

**SPECIAL COURT FOR SIERRA LEONE**  
OFFICE OF THE PROSECUTOR  
Freetown – Sierra Leone

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

Registrar: Mr. Robin Vincent

Date filed: 22 April 2005

**THE PROSECUTOR**

**Against**

**Issa Hassan Sesay**  
**Morris Kallon**  
**Augustine Gbao**

Case No. SCSL – 2004 – 15 – T

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**PROSECUTION RESPONSE TO APPLICATION BY THE SECOND ACCUSED  
FOR LEAVE FOR INTERLOCUTORY APPEAL AGAINST THE MAJORITY  
DECISION OF THE TRIAL CHAMBER OF 9<sup>TH</sup> DECEMBER 2004 ON THE  
MOTION ON ISSUES OF URGENT CONCERN TO THE ACCUSED MORRIS  
KALLON**

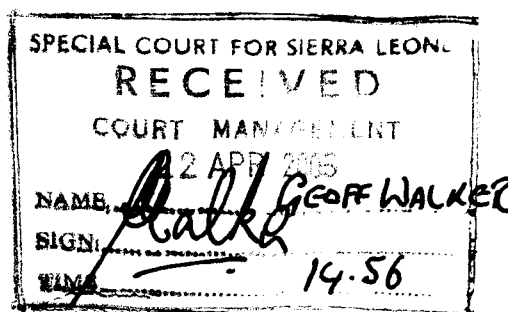
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Office of the Prosecutor:  
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**I. PROCEDURAL BACKGROUND**

1. The Prosecution files this Response to the Application by the Second Accused for Leave for Interlocutory Appeal against the Majority Decision of the Trial Chamber of 9<sup>th</sup> December 2004 on the Motion on Issues of Urgent Concern to the Accused Morris Kallon (“the Application for Leave to Appeal”), dated 9 April 2005 and filed 11 April.
2. On 1 October 2004 the Second Accused filed a Motion raising issues of non-compliance concerning the service of and arraignment on various indictments, and seeking numerous orders in relation thereto (“the motion”). The Prosecution Response was filed on 8 October 2004 and the Reply thereto was filed on 11 October 2004.
3. On 9 December 2004 the joint decision of Judges Thompson and Boutet (“the majority decision”) was delivered. The majority decision dismissed the motion and found:

Accused.

- b) That the majority decision that the Consolidated Indictment and Amended Consolidated Indictment are not new, save as to Count 8 of the Amended Consolidated Indictment, resulted from the majority judges misdirecting themselves.
  - c) That the failure to stay the Original Indictment and the Consolidated Indictment tends to erode the protection of the Second Accused from double jeopardy under Article 9(1) of the Statute of the Special Court and Article 14(7) of the ICCPR, smacks of a stand-by indictment, is procedurally and legally unfair and untransparent, and is an abuse of process.
6. The Application for Leave to Appeal further argues that the requirements of exceptional circumstances and irreparable prejudice in Rule 73(B) are satisfied because the interests of justice and the integrity of the process, as well as the right to a fair trial of the Second Accused, warrant an Appeals Chamber ruling on the very important issues of law, procedure and fact raised.
7. The Prosecution submits that the Application for Leave to Appeal demonstrates neither exceptional circumstances nor irreparable prejudice and, accordingly, should be dismissed.

## II. ARGUMENT

### The Test for Granting Leave to Appeal

8. Rule 73(B) of the Rules of Procedure and Evidence reads:
- Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.
9. A previous decision of this Trial Chamber established that this rule:

“involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs of the test are clearly conjunctive and not disjunctive; in other words they must both be satisfied.”<sup>1</sup>

10. A more recent decision observed that:

“At this point in time, as the trials are progressing, the Chamber must be very sensitive, and rightly so, to any proceedings or processes that will indeed encumber and unduly protract the ongoing trials. For this reason, it is a judicial imperative for us to ensure that the proceedings before the court are conducted expeditiously and to continue to apply the enunciated criteria with the same degree of stringency as in previous applications for leave to appeal so as not to defeat or frustrate the rationale that underlies the amendment of Rule 73(B).”<sup>2</sup>

11. The Prosecution submits that the Application for Leave to Appeal does not meet the threshold of the twin criteria of Rule 73(B).

### **Alleged Non-Arraignment**

12. The Prosecution submits that the difference of opinion expressed in any decision of the Trial Chamber that is not unanimous is not, of itself, sufficient foundation to establish the twin elements of exceptional circumstances and irreparable prejudice necessary to justify leave being granted pursuant to Rule 73(B). To the extent that the Application for Leave to Appeal simply avers that the Consolidated Indictment and Amended Consolidated Indictment are new in reliance upon the reasoning of the partially dissenting decision, and contrary to the reasoning of the majority decision, and asserts that this averment justifies a re-arraignment of the Second Accused on the whole of the Amended Consolidated Indictment, the Prosecution submits that such averment falls well short of establishing the criteria of Rule 73(B).

13. This is especially so given that the April 2004 unanimous Decision of this

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<sup>1</sup> *Prosecutor v Sesay and others*, SCSL-2004-15-PT, “Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder”, 13 February 2004, para. 10.

<sup>2</sup> *Prosecutor v Norman and others*, SCSL-2004-14-T, “Majority Decision on the Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution’s Request for Leave to Amend the Indictment Against Norman, Fofana and Kondewa”, 2 August 2004, para. 25.

Chamber,<sup>3</sup> delivered two months following the filing of the Consolidated Indictment,<sup>4</sup> dismissed the motion of the Second Accused which alleged that the Consolidated Indictment contained new allegations that effectively amended the Original Indictment. Indeed that Decision found that the Second Accused stood to benefit from the added specificity.<sup>5</sup> The Second Accused did not seek leave to appeal that Decision.

14. If the Consolidated Indictment contains no new allegations vis-à-vis the Original Indictment, it follows that, save as to Count 8 – the only new count ever added to an Indictment,<sup>6</sup> the Amended Consolidated Indictment contains no new allegations. It also follows that the Accused has been arraigned on all Counts in the Amended Consolidated Indictment: on 17 May 2004 with respect to Count 8 and on the original counts during his initial appearance on 15, 17 and 21 March 2003.
15. The Prosecution submits that the averment of the Application for Leave to Appeal that both the Consolidated and Amended Consolidated Indictment are new simply rehearses a previously articulated argument which was dismissed in the majority decision. Further, that there has been no breach of Articles 9(2) and 14(3) of the ICCPR<sup>7</sup> or of Rule 50 of the Rules established. Accordingly, the Prosecution submits that this ground of the Application for Leave to Appeal demonstrates neither irreparable prejudice to the Accused, nor exceptional circumstances.

<sup>3</sup> *Prosecutor v Sesay and others*, SCSL-04-15-PT, Decision on Motion for Quashing of Consolidated Indictment, 21 April 2004.

<sup>4</sup> At paragraph 5 of the partially dissenting decision the Learned Dissenting Judge notes that the Joinder Decision of 27 January 2004 “was premised on the assurances furnished by the Prosecution, (and which turned out to be untrue), that the contents of the Consolidated Indictments were the same as those of the Initial Individual Indictments.” The Prosecution did not annex the proposed Consolidated Indictment to its Motion for Consolidation, but the signed Consolidated Indictment was filed on 5 February 2004, two months in advance of the 21 April 2004 Decision on Motion for Quashing of Consolidated Indictment.

<sup>5</sup> *Ibid*, para. 21.

<sup>6</sup> Count 8 alleges a crime of “forced marriage”, being a Crime Against Humanity, namely other inhumane act, contrary to Article 2(i) of the Statute. This new Count of sexual violence added to 3 existing counts of sexual violence which were pleaded in both the Original Indictment and the Consolidated Indictment. Cf paras. 1 and 7 of the partially dissenting decision.

<sup>7</sup> The Prosecution does not accept the argument that the right to be informed of charges contained in these two Articles necessarily includes arraignment, but does not find it necessary to elaborate upon the issue.

**A Stay or Withdrawal of Former Indictments**

16. The Prosecution submits that the argument of the Second Accused that the failure to stay or order the withdrawal of the Original individual Indictments and the Consolidated Indictment puts the protection of the Second Accused from double jeopardy at risk is speculative, at best. The Prosecution further submits that the allegation that the subsistence of the former indictments “smacks of a grand design to have a stand-by indictment” is made entirely without foundation.
17. The filing of the Amended Consolidated Indictment superseded and extinguished the Consolidated Indictment and the Original Indictment. The Prosecution repeats its submission made in paragraph 12 above that the fact that the partially dissenting decision disagrees with the majority decision on this point is not, of itself, sufficient to justify a grant of leave pursuant to Rule 73(B).
18. The Prosecution submits that no exceptional circumstances or irreparable prejudice arise with respect to this ground.

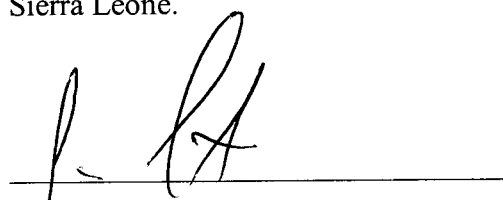
**III. CONCLUSION**

19. The Prosecution respectfully submits that the Application for Leave to Appeal be dismissed.

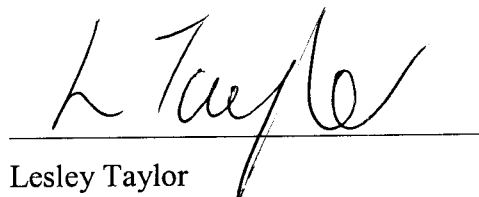
Dated this 22<sup>nd</sup> Day of April,

In Freetown,

Sierra Leone.



Luc Côté  
Chief of Prosecutions



Lesley Taylor  
Senior Trial Counsel

**PROSECUTION INDEX OF AUTHORITIES**

*Prosecutor v Sesay* and others, SCSL-2004-15-PT, “Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder”, 13 February 2004.

*Prosecutor v Sesay* and others, SCSL-04-15-PT, Decision on Motion for Quashing of Consolidated Indictment, 21 April 2004.

*Prosecutor v Norman* and others, SCSL-2004-14-T, “Majority Decision on the Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution’s Request for Leave to Amend the Indictment Against Norman, Fofana and Kondewa”, 2 August 2004.