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

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

SANTIGIE BORBOR KANU

Case No. SCSL – 2004 – 16 – 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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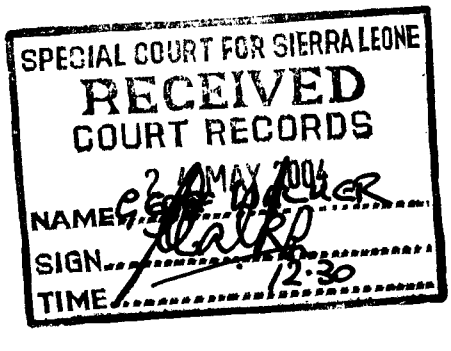

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The Prosecution files this consolidated reply to the two Responses filed by the Defence to the Prosecution's Application for leave to file an interlocutory appeal against the decision on the Prosecution's Motion for concurrent hearing of evidence common 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 17 May 2004, Defence for Accused Kanu filed a response requesting the Trial Chamber to deny the Prosecution's Application ("Kanu Response"). On 20 May 2004, Defence for Accused Brima also filed a response requesting the Trial Chamber to deny the Prosecution's Application ("Brima Response"). The Prosecution files this consolidated reply to both the Kanu Response and the Brima Response.

II. DEFENCE SUBMISSIONS

5. In the Kanu Response, the Defence requests the Chamber to dismiss the Prosecution's Application on the grounds that the Trial Chamber's decision contains no errors of law or fact; that applicable to this case are all its arguments relevant to the Chamber's decision of 13 February 2004 to refuse to grant the Prosecution leave to file an interlocutory appeal against the its decision on the Joinder Motion ("decision of 13 February 2004"); that the Chamber's decision of 13 February 2004 implies that a denial of a concurrent hearing is an "irreversible judicial fact which cannot be reopened through these proceedings"; that exceptional circumstances or irreparable prejudice to the Prosecution were not established by the Prosecution.
6. In the Brima Response, the Defence requests the Chamber to dismiss the Prosecution's Application on the grounds that exceptional circumstances do not exist and that the Decision does not cause irreparable prejudice to the Prosecution.

III. ARGUMENTS

Errors of law and fact exist

7. The Defence asserts, in paragraph 3 of the Kanu Response, that "the Trial Chamber's decision contains no error of law, nor error of fact which warrants leave for appeal". The Prosecution objects to this argument, and reiterated its submissions in paragraphs 4-10 of its Application. The Prosecution clarifies, that the submissions in paragraphs 4, 6, 8 and 9 of its Application pertain to errors of law, and that those in paragraphs 5, 7 and 10 therein pertain to errors of fact.
8. The Prosecution reasserts, as submitted in paragraph 6 of its Application, that the Trial Chamber erred in law when it failed to consider principles extrinsic to the rights of the Accused, such as judicial economy, and that the Chamber mistakenly interpreted the Prosecution Motion as requiring the sacrifice of the rights of the Accused in favour of economic or political considerations. The Prosecution stresses that even the practice of this Chamber includes balancing the rights of the Accused against such principles which are extrinsic to the rights of the Accused. For example, in its decision of 13 February 2004, the Chamber balanced the "peculiar circumstances of the Special Court" against the rights of the Accused when it restrictively interpreted the provision in Rule 73(B) which allows a Party to be granted leave to appeal against interim decisions.[1]

Defence Arguments relating to Chamber's decision of 13 February 2004 are irrelevant

9. In paragraph 4 of the Kanu Response, the Defence refers to the Chamber's decision of 13 February 2004, and asserts that "the arguments of which decision indirectly apply here". The Prosecution assumes that the intention of the Defence for Kanu, was to incorporate all the arguments raised in the response it filed on 6 February 2004 to the Prosecution's application for leave to file an interlocutory appeal against the Trial Chamber's decision on the Joinder Motion.

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[1] In interpreting Rule 73(B), in particular, the two requirements which must be met in order to be granted leave to file an interlocutory appeal, the Trial Chamber stated: "Nevertheless, this restriction is in line with the trend and our determination to tighten the test for granting leave in respect of interlocutory appeals in the interest of expeditiousness. The further restriction is appropriate and acceptable in the peculiar circumstances of the Special Court whose mandate, we must observe, is limited in its duration." See *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. 15.

10. The Prosecution respectfully reasserts that the arguments made in relation to the issue of a joinder trial, are irrelevant to the issue of a concurrent hearing, as these are two distinguishable concepts, as submitted in its Application. Alternatively, the Prosecution reiterates all the arguments made in its reply to the said response of 6 February 2004, which it filed on 9 February 2004. The Prosecution reiterates its submissions in paragraphs 4 and 7 of its reply of 5 May 2004 to the response filed by Defence for Kanu to the Prosecution motion for concurrent hearing, where the Prosecution demonstrated the differences between the concept of 'joint trial' and that of 'concurrent hearing'.

Chamber's decision of 13 February 2004 is irrelevant

11. The Defence asserts, in paragraph 5 of the Kanu Response, that "the previous ruling of the Trial Chamber rejecting an interlocutory appeal on part of the Prosecutor with respect to the requested joinder of the case, implies the presence of an irreversible judicial fact which is not to be reopened through these proceedings".
12. The Prosecution reasserts that a 'joint trial' and a 'concurrent hearing' are two distinguishable concepts, as submitted in paragraph 10 above. 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.

Exceptional circumstances and irreparable prejudice exist

13. In paragraph 7 of the Kanu Response, the Defence argues that the Prosecution did not establish that the Chamber's Decision "creates exceptional circumstance and that it creates irreparable prejudice to the Prosecution". It further asserts, in paragraph 8 of the Kanu Response, that just as it was in the case of the Prosecution's application for leave to file an interlocutory appeal against the joinder motion decision, here also "the alleged irreparable prejudice aims at procedural matters". The Defence also argues that the Prosecution's arguments relating to the loss of evidence which could result from denying a concurrent hearing "pertain to future expectations and do not relate to any fact" and as such does not merit the Chamber's consideration.

14. The Brima Response asserts that the submissions in the Prosecution's Application neither demonstrate the existence of exceptional circumstances nor establishes that irreparable prejudice is caused to the Prosecution. Nonetheless, the Defence fails to substantiate these arguments, save for stating that "[t]he assertion by the Prosecution that as a result of the hardships and risks involved, some witnesses will not appear for the second trial to which they are called to testify is purely speculative and not borne out by the facts of this instant case."
15. The Prosecution reasserts, as stated in paragraphs 12-13 of its Application, that the exceptional circumstance created by the Chamber's decision, is the hearing of a large corpus of witnesses twice. This will prolong the trials and unnecessarily duplicate the risks and pain suffered by the witnesses. This result will also adversely affect the right of the Accused to a fair trial, as the expeditious nature of the proceedings against him are part of this right.[2]
16. The Prosecution further reasserts, in accordance with the submission in paragraph 16 of its Application, that the decision creates irreparable prejudice to the Prosecution, since after having testified once, many witnesses will not testify a second time, thus significantly hindering the ability of the Prosecution to prove the allegations made in the Indictment. The Prosecution stresses that not only does such loss of evidence cause the Prosecution irreparable prejudice of a substantial nature, but it also jeopardizes the ascertainment of truth and the fairness of the trial. It is the Prosecution's assertion that this is not a hypothetical situation, as the prosecution witnesses are already intimidated, as confirmed by the witness protection orders granted by this Chamber. Furthermore, following both common sense and the experience of the ICTY and ICTR, the confrontation with the Accused at trial, will further intimidate these prosecution witnesses, and may entail their refusal to testify a second time.
17. The Prosecution also reaffirms, as it did in paragraph 17 of its Application, all its arguments in paragraphs 13-21 of its application for leave to file an interlocutory appeal

[2] See footnote 1 in Application, referring to A. Cassese, *International Criminal Law* (N.Y., Oxford University Press, 2003), p. 398: "One of the obvious requirements of a fair trial is that trial proceedings be as speedy as possible. Plainly, as the accused enjoys the presumption of innocence until found guilty, it is only rational and appropriate to establish whether he is innocent or guilty as rapidly as possible."

against the joinder decision.[3] The Prosecution submits that these arguments were never rejected by the Trial Chamber, since in its decision of 13 February 2004 the Chamber did not address the Prosecution's argument pertaining to 'irreparable prejudice to a party'; nor did it validate any of the Defence arguments made in relation to this matter.[4]

IV. CONCLUSION

18. The Prosecutor submits that for the foregoing reasons, the Trial Chamber should dismiss both the Kanu Response and the Brima Response, and grant the Prosecution's Application for leave to file an interlocutory appeal.

Freetown, 24 May 2004

For the Prosecution,

Luc Cote

Robert Petit

[3] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Application for Leave to file an Interlocutory Appeal Against the Trial Chamber's decision of 27 January 2004, filed on 3 February 2004.
[4] 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.