SCSL-2004-14-T.
(7448-7457).

SPECIAL COURT FOR SIERRA LEONE

Before: Judge Bankole Thompson, Presiding Judge
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet
Registrar: Robin Vincent
Date: 14 June 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

CASE NO. SCSL-2004-14-T

JOINT RESPONSE OF SECOND AND THIRD ACCUSED TO PROSECUTION'S APPLICATION FOR LEAVE TO APPEAL AGAINST THE DECISION ON REQUEST FOR LEAVE TO AMEND THE INDICTMENT

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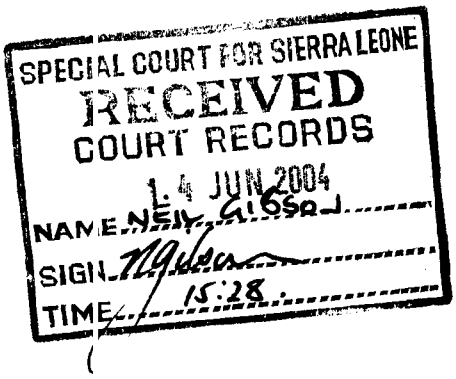

Introduction

1. The Defence for Mr. Moinina Fofana (the "**First Accused**") and the Defence for Allieu Kondewa (the **Second Accused**") hereby file this joint response to 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 Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa" (the "**Response**" & the "**Application**").[1]

2. The Prosecution submits that there are both exceptional circumstances warranting an appeal *and* that there would be irreparable prejudice to a party, were the leave not granted. Furthermore, the Prosecution submits that the Trial Chamber erred in its findings.

3. In this Response, the Second Accused and Third Accused (the **"Defendants"**) submit that the requirements for the grant of leave to appeal under Rule 73(B) of the Rules of Procedure and Evidence (the "**Rules**") are not met. Not only did the Prosecution fail to demonstrate exceptional circumstances and irreparable prejudice, but, even if these requirements were met, the Prosecution failed to show why the Trial Chamber should exercise its discretion to grant leave to appeal.

[1] The Defence notes that although the Prosecution named its document "Application" it is clear from Article 6(D)(i)(a) of the Practice Direction on Filing Documents before the Special Court for Sierra Leone that the document should be considered a motion. From sub-paragraph (b) of the Article it is clear that the Defence has the right to respond to it.

Relevant Law

4. Rule 73(B) of the Rules states that "in exceptional circumstances *and* to avoid irreparable prejudice to a party", the Trial Chamber *may* give leave to appeal (emphasis added).

5. The Trial Chamber of the Special Court has rendered two decisions with respect to this provision, namely in the case against Sesay *e.a.*, "Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder" (the "**Sesay Decision**"),[2] and in the case against Brima *e.a.*, "Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder" (the "**Brima Decision**"),[3] both rendered on 13 February 2004.

6. In these decisions, the Trial Chamber noted that Rule 73(B) in its first sentence states clearly the general rule that decisions on motions are without interlocutory appeal. It is likewise clear that the granting of leave to lodge an interlocutory appeal should remain "an extremely limited exception"[4] to this general rule.[5] The Chamber held that leave to appeal is only appropriate upon meeting the "high threshold" of demonstrated exceptional circumstance and evidence that failure to grant the leave to appeal would cause irreparable prejudice to a party. The existence of exceptional circumstances and irreparable prejudice to a party are conjunctive – not disjunctive – requirements.

7. If this initial high threshold is met, the Trial Chamber "may" give leave to appeal. The use of the word "may" makes clear that the grant of leave at this stage is a discretionary power, and indeed the Sesay and Brima decisions have confirmed that the moving party bears the burden of demonstrating "something to justify the

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[2] SCSL-2004-15-PT.
[3] SCSL-2004-16-PT.
[4] *See* para. 9 of the Sesay Decision and para. 12 of the Brima Decision.
[5] *See* paras. 10 and 13 of the Sesay Decision and paras. 13 and 16 of the Brima Decision respectively.

exercise of this discretion (...) in its favour."[6] There is thus a second step in applying for leave.

The Prosecution failed to demonstrate any exceptional circumstance

8. In paragraph 4 of the Application, the Prosecution argues that a dissenting opinion of a member of the Trial Chamber "may in itself constitute an exceptional circumstance warranting the granting" of leave to appeal. The Defendants respectfully contest this submission. Whether or not, as the Prosecution would have it, appending a dissenting opinion alters the weight and character of the majority decision, the existence of a dissenting opinion, no matter how "strong and articulate",[7] cannot in itself constitute an exceptional circumstance as envisaged by Rule 73(B). Rather than being exceptional, the practice of appending dissenting opinions at international tribunals is standard.

9. The Prosecution also attempts to demonstrate exceptional circumstances by rephrasing two arguments that it previously submitted in its "Request for Leave to Amend the Indictment" of 9 February 2004 (the "**Request**").

10. The Prosecution argues that it is obligated to prosecute to the full extent of the law, and the Court is obligated to establish a complete and accurate historical record of the crimes committed.[8] It is hard to imagine how these arguments, which the Trial Chamber dealt with at length, can now be relied upon as "exceptional circumstances" justifying the grant of leave to appeal. At the very best, these arguments would be appropriate only on appeal. In any case, there is no obligation for the Prosecution to prosecute to "the full extent of the law". If such an obligation really existed, the negotiation of plea agreements would not be possible.

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[6] *See* para. 13 of the Sesay Decision and para. 16 of the Brima Decision.
[7] Application, para. 4.
[8] Compare paras. 5 and 6 of the Application with respectively paras. 26 and 33 of the Request.

11. In conclusion, the Prosecution's arguments in paragraphs 4, 5 and 6 of its Application do not demonstrate the existence of exceptional circumstances as required by Rule 73(B). The Application should be dismissed.

The Prosecution failed to demonstrate irreparable prejudice

12. Should the Trial Chamber find exceptional circumstances, the Application should nevertheless be dismissed, as there is no irreparable prejudice to the Prosecution if leave is not granted.

13. Firstly, the Defendants reiterate *mutatis mutandis* their submission that an argument that has been raised in the original motion cannot, as a rule, amount to irreparable prejudice, since the Trial Chamber will have weighed this argument in its decision.

14. The argument raised by the Prosecution in paragraph 7 of its Application is, as stated above,[9] only a reiteration of an argument raised in its original Request.[10]

15. In paragraph 8 of its Application, the Prosecution argues that denial of the requested amendment impairs the remedies to which victims of sexual violence are entitled. With all due respect for possible victims of alleged sexual or gender based crimes, it should be noted that such individuals are not a party to this case.[11] Even if denial of leave to amend the indictment were to impair the alleged victims' remedies, this does not constitute irreparable prejudice "to a party", as required by Rule 73(B).

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[9] Para. 10, above, including footnote 8.
[10] 7 of the Request with para. 5 of the Application.
[11] *See* Rule 2(A) sub "Party" of the Rules.

16. The Prosecution's argument in paragraph 9 of the Application that the Accused would be "forever excused" is speculative if not disingenuous. There is no reason to assume that the Defendants will never face charges in national courts in Sierra Leone. Moreover, it ignores the fact that the Prosecution has made clear that even if they are unable to amend the indictment, they will offer the sexual violence evidence in support of other counts in the consolidated indictment. In fact the Prosecution made numerous and detailed references to allegations of sexual violence in its opening statement.

The Prosecution has shown no justification for the exercise of discretion

17. In the alternative, even if the Trial Chamber were to rule that the "high threshold" is reached, that is that the criteria of "exceptional circumstances" and "irreparable justice to a party" are both met, the Defendants submit that leave to appeal should still not be granted.

18. As is clear from the wording of Rule 73(B) ("may") and from the Sesay and Brima Decisions,[12] the Trial Chamber has discretion to give leave to appeal. The Prosecution has not addressed, let alone demonstrated, that there is "something to justify the exercise of this discretion by the Chamber in its favour." It is the Defendants' submission that there is no reason either why the Chamber should exercise its discretion *proprio motu*.

19. No guidance is given in Rule 73(B) as to how the Trial Chamber should exercise its discretion; however, it is a generally recognised principle of law that the interests of *all* parties should be taken into consideration when a discretionary power is exercised.

[12] Paras. 13 and 16 of the Sesay and Brima Decisions respectively.

20. The Trial Chamber has already stated in this case that the delay caused by allowing the Prosecution to amend the Indictment:

> "would not only prejudice their rights to a fair and expeditious trial, but will amount not only to a violation of those rights guaranteed to them under the provisions Articles 17(4)(a), 17(4)(b) and 17(4)(c) of the Statute of the Special Court for Sierra Leone, but also to an abuse of process that will certainly have the effect of bringing the administration of justice into disrepute."[13]

The prejudice would only be increased if the amendment were made after a lengthy appeal procedure. Such a weighty consideration could only be countered by a similarly pressing interest on the side of the Prosecution; no such interest has been demonstrated.

21. The Prosecution seems to rely on alleged errors in the Trial Chamber's decision to support its "argument" that the discretion should be exercised in its favour.

22. However, the 23 paragraphs of the Application,[14] in which the Prosecution dwells on alleged errors committed by the Trial Chamber, are outside the scope of this procedure. Indeed, the Prosecution stated in paragraph 11 that these arguments would be presented to the court "***if*** granted leave to appeal"[15] (emphasis added). The arguments presented here by the Prosecution would therefore only be appropriate in an appellate proceeding and should not have appeared in the Prosecution's Application. They have no weight in the balancing act described above.

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[13] Trial Chamber, Decision on Prosecution Request for Leave to Amend the Indictment, dated 20 May 2004, filed on 1 June 2004, para. 86.
[14] Paras. 12-24.
[15] Application, para. 11.

23. Not only are the alleged errors irrelevant to the Trial Chamber's exercise of discretion, but in the submission of the Defendants the Prosecutor also failed to show that the Trial Chamber committed any errors at all.

24. The Prosecution's two major arguments are, firstly, that the Trial Chamber erred in finding that the Prosecution did not exercise due diligence in conducting its investigations[16] and, secondly, that the Trial Chamber erred in finding that the Prosecution did not file the Request in a timely manner after it had possession of the evidence of the new counts.[17] The Defendants agree with the Trial Chamber's findings and rebuts the Prosecution's main arguments as follows.

25. The Prosecution submits that obtaining evidence of gender-based crimes necessitates much more time than collecting evidence concerning other crimes.[18] The Prosecution further asserts that "even more time is required" for investigation of gender-based crimes allegedly committed by the CDF, claiming that there is popular support for the CDF in some areas of Sierra Leone and that CDF members allegedly committed such crimes against their own supporters.[19] The Prosecution, however, fails to present any evidence to support the distinction between the difficulties encountered in investigating alleged CDF gender-based crimes and those charged against the RUF and AFRC. Lacking evidence, this argument is without merit and should be dismissed.

26. Additionally, the Prosecution alleges that the Trial Chamber erred in deeming "unacceptable and untenable" the significant amount of time between the Prosecution's procurement of alleged evidence of gender-based crimes and its filing of the Request.[20]

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[16] Application, paras. 12, 15, 16, 17 and 18.
[17] Application, paras. 13, 19, 20 and 21.
[18] Application, para. 15.
[19] *Ibidem.*
[20] Application, para. 19.

27. The Defendants contend that the Trial Chamber's holding was not errant, given that the newly disclosed material regarding sexual violence contains one statement made on 9 May 2003, two on 24 September 2003, three on 25 September 2003, and two on 1 October 2003.[21] It should be noted that the date of filing of the Request had nothing to do, even in the Prosecution's explanation, with the nature of the new charges. Furthermore, in the Defendants' view, the lapse of time between 1 October 2003 and 9 February 2004 cannot be disguised under the pretence of judicial economy. The Prosecution in paragraph 19 of the Application juggles with months as if they were days. The filing was not late by a few days or even weeks, but by four months. The reference to "nine separate motions" is also exaggerated: three would be the right number *in casu*. In the Defendants' submission, the Trial Chamber's finding that the Request was not timely filed was correct.

28. In conclusion, the Defendants submit that in order to convince the Trial Chamber to exercise its discretion in favour of the Prosecution, it would need to demonstrate that its interests in the matter outweighed those of the Accused in avoiding a violation of his right to a fair and expeditious trial, as well as "an abuse of process that will certainly have the effect of bringing the administration of justice into disrepute". The Defendants respectfully submits that the Prosecution failed to do so.

[21] *See* "Compliance Report" with respect to witnesses TF2-126, TF2-128, TF2-131, TF2-133, TF2-135, TF2-189 and TF2-190 (Second Annex to the Prosecution's "Supplemental Materials Filed Pursuant to Order from the Bench During Pretrial Conference held 28 April 2004 and Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004", filed on 5 May 2004). Note that the reference to "late October" in para. 13 of the Application is misleading, to say the least, with respect to witness statements obtained on 1 October 2003 at the latest.

Done in Freetown the 14th day of June 2004
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