**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: 7 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 MOTION FOR CONCURRENT HEARING OF EVIDENCE COMMON TO CASES SCSL-2004-15-PT AND SCSL-2004-16-PT

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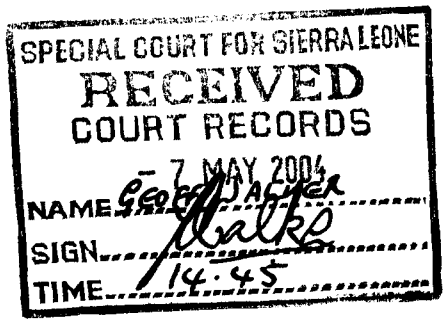

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The Prosecution files this consolidated reply to the Response to Prosecution Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT respectively filed by the Defence for Sesay and the Defence for Kallon.

## I. BACKGROUND

1. On 30 April 2004, the Prosecution filed a Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT (the Motion). On 30 April 2004, the Trial Chamber issued an Order for Expedited Filing, ordering the Defence to respond to the Prosecution Motion by 5 May 2004 and the Prosecution to reply to any such response by 7 May 2004. On 5 May 2004, the Defence for Issa Sesay and the Defence for Morris Kallon each filed a response requesting the Trial Chamber to deny the Prosecution Motion.

## II. DEFENCE SUBMISSIONS

2. In the response filed by Sesay, the Defence argues for the dismissal of the Motion on the grounds that the Motion is untimely and should have been brought well in advance; that the request for concurrent hearing should be made at the time the Prosecution seeks to call a witness common to both trials; that if 'crime base' evidence does not implicate the Accused it should be deemed irrelevant and the Motion is otiose; that a concurrent hearing will have the effect of lengthening the trial process and will be inconvenient for Defence Counsel; and that the Motion is effectively a motion for a joint trial.

3. In the response filed by Kallon, the Defence argues for the dismissal of the Motion on the grounds that granting the Prosecution Motion would have the result of a joint trial; that the Prosecution Motion has not been "substantiated" and that it is premature in the absence of full disclosure; that the requested concurrent hearing may lengthen the proceedings; that the judicial consistency and the conduct of the judicial process may be threatened; and, that there is a likelihood of conflict of interest in the defences and mutual recrimination in light of references by the common witnesses to different factions.

## III. ARGUMENTS

4. The Prosecution is rather disappointed at the remarks made by both the Defence for Accused Sesay and the Defence for Accused Kallon, suggesting disingenuousness on the Prosecution's part. The Prosecution will simply state its hope that all parties will recognize each other as officers of the Court and try to work together with trust and confidence in each other.

**Prosecution motion is timely**

5. The Defence for Accused Sesay submits that the Prosecution hijacked the proceedings by waiting until 30 April 2004 before filing its Motion. The Prosecution reiterates that for the first time on 28 April 2004, the Chamber officially stated the format of the trials it was considering, prompting the Prosecution to move for concurrent hearing of some of the RUF and AFRC witnesses.

6. The Prosecution further submits that the Motion for concurrent hearing was the culmination of a process of events. First, there was a decision denying the Prosecution Motion for Joinder. At the Status Conference in March 2004, the Prosecution stated its intention to propose an amendment to the Rules authorizing a common hearing. At the plenary session in March 2004, the Judges of the Special Court amended the Rules to allow for a common hearing. Finally, the Chamber stated for the first time on 28 April 2004 that it was minded to try the CDF case simultaneously with either the RUF or AFRC case. At this stage, the Prosecution then found it necessary to file its Motion for concurrent hearing.

**Request for concurrent hearing need not wait until the time the Prosecution seeks to call a witness common to both trials**

7. The Prosecution opposes the suggestion made by Defence for Accused Sesay that the request for a common hearing "ought to be decided when and if the Prosecution seek to rely upon common witnesses". This piecemeal 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.

8. The Defence assertion that a decision on this matter would be in the abstract is without merit. The Prosecution has provided the Chamber (and the Defence[1]) with evidence in the form of summaries of witness statements from which the proper evidentiary analysis for granting or denying the Prosecution motion can be made. The fact that the Defence

[1] In addition to summaries of witness statements, the Prosecution has provided the Defence with the actual statements of the witnesses.

takes issue with the form of such evidence does not detract from the fact that evidence is available to the Chamber to allow it to make an informed decision.

9. The Prosecution submits that the summaries of witness statements relied on by the Prosecution for its Motion are the same summaries which it submitted pursuant to the Court Order of 1 April 2004, made pursuant to Rule 73 *bis*. In making a decision on the Motion, the Trial Chamber is obviously not limited to the Prosecution summaries; the Chamber also has the benefit of the Defence submissions, and to assist them with their submissions the Defence had at their disposal the statements of the witnesses as well as other evidence disclosed in the respective cases.

**Prosecution Motion is well-founded and is not premature due to absence of full disclosure**

10. In paragraph 13 of its Response, the Defence for Accused Kallon argues that "the grounds canvassed by the Prosecution in support of its Motion – the interest of justice, enhancing judicial economy, consistency in jurisprudence and in the conduct of the judicial process have not been substantiated". The Defence bases this argument on the assertions that there has not been full disclosure; that the Prosecution witness lists are not final; and, that different witnesses refer to different factions or generally to "armed men".

11. In paragraph 14 of its Response, the Defence for Accused Kallon argues that "the Prosecution Motion is premature and incompetent in the absence of full disclosure". It subsequently argues that the Motion "leaves the Chamber to speculate on the actual number of common witnesses the Prosecution intends to call."

12. With respect to the Defence argument that there has not been full disclosure, the Prosecution reasserts that, in accordance with its obligations, it has disclosed to the Defence redacted statements of witnesses. The Prosecution submits that the redacted parts contain evidence which reveal the identity of witnesses and is therefore immaterial to the analysis in the determination for a concurrent hearing. Further, the Defence also has available a summary of the facts on which each witness will testify and the points in the indictment on which each witness will testify, which the Prosecution filed.

13. The Prosecution further submits that the full statements and identities of the Prosecution witnesses will be revealed to the Defence forty-two days before the appearance of the

witnesses pursuant to the Trial Chamber's various witness protection decisions. Hence, the Defence within a timely fashion could assess whether the testimony of a certain witness could be detrimental to their defence due to risks of mutual recriminations, or conflicts in defence strategies, and apply to the Chamber asking for a severance of that witness' testimony from the concurrent hearing.

14. With relation to the Defence argument that the Prosecution witness lists are not final, the Prosecution submits that the Defence argument is irrelevant as final lists are not necessary in order to address the fundamental issue of the Motion. The precise number of witnesses has no bearing on the Court's decision on the principle of whether to undertake the measure of a concurrent hearing. Furthermore, the Prosecution submits that the lists adequately reflect the proportion of common 'crime base' witnesses out of the total number of witnesses.

15. Regarding the Defence argument that different witnesses refer to different factions or generally to "armed men", the Prosecution submits that while this may be true, it does not justify denying the Motion. First, in the course of the requested concurrent hearing only 'crime base' evidence will be presented. This evidence will go to proving the existence and nature of the crimes committed. Second, one of the Prosecution's theory, as known to the Chambers and Defence, is that the RUF and AFRC participated in a joint criminal enterprise. Accordingly, the Prosecution will demonstrate, in both trials, that all crimes linked to one faction may be imputed to the other.

**'Crime base' evidence is relevant albeit not directly implicating Accused**

16. The Defence for Accused Sesay submits, in paragraph 21 of its Response, that if, as stated in the Prosecution Motion, the evidence to be presented in the concurrent hearing is 'crime base' evidence which does not directly implicate the Accused, then it should be deemed irrelevant, rendering the Prosecution Motion 'otiose'.

17. The Prosecution reiterates the point made in paragraph 20 of its Motion that the 'crime base' evidence which will be presented in the concurrent hearing is not evidence of direct acts or direct participation by any of the Accused individuals, or of their relationship to perpetrators of crimes. This 'crime base' evidence, however, demonstrates the nature and

scope of crimes committed, and when combined with further evidence to be presented in the context of each of the two separate trials, will establish the individual criminal responsibility of each of the Accused under Article 6(1) or Article 6(3). The evidence to be presented in the concurrent hearing is therefore clearly relevant to the proceedings and the Motion is therefore an appropriate one.

**Granting Prosecution motion would not have the result of a joint trial**

18. In paragraph 28 of the Response of the Defence for Accused Sesay and in paragraph 12 of the Response of Defence for Accused Kallon, it is submitted that what the Prosecution is requesting is a joint trial. The Prosecution denies that granting its Motion will result in a joint trial, as what is requested is the mere joining of the physical occurrence during the course of which all 'crime base' evidence that is common to both trials will be heard. This evidence will not directly implicate any of the Accused individuals in the commission of crimes, in contrast to the situation of a joint trial. Furthermore, it is 56% of the witnesses whose evidence is requested to be concurrently presented, whereas in the situation of a joint trial - all evidence is presented concurrently.

19. The Prosecution stresses that without a common hearing this common 'crime base' evidence will be presented twice in the exact same form, once in each trial, causing the unnecessary prolongation of each trial. Further, the potential for inconsistencies in verdicts is greater if the same evidence were to be heard and decided by 2 different chambers.

**Concurrent hearing will neither lengthen trial process nor inconvenience Defence Counsel**

20. As to the schedule or arrangement of the trials, it is the Prosecution's submission that the Defence for Sesay in paragraph 26 of their Motion fails to appreciate the Chamber's ability to set up a schedule which would take into account the needs of the parties. For instance, the trials could be scheduled for blocks of time with breaks in between.

21. In paragraph 18 of the Response of the Defence for Kallon, it is argued that "concurrent hearing of evidence in a joint-sessions trial will cause unreasonable delay in the proceedings". The Defence bases its argument on its subsequent assertion that "any

adjournment of the trial requested and granted in respect of any one of the Accused persons in the proceedings at any given time would result in an adjournment of the trial as a whole". The Prosecution submits that this argument has no foundation and is based on a hypothesis. Further, the hypothetical adjournment referred to by the Defence is intrinsic to any proceeding involving a single trial of multiple defendants and is not inherent ot the conduct of the requested concurrent hearing. Ultimately, the Trial Chamber controls the proceedings and will decide on requests for adjournments.

22. The Prosecution reasserts, in accordance with its submissions in the Motion, that over one hundred and fifty (150) witnesses are common to both cases. Rejecting the Prosecution Motion will result in calling over one hundred and fifty (150) witnesses twice, to testify before the Special Court at two different occasions, with relation to the exact same evidence. It is therefore evident that conducting a concurrent hearing of common witnesses will promote judicial economy and expedite proceedings, even if the testimony of several of these witnesses were to be severed from the concurrent hearing.

23. The Prosecution further submits that any adjournment of the trial due to considerations pertaining to any one of the Accused individuals, would not substantially prolong the proceedings and in any event would be outweighed by the time and resources conserved by enabling a concurrent hearing.

24. The rest of the remarks made by the Defence for Sesay concerning its resources are immaterial and irrelevant to the legal issue of whether or not to grant a motion for concurrent hearing. The Prosecution adds that prior to taking up the assignment to defend an accused person before the Special Court, the Defence knew or should have known of the extent of its resources.

**Judicial consistency and the conduct of the judicial process are not threatened**

25. In paragraph 19 of its Response, the Defence for Kallon argues that "[o]n the issue of judicial consistency and enhancing the conduct of the judicial process, it is submitted that these may well be threatened rather than enhanced in the very unlikely event that the Chamber is minded to depart from its previous stance on the Joinder Motions and if, when

the suggested applications for severance were to be made by the Defence different decisions were given on a case by case approach".

26. As mentioned above, the Prosecution asserts that conducting a concurrent hearing of the common 'crime base' evidence is a completely different notion than the concept of a joint trial. Hence, in the event the Court grants the Prosecution Motion, this decision will not contradict its decision against a joint trial nor infringe on the rights of the accused persons.

27. With relation to the Defence argument that applications for severance may entail inconsistent decisions, the Prosecution submits that the Defence argument lacks foundation, and that there is no reason to assume that the Court's approach will be inconsistent with relation to different witnesses whose testimony was the subject matter of a severance application.

28. Furthermore, the Prosecution submits, that such a potential inconsistency in the Court's approach has no bearing on the fundamental decision with relation to the request made in its Motion.

**References to different factions by common witnesses do not create likelihood of conflict and mutual recrimination**

29. In paragraph 20 of its Response, the Defence for Kallon argues that "[a]n examination of the Summaries annexed to the Motion dramatically demonstrates the real likelihood of conflict and mutual recriminations between the RUF and AFRC accused persons. Some allege the misconduct was engaged by AFRC and RUF personnel, others allege misconduct by "AFRC", "SLA", "EX-SLA" or "RUF", while still others only identify the alleged wrongdoers as "rebels", "armed men" soldiers". The Defence also submits that "in each of these circumstances the prospects of conflict and running cut-throat defences in a joint-sessions trial becomes potent and which will prove inimical to the guaranteed rights of the Accused to a fair trial under the Statute of Court and the Rules."

30. Such potential conflict does not prevent conducting a concurrent hearing of the 'crime base' witnesses common to both the RUF and the AFRC cases. First, the Prosecution submits that under international law, concurrent presentation of evidence relating to

several Accused individuals does not *per se* constitute a conflict of interests.[2] The Trial Chamber, in its Decision of 27 January 2004, explicitly endorsed this principle, considering it to be among the "*specific principles* on the question of joinder" that were established in the jurisprudence of the ICTY and ICTR.[3] Second, the Prosecution is requesting the concurrent hearing of witnesses who will only present evidence as to the nature and scope of the crimes committed, without directly implicating any of the Accused in the perpetration of these crimes. If the Prosecution Motion is not granted, these witnesses will testify twice, in two separate trials, as to the exact same evidence. It will then be up to the Parties to prove the relation of the Accused to these crimes. Hence, a potential conflict in defence strategies is a consideration which should be taken into account in the event evidence linking the Accused individuals to the perpetration of crimes were to be presented concurrently. The Prosecution submits, however, that in the case of 'crime base' evidence, such conflict does not exist and should therefore not bar the granting of the Prosecution Motion.

31. The Prosecution submits that under Rule 48(C), it is the 'same transaction' test which is decisive for the requested common hearing. The Trial Chamber in its decision of 27 January 2004, agreed that the Indictments charge all six Accused persons with crimes committed in the course of the same "transaction".[4] Rule 48(C) permits the Trial Chamber to order a concurrent hearing of witnesses common to Accused persons who were separately indicted if they are accused of crimes committed in the course of the same transaction.

32. With regard to the references made by witnesses to different factions, the Prosecution reminds that its theory is that the RUF and AFRC participated in a joint criminal enterprise and reassert that it will demonstrate, in both trials, that all crimes linked to one faction may be imputed to the other.

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[2] *Prosecutor v. Kovacevic et al*, IT-97-24-AR73, Decision on Motion for joinder of Accused and Concurrent Presentation of Evidence, 14 May 1998 ("*Kovacevic* Decision on Joinder, 14 May 1998"). This case was filed as Annex 1 to Prosecution's Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, dated 30 April 2004.

[3] Joinder Decision, 27 Jan. 2004, paras. 28-29.

[4] Joinder Decision, 27 Jan. 2004, paras. 34.

## III. CONCLUSION

33. The Prosecution reaffirms that it is in the overall interest of justice and in the best interest of the Accused to have a concurrent hearing, as such a hearing will facilitate expediency of the proceedings.

34. The Prosecutor submits that for the foregoing reasons, the Trial Chamber should dismiss the Responses of the Defence, grant the Prosecution's Motion and order, pursuant to Rule 48(C), that one hearing be held where 'crime base' 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) will be presented concurrently.

Freetown, 7 May 2004

For the Prosecution,

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Robert Petit