defence could have objected to such testimony....earlier in the case, but it nonetheless deems the objections to lack of notice in the Defence's 98*bis* Motion [for acquittal] sufficient to place the burden of proof on the Prosecution".[8]

7. In *Niyitegka,* the Appeals Chamber of the ICTR held that:

> "Where...the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired."[9]

8. Therefore, according to *Niyitegeka,* not until a case reaches the appellate stage is an objection so untimely as to displace the burden of proof from the Prosecution.

---

[7] The Response, at para 4, ("'an objection raised later at trial will not automatically lead to a shift in the burden of proof'"); citing *P v. Bagosora et al.*, ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, at para 42, 45 and 46; see also the Motion, at para 5; citing the *Ntabakuze* Decision, at para 47. The Response notes contends that the "ICTY and ICTR Rules are significantly different [from the Rules of the Special Court] and the decisions rendered by those Tribunals have little if any application in the context of this Motion", the Response, at para 11. The Defence makes the following observations. First, the argument is unconvincing on the basis that the Response cites the jurisprudence of the ICTY and ICTR. Second, the decision of the Appeals Chamber on which the Response relies makes no such observation, *Id.*; citing *P v. Norman,* SCSL-04-140T-371, Fofana- Appeal Against Decision Refusing Bail, 11 March 05, at para 26 and 34. The aforementioned decision considers the application of Rule 89(C). Rule 89 of the Special Court is identical, in every relevant part, to Rule 89 of the ICTR and the ICTY. Rule 47 of the Rules is not materially different from Rule 47 of the Rules at the ICTR and ICTY. Article 17, which guarantees the rights of an accused, corresponds exactly to Article 21 of the Statutes of the both the ICTY and ICTR. Third, the relevant legislation of the Special Court cited in the Motion is materially no different from the corresponding legislation of the ICTR and ICTY.

[8] *P v. Bagosora et al.,* ICTR-98-41-T, Decision Reconsidering Exclusion of Evidence Following Appeals Chamber Decision, 17 April 07, at para 7; see also para 16

[9] *P. v. Niyitegeka*, ICTR-96-14-A, Judgment, 9 July 04, (the "*Niyitegeka* Appeal Judgment"), 9 July 04, at para 200, ("[i]f the Defence is denied the material facts of the accused's alleged criminal activity until the Prosecution files its pre-trial biref or until the trial itself, it will be difficult for the Defence to conduct meaningful investigations prior to the commencement of the trial.")

This reflects the gravity of the prejudice caused by retaining unpleaded evidence on the record and, it is submitted, is the standard which should apply to the Motion.

9. The Defence raised objections contemporaneously with the Impugned Evidence. It objected again in its Rule 98 pleadings. Relevant objections are listed in Annex A.

10. Thus, it is submitted that the burden of proof lies squarely with the Prosecution in showing that the retention of the evidence on the record does not materially impair the preparation of the defence case. The Prosecution has made no such showing.

11. Without prejudice to the foregoing argument, the material impairment of the ability of the Accused to prepare his defence case that has been caused by the admission of the Impugned Evidence is undeniable.[10] The Defence makes the following additional observations. First, the principle of *pre-trial* notice allows the defence to prepare its case properly, pursuant to the rights to a fair trial, and any notice given after the commencement of the trial has a compromising effect on that principle. [11] Second, the allegations to which Mr Kallon must respond have altered and multiplied as the Prosecution evidence has been adduced. Under the circumstances, the Defence investigations and case preparation, which necessarily reflect the allegations made by the Prosecution, have been put under an inequitable amount of strain in attempting to respond to allegations made by Prosecution witnesses of which it was not put on notice in the proper way by pre-trial disclosure materials. Third, the Defence has been deprived of the opportunity to elicit exculpatory evidence in relation to the newly-emerging allegations on cross-examination of Prosecution witness. This opportunity has been available to the Prosecution presuming that, according to the law on pleading, it knew the nature of its case before the trial commenced. On that basis, the Chamber is urged to restore equality of arms as between the parties.[12] In addition, the Defence

[10] See the Motion, at para 32-34.

[11] *Niyitegeka* Appeal Judgment, at para 194.

[12] The prejudice caused is exemplified by the addition of TFI 371, who brought a raft of new allegations against the Accused, (see the Motion, Annex A), and was called by the Prosecution as the *last witness* in its case with the effect that the Defence was unable to cross-examine previous witnesses on the allegations and was deprived the chance of eliciting vital evidence from those witnesses, (see para 19, *infra*, which demonstrates the prejudice caused by the late addition of this witness and late disclosure of the facts to which he testified). Had the Defence been informed of the allegations by the Indictment then clearly that prejudice would have

disputes the characterisation of Annex A of the Motion as including "lengthy arguments and submissions" which lists evidence and relates argument which are made in the Motion itself.[13]

(2) Substantive Issues Raised by the Motion Are Valid

12. The Response contends that "the Indictment...sufficiently states the material facts underpinning the charges in the Indictment."[14] The obligation on the Prosecution is to inform the accused of both the charges and the material facts underpinning those charges. The distinction between a charge and a material fact was explained as follows in the *Ntabakuze* Decision: "[t]he count or charge is the legal characterisation of the material facts which support that count or charge", whereas material facts are "the acts or omissions of the Accused that give rise to that allegation of infringement of a legal prohibition".[15] The Response contends that the Defence was put on notice of material facts through various paragraphs in the Indictment and other disclosure materials.[16] For the most part, the Indictment and pre-trial pleadings merely track the language of the jurisprudence, alleging every legal element required to find an accused person guilty of the crimes pleaded therein.[17] Thus, the pleadings describe charges They do not plead material facts.

13. Charges *must* be pleaded in the indictment. It is submitted that a large body of evidence exists on the record which seeks to expand existing charges to such an extent that they should be characterised as new charges.[18] For example, because of this very deliberate method of categorising offences by crime base in the

---

been avoided.

[13] See the Response, at para 9; and the Motion, at para 3, explaining that the Motion was made in light of, and in compliance with, a previous decision of the Chamber, referring to *P v. Sesay et al.*, SCSL-04-15-T-1044, Decision on Kallon Application to Make a Motion in Excess of the Page Limit, 10 March 08, at para 10.

[14] The Response, at para 10.

[15] The *Ntabakuze* Decision, at para 29. The particulars of an allegation that have been held to constitute material facts are discussed in the Motion, at para 20.

[16] See the Response, Annex A.

[17] For example, paragraph 38 pleads, "by their acts or omissions" without specifying what those acts or omissions are, and the opening statement alleges "widespread and systematic attacks", (see, eg, T. 05/07/04, pg 24, line 16-18), and campaigns to "terrorise the civilian population", (see, eg, T. 05/07/04, pg 39, line 32-33), without notifying the Defence of the material facts with which it intends to establish those attacks or campaigns.

[18] The Chamber noted a "divergence or discrepancy between the evidence adduced on highly contentious matters and the allegations as to material times in respect of such matters in the [Amended Consolidated] Indictment" and that reconciliation of which would offend the rights of the accused, see *P v. Sesay et al.*, SCSL-04-15-T-617, Decision on Prosecution Application for Leave to Amend the Indictment, 31 July 06, the relevance of which is explained at para 16, *supra*.

Indictment, the Defence is entitled to proceed on the basis that, where a crime is not alleged in a certain district, the Prosecution case would exactly and precisely reflect that.

14. 'Curing' can only be achieved, if at all, by "timely, clear and consistent information".[19] Furthermore, the Defence submits that the information is not "consistent", where a solitary document which discloses the material fact has been cited; not "timely", where the disclosure was made too late to allow the Defence to investigate properly and cross-examine *all* witnesses in relation to the material fact; and not "clear" unless the material fact is set out unambiguously. The Defence re-emphasises the position already expressed by this Chamber in relation to 'curing'.[20] The Chamber will note the lack of disclosures identified by the Prosecution in relation to the Impugned Evidence.[21] In that regard, it is submitted that the burden of identifying the relevant disclosures falls on the Prosecution.[22] Where the Indictment is defective, culpability lies with the Prosecution. It is submitted that the Prosecution has failed to discharge that burden.

15. In relation to the pleading of crimes of a large scale,[23] the Defence makes the following observations and submissions. First, this mitigation from the imperative of informing the accused with particularity of the nature of the charges against him allows for a *lower degree* of specificity, it does not give licence for an indictment which is devoid of specificity, as in the present case. Second, this lower threshold may not be used in relation to single instances of, for example, killings or rapes.[24] Third, it is submitted that in this context the "scale of the crimes" does not refer to the number of allegations which the Prosecution has

---

[19] *P v. Bagosora et al.*, ICTR-98-41-T, Decision on Ntabakuze Motion for Exclusion of Evidence, 29 June 06, at para 6; see also the Motion, at para 27-29.

[20] See the Motion, at para 27.

[21] See the Resopnse, Annex A.

[22] This is consistent with the principle that "[c]lear notice must be given and, until that time, the Defence is entitled to assume that the material facts enumerated in the Indictment are exhaustive and represent the case it has to meet", *P v Muhimana*, ICTR-95-1B-T, Judgment, 28 April 05, at para 452.

[23] See the Motion, at para 17; and the Response, at para 13.

[24] Indeed the Appeals Chamber of the ICTY explained that the lower threshold is provided for cases where the number of victims runs into hundreds, in the following terms: "where the Prosecution alleges that an accused participated in an attack, as a member of an execution squad, in the killing of hundreds of men. The nature of such a case would not demand that each and every victim be identified in the indictment", *P v. Kupreskic et al.*, IT-95-16-A, Judgement, 23 Oct. 01, (the "*Kupreskic* Appeal Judgment"), at para 89 and 90.

levied. Indeed, where the Defence is charged to respond to a large volume of allegations, the need to particularise the allegations is all the more important in order to safeguard the rights of the accused. Rather it refers to the scale of the alleged crime in terms of numbers of victims or physical perpetrators.

16. The Chamber has already dismissed an application by the Prosecution to amend the Amended Consolidated Indictment[25] by, *inter alia*, extending the timeframes pleaded in respect of crimes alleged in Kono the to 31 January 2000.[26] Although the Prosecution contended that "amendment of the Indictment is [not] necessary in order for...the evidence...to be taken into account"[27] the Chamber made the following findings: it observed a "divergence or discrepancy between the evidence adduced on highly contentious matters and the allegations as to material times in respect of such matters in the [Amended Consolidated] Indictment";[28] it recognised that the application amounted to a request for judicial reconciliation of that "divergence or discrepancy" which it was not prepared to make;[29] and it held that to allow the Prosecution to expand the "scope and extent of the charges" against the three accused persons, which such an amendment would in effect do, would offend Article 17 of the Statute.[30]

17. The relevant sections of the Amended Consolidated Indictment survived in the Indictment.[31] Therefore, the case which the Defence is on notice that it must answer remains unchanged: It is submitted that the Chamber has, thus, recognised evidence on the record which is outside the scope of the Indictment and that such evidence threatens the right of the Accused. It is submitted that now is the time for the Chamber to rectify that threat by excluding the evidence under consideration in the aforementioned decision and by granting the Motion to that extent.

---

[25] *P v. Sesay et al.*, SCSL-04-15-T-488, Prosecution Application for Leave to Amend the Indictment, 20 Feb. 06. Note, that the operative indictment at the time was the Amended Consolidated Indictment. The proposed amendment would have effected all counts except the counts relating to sexual violence.

[26] *P v. Sesay et al.*, SCSL-04-15-T-617, Decision on Prosecution Application for Leave to Amend the Indictment, 31 July 06.

[27] *P v. Sesay et al.*, SCSL-04-15-T-488, Prosecution Application for Leave to Amend the Indictment, 20 Feb. 06, at para 5.

[28] *Supra*, at note 16, at para 37.

[29] *Id.*

[30] *Id.*, at para 33.

[31] The Indictment differs from the Amended Consolidated Indictment in respect of a single word which was introduced pursuant to the same decision and which has no bearing upon the case against Mr Kallon.

Furthermore, it is submitted that, although the scope of the aforementioned Prosecution application was limited to timeframes in Kono District, evidence exists on the record which represents as much of a divergence or discrepancy, in relation to other crime bases and/or other material facts, from the Prosecution case as set forth in the Indictment, as the evidence in issue before the Chamber in the aforementioned decision. It is submitted that the Chamber must adopt the same approach in every case. There is no logical or legal basis to suggest otherwise.

18. The Response seeks to characterise the Motion as a request for reconsideration of earlier decisions.[32] The Defence notes that the Prosecution identifies decisions seeking the exclusion of *written supplemental statements* as the relevant decisions. As is clearly set out in the Motion, the Defence seeks the exclusion, in part, of testimonial evidence. The decisions cited by the Prosecution are, therefore, irrelevant.

19. In relation to paragraph 16 of the Response, the Defence submits that review of the motions cited therein to add TFI 360, TFI 361, TFI 366 and TFI 367 reveals that none of the material facts elicited in the Impugned Evidence were disclosed at that time. The motion to add TFI 371 was filed on 10 March 2006, a year and 8 months after the Prosecution called its first witness. At that time the Chamber had already heard 61 of the eventual 84 Prosecution witnesses. The facts disclosed in the motion to which he testified were disclosed for the first time at that point.[33] Large portions of the facts to which he testified were not were not disclosed at all.

20. In relation to the disclosures identified in Annex A it is established that, in light of the volume of disclosure in a case such as this, "service of mere witness statements"[34] pursuant to the disclosure requirements does not give reasonable

---

[32] The Response, at para 2.

[33] See para 11, supra, which demonstrates the prejudice caused by such late disclosure; and para 14, *infra*, which explains that where notification was not made in the indictment, subsequent disclosure must be timely, *inter alia*.

[34] *P v. Naletilic*, IT-98-34-A, Judgment, 3 May 06, (the "*Naletilić* Appeal Judgment"), at para 26; cited with approval in *P v. Bagosora*, ICTR-98-41-T, Decision on Ntabakuze Motion for Exclusion of Evidence, 29 June 06, at para 6; see also *P v Bagosora*, ICTR-98-41-T, Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 Sept. 05, at para. 3; *P v Bagosora*, ICTR-98-41-T, Decision on Kabiligi Motion for Exclusion of Evidence, 4 Sept. 06 at para. 3; *P v Karemera* ICTR-98-44-T, Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment, 20 Oct. 06, at para. 14.

notice. The notification of a material fact somewhere within the volumes of Prosecution disclosure does not represent "clear, timely and consistent information".

21. In relation to paragraph 19 of the Response the Defence submits that potential prejudice caused to the Accused by retaining such evidence in the record outweighs its potential probative value. Indeed, evidence which serves only to give context has no probative value inasmuch as it cannot form the basis of any conviction and so does not prove any of the charges in the indictment. In the alternative, should the Chamber find portions of the Impugned Evidence admissible for contextual or otherwise limited and specific purposes only, the Defence prays the Chamber to declare it inadmissible for all other the purposes.

22. In relation to paragraph 20 of the Response, the Defence notes that the Appeals Chamber in *Brima et al.* has upheld the Trial Chamber as cited in the Motion.[35]

23. Paragraph 21 of the Response is an incorrect statement of the law. Rule 93(A) cannot be used by the Prosecution to admit through the back door evidence of crimes which have not been properly pleaded The Motion is premised upon the relevance standard for admissibility of evidence established by Rule 89(C), inasmuch as evidence outside the scope of the indictment is not *relevant* to any of the crimes charged therein. The Appeals Chamber explained the application of Rule 93(A) as follows: "Rule 93 does not create an exception to Rule 89(C), but rather is *illustrative* of a specific type of evidence which may be admitted".[36] It further held that "evidence of prior criminal acts of the Accused is inadmissible for the purpose of demonstrating 'a general propensity or disposition' to commit the crimes charged".[37]

24. The Response contends that notice was given in the Indictment of a case of physical perpetration through the mere addition of the word "committing" in

---

[35] See the Motion, at para 21; citing *P v. Brima et al.*, SCSL-04-16-T, Judgment, 20 June 07, at para 37, (emphasis added); upheld by *P v. Brima et al.*, SCSL-04-16-A, Judgment, 22 Feb. 08, at para 61-65; see also *P v Ntakirutimana*, ICTR-96-10-A, Judgment, 13 Dec. 04, at para 75; and *P v. Niyitegeka*, ICTR-96-14-A, Judgment, 9 July 04, at para 215.

[36] *P v. Bagosora et al.*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 Dec. 03, at para 13, (emphasis added).

[37] *P v. Bagosora et al.*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 Dec. 03, at para 14.

25. paragraph 38 of the Indictment and "repeated in all counts" and that, the pleading obligations are thereby discharged.[38] The Defence makes the following observations.[39] First, the material facts underpinning a purported case of physical perpetration are entirely absent from the Indictment.[40] Second, joint criminal enterprise is a form of "committing" with which the Indictment purports to charge the accused in respect of all counts alleged therein. Therefore, the mere inclusion of the word "committing" does not necessarily imply personal and physical perpetration. The Indictment does not make it clear whether the Accused is indicted pursuant to joint criminal enterprise, physical perpetration or both and the resultant effect is ambiguity.[41]

26. In relation to paragraph 24 of the Response, the Defence observes that this statement overlooks corroboration.[42] If the particulars of an allegation are not provided by each witness, the Chamber is in no position to find two pieces of evidence corroboratory.[43]

27. The principle of orality[44] has been invoked by the Chamber to allow a witness to expand on his or her previous statement without intervention on procedural grounds. It operates on the relationship between a witness' live testimony and his or her previous statement. It has no bearing on the relationship between the indictment and evidence lead by the Prosecution at trial and, as such, does not supersede the requirement that the case of the Prosecution be spelled out clearly and unambiguously in the Indictment. Therefore, it is irrelevant to the determination of the issues raised by the Motion.

DONE in Freetown on this...7.... day of...04....., 2008.

For Defendant **KALLON,**

Chief Charles A. Taku

[38] The Response, at para 27.
[39] See the Motion, at para 16-19.
[40] These must be pleaded, see the Motion, at para 18-19.
[41] See *P. v. Kordic*, IT-95-14/2-A, Judgment, 17 Dec. 04, at para 129, ("[t]he nature of the alleged responsibility should be unambiguous in an indictment"); see also *P. v. Kvocka, et al.*, IT-98-30/1-A, Judgment, 28 Feb. 05, at para 29, ("[i]f an indictment merely quotes the provisions of Article 7(1) without specifying which mode or modes of responsibility are being pleaded, then the charges against the accused may be ambiguous"); and *P. v. Krnojelac*, IT-97-25-A, Judgment, 17 Sept. 03, ("when the Prosecution charges the 'commission' of one of the crimes under the Statute within the meaning of Article 7(1) [individual responsibility], it must specify whether the term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both.").
[42] Which is required by law in respect of accomplice witnesses.
[43] See also the Motion, at para 31.
[44] See the Response, at para 2.

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +39 0831 257000 or +232 22 297000 or +39 083125 (+Ext)
UN Intermission 178 7000 or 178 (+Ext)
FAX: +232 22 297001 or UN Intermission: 178 7001

Court Management Section - Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the ***Confidential*** Case File.

Case Name: The Prosecutor – v- Sesay, Kallon & Gbao
Case Number: SCSL-2004-15-T
Document Index Number: 1074
Document Date 7 April, 2008
Filing Date 7 April, 2008, 2008 at 16:30pm
Number of Pages: 63
Page Numbers: **25534-25569**
Document Type: -
☐ Affidavit
☐ Indictment
☐ Motion
☐ Order
☐ Other
☐ **Reply**
☐ Response
☐ Application

Document Title: **Reply With Confidential Annex A To Prosecution Response To Kallon Motion To Exclude Evidence Outside The Scope Of The Indictment**

Name of Officer:

Thomas George

Signed: