SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

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

Registrar: Mr. Robin Vincent

Date filed: 24 May 2004

THE PROSECUTOR

Against

ISSA HASSAN SESAY

MORRIS KALLON

AUGUSTINE GBAO

Case No. SCSL – 2004 – 15 – PT

PROSECUTION CONSOLIDATED REPLY TO DEFENCE RESPONSE TO PROSECUTION'S APPLICATION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL AGAINST THE DECISION ON THE "PROSECUTION'S MOTION FOR CONCURRENT HEARING OF EVIDENCE COMMON TO CASES SCSL-2004-15-PT AND SCSL-2004-16-PT"

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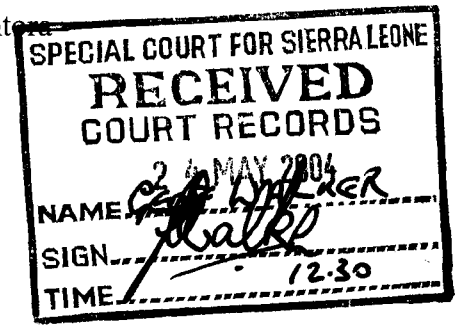

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The Prosecution files this consolidated reply to the two Responses filed by the Defence to the Prosecution's Application for leave to file an interlocutory appeal against the decision on the Prosecution's Motion for concurrent hearing of evidence common to cases SCSL-2004-15-PT and SCSL-2004-16-PT.

I. BACKGROUND

1. On 30 April 2004, the Prosecution filed, pursuant to Article 17 of the Statute of the Special Court and Rules 48(C), 54 and 73 of the Rules of Procedure and Evidence of the Special Court ("Rules"), a Motion for a concurrent presentation of evidence common to both the case of *Prosecutor v. Sesay, Kallon and Gbao* (SCSL-2004-15-PT) and the case of *Prosecutor v. Brima, Kamara and Kanu* (SCSL-2004-16-PT) ("Motion").

2. On 11 May 2004, the Trial Chamber denied the Prosecution's Motion, finding the notion of 'concurrent hearing of evidence' to be conceptually irreconcilable with the notion of 'joint separate trials' ("Decision").
3. On 14 May 2004, pursuant to Rule 73(B) of the Rules, the Prosecutor filed an Application for leave to file an interlocutory appeal against the Chamber's Decision ("Application").
4. On 17 May 2004, the Trial Chamber issued an Order for Expedited Filing, ordering the Defence to respond to the Prosecution's Application by 20 May 2004 and the Prosecution to reply to any such response by 24 May 2004. On 19 May 2004, Counsel for Accused Kallon filed a response ("Kallon Response") requesting the Trial Chamber to deny the Prosecution Application. On 20 May 2004, Counsel for Accused Gbao also filed a response ("Gbao Response") requesting the Trial Chamber to deny the Prosecution Application. On 21 May 2004, Counsel for Accused Sesay also filed a response ("Sesay Response") requesting the Trial Chamber to deny the Prosecution Application. The Prosecution files this consolidated reply to all three Responses.

II. DEFENCE SUBMISSIONS

5. The Kallon Response requests the Chamber to deny the Prosecution Application since it fails to demonstrate the exceptional circumstances and irreparable prejudice to the Prosecution, specifically with relation to the RUF case. It also argues that granting the Application will delay the proceeding in the RUF trial thereby infringing on the rights of the Accused to a fair and expeditious trial; that the Trial Chamber exercised its discretion properly in deciding not to grant the concurrent hearing; and, that the Prosecution's Application did not advance any new arguments.
6. In the Gbao Response, the Defence bases its objection to granting the Prosecution Application on the assertions that no exceptional circumstances exist; that conducting a concurrent hearing will not reduce the anguish of the witnesses as they will still be subject to cross-examination by Defence counsel in both case; that the potential of witnesses not appearing in trial is inherent to the judicial process; that irreparable harm will not be caused to the Prosecution if the requested concurrent hearing is not held; that the Chamber's rejection of the Prosecution's application for leave to file an interlocutory appeal against the joinder trial decision warrants the rejection of the present Application;

that the Prosecution is not barred from requesting the concurrent hearing of witnesses in specific cases; and, that granting the Application will lengthen the proceedings.

7. In the Sesay Response, the Defence asserts that the Prosecution does not demonstrate exceptional circumstances and irreparable prejudice. However, the Response which was filed late, contains no substantive arguments to support its contentions. It merely lists recriminations and the Prosecution submits that its tone and assertions are unfounded and in a language not conducive to the furtherance of judicial argument in a forum such as the Special Court.

III. ARGUMENTS

Existence of exceptional circumstances and irreparable prejudice

8. In paragraph 9 of the Kallon Response, it is argued that the Prosecution fails to demonstrate, specifically with relation to the RUF case, that existence of exceptional circumstances and irreparable prejudice. The Prosecution submits that since the AFRC trial will commence as soon as the second Trial Chamber is instated, it will run parallel to the RUF trial, and that therefore all the assertions made in the Application are applicable to the RUF trial. Furthermore, given the amount of time each witness will take to testify, and the fact that the first Trial Chamber will hear the RUF in alternate months while the second Trial Chamber will hear the AFRC case in a continuous manner, there is a realistic possibility that the proceedings in the AFRC trial will 'catch up' with, and even get ahead of, those in the RUF trial. Thus there will be witnesses who will first be called to testify in the AFRC trial, and only later will be called to testify in the RUF trial. In such cases, these witnesses may refuse to testify in the RUF trial, for the reasons explained in the Prosecution Application.
9. In paragraph 2 of the Gbao Response, the Defence argues that the Prosecution does not establish that there is "anything exceptional about a witness giving evidence twice in two separate trials". The Prosecution disagrees and reasserts that in this case there are over 150 such witnesses, and they are subject to extraordinary security and mental conditions, in part due to having to testify in the country where the crimes were committed, while living in the vicinity of co-perpetrators of the Accused. The Prosecution submits that these are exceptional circumstance, which result from the nature of the crimes and the fact

that the Special Court is the first international criminal tribunal which operates in the locus of the crimes.

10. In paragraph 3 of the Gbao Response, the Defence argues that conducting a concurrent hearing will not reduce the anguish of the witnesses, are they will still be subject to cross-examination by Defence counsel in both case. While this is true, the Prosecution asserts that having to undergo the totality of the hearing all at one time will minimize the impact on the witnesses and help preserve the testimony.
11. In paragraph 4 of the Gbao Response, the Defence argues that there is nothing unique about the existence of the possibility that witnesses fail to appear to trial. Nonetheless, it is the Prosecution's submission, that in the case at hand, this risk is magnified, as there is a distinct possibility that witnesses who will have already testified once, will fail to show up as they will be subjected to great difficulties when confronting the accused and reliving their traumas.
12. In paragraph 5 of the Gbao Response, the Defence refers to the 'large pool' of prosecution witnesses, and the availability of granting them protective measures, as negating any irreparable harm to the Prosecution if the requested concurrent hearing is not held. The Prosecution denies this argument and asserts that this great number of witnesses is necessary in this case, in which a large number of crimes were alleged, in many different locations, especially since the establishment of criminal responsibility for international crimes involves proving many complex aspects which do not exist in ordinary or domestic crimes. Furthermore, the protection measures do not ensure that no harm will occur to the witnesses, or that a witness will indeed appear to testify a second time, and in event undermine judicial economy and expeditious proceedings.

Previous decision on application for leave to file an interlocutory appeal is irrelevant

13. In paragraph 6 of the Gbao Response, the Defence argues that the rejection by the Chamber of the Prosecution application for leave to file an interlocutory appeal against the joinder trial decision, warrants the rejection of this present Application. The Prosecution objects to this argument and emphasizes that the Chamber refused to grant leave to file an interlocutory appeal on the joint trial issue because the Prosecution failed to address one of the two conjunctive requirements required in order to be granted leave

to file an interlocutory appeal, without discussing the merits of both parties' arguments.[1] The Prosecution asserts that the present situation is not analogous to that case, as the Prosecution addressed both conjunctive requirements required by Rule 73(B) of the Rules. Moreover, the Prosecution reasserts, in accordance with its submission in paragraph 5 of the Application, that a concurrent hearing and a joint trial are two completely different measures, provided for by two distinct and separate Rules, and that therefore, the Chamber's refusal to jointly try RUF and AFRC members, under Rule 48(B), does not bar the Chamber from applying Rule 48(C). It is therefore submitted, that the Chamber's decision of 13 February 2004, refusing to grant leave for interlocutory appeal against its denial of a joint trial of RUF and AFRC members, does not bear on the issue of conducting a concurrent hearing of common 'crime base' witnesses.

No delay of Proceedings

14. In paragraph 10 of the Kallon Response, as well as in paragraph 8 of the Gbao Response, it is argued that granting the Application will delay the proceedings in the RUF trial.
15. The Prosecution reaffirms that granting its Application will not delay the proceedings in the RUF trial, in conformity with its submission in the AFRC pre-trial conference of 30 April 2004, that the deliberations concerning its Motion will not delay the proceedings in the trials.
16. The Prosecution stresses, that there is a real possibility that by the second or third session of the RUF proceedings (October 2004 and December 2004, respectfully) the AFRC trial will commence. Since the RUF trial will be heard in alternate months, and the AFRC trial in a continuous manner, the proceedings in the latter case will quickly 'catch up' with those in the former. If permission to hold a concurrent hearing is issued after the commencement of the trials, then the Prosecution submits that, given the amount of time each witness will take to testify, the calling of witnesses who have already testified in one trial to testify a second time in the other trial, will only have a marginal impact as there

[1] The Trial Chamber's decision rejected this application on the grounds that it did not address the issue of 'exceptional circumstance', which was one of the two conjunctive conditions stipulated in Rule 73(B), and accordingly held that "it would not be necessary to address the question of irreparable prejudice given that the test is conjunctive". *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 Feb. 2004, para. 18.

will be few such witnesses, and the holding of a concurrent hearing will still achieve all the aims outlined in the Prosecution Motion

Requesting concurrent hearing of witnesses in specific cases is undesirable

17. In paragraph 7 of the Gbao Response, the Defence asserts that the prosecution can always apply, on a case by case basis, to have certain witness heard concurrently, in accordance with the provisions of Rule 48(C) of the Rules. The Prosecution reasserts, as stated in paragraph 7 of the consolidated reply it filed in this case to the Defence response to the Prosecution Motion, dated 7 May 2004, that such an 'ad hoc' approach "would frustrate an orderly organization of the trial process and would be against the interest of judicial economy. It would mean that the Prosecution would have to bring individual motions for over one half of its witnesses during the course of trial before calling each one of these witnesses to testify. This would lead to several logistical problems: the Chamber would be put in the difficult position of how and when to schedule a common hearing for each individual witness; proper planning not only for the Prosecution but also for the Witness and Victims Support Unit, tasked with the responsibility of making travel arrangements and accommodations for witnesses all over the country who have to be brought to the Court in Freetown to testify will be hindered."

Trial Chamber failed to exercised its discretion properly

18. The Prosecution objects to the argument in paragraph 11 of the Kallon Response, that the Trial Chamber exercised its discretion properly. The Prosecution reassert that the Chamber failed to consider fundamental factors in the exercise of its discretion, as stated in paragraphs 4-10 of the Application.

Application need not advance new arguments

19. With relation to the argument made in paragraph 12 of the Kallon Response, the Prosecution asserts, that the fact that its Application did not advance any new arguments is irrelevant. This merely highlights that certain considerations which were previously indicated in the Prosecution Motion, were nonetheless either wrongfully ignored or not accorded sufficient weight by the Chamber.

III. CONCLUSION

20. The Prosecutor submits that for the foregoing reasons, the Trial Chamber should dismiss the Defence Responses and grant the Application for leave to file an interlocutory appeal.

Freetown, 24 May 2004

For the Prosecution,

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Robert Petit