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SCSL-2004-16-PT
(5269-5275)

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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: 5 May, 2004

THE PROSECUTOR

Against

**ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU**

Case No. SCSL – 2004 – 16 – PT

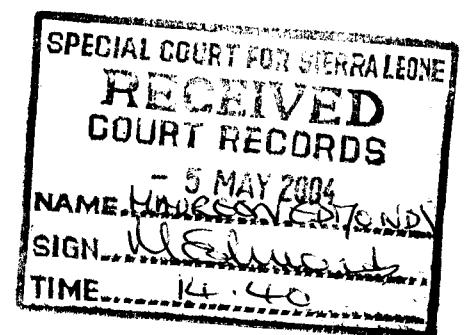
**REPLY TO DEFENCE RESPONSE TO PROSECUTION'S MOTION FOR
CONCURRENT HEARING OF EVIDENCE COMMON TO CASES SCSL-15-PT AND
SCSL-2004-16-PT**

Office of the Prosecutor:

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The Prosecution files this reply to the Defence Response to 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 a Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT ("Motion"). On 4 May 2004 Counsel for Kanu ("Accused") filed a response ("Response") requesting the Trial Chamber to deny the Prosecution Motion. The Prosecution files this reply to the Defence Response.

II. DEFENCE SUBMISSIONS

2. The Defence bases its objections on the assertions that granting the Prosecution Motion infringes the object and purpose of the Trial Chamber's "Decision and Order on Prosecutor Motion for Joinder", dated 27 January 2004, which is to prevent the derogation of the rights of the Accused in light of potential conflict in defence strategies and mutual recrimination between RUF and AFRC members; that severing the testimony of a particular witness from the concurrent hearing in accordance with the suggestion made in paragraph 21 of the Prosecution Motion is insufficient to safeguard the rights of the Accused; that granting the Prosecution Motion would have the result of a joinder of the trials; and, that granting the Prosecution Motion would infringe the principle of individual criminal responsibility, since concurrent presentation of evidence could transgress into the presentation of collective responsibility.

III. ARGUMENTS

Object and purpose of "Decision and Order on Prosecutor Motion for Joinder" is not infringed

3. In paragraph 3 of its Response, the Defence argues that "granting this Motion infringes the object and purpose of the Trial Chamber's 'Decision and Order on Prosecutor Motion for Joinder' ("**Decision**") from January 27, 2004". The Defence essentially bases its argument, in paragraphs 4 to 6 of its Response, on the fact that the Decision recognizes the potential conflict of defence strategies between the RUF and AFRC defences, as well as the possibility of mutual recrimination between members of the two groups, derogating from the rights to which each Accused is entitled in the context of separate trials. On this basis, in its Decision, the Trial Chamber refused to jointly try RUF members with AFRC members. The Defence in its Response asserts that a concurrent hearing of witnesses common to both the RUF and the AFRC cases, should also be rejected on the bases of potential conflict of defence strategies.
4. The Prosecution denies that potential conflicts in defence strategies prevents 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.¹ 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.² 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, and present the same exact 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.

Severance of the hearing of a particular witness is a sufficient safeguard

5. In paragraph 7 of its Response, the Defence submits that the measure suggested in paragraph 21 of the Prosecution Motion provides an insufficient safeguard to protect the rights of the individuals Accused or the interest of justice. The Prosecution disagrees with the Defence’s position. First, the Prosecution re-asserts that the rights of the individuals Accused or the interest of justice will not be adversely affected by the concurrent hearing. However, in the event there is an exception to this general rule, and a specific testimony may adversely affect the rights of the Accused or the interest of justice, then the defence may undertake the measure suggested in paragraph 21 of the Prosecution Motion.
6. The Prosecution, in paragraph 21 of its Motion, suggested that “if in the view of the Defence, due to risks of mutual recriminations, or conflicts in defence strategies, the examination of a certain witness may adversely affect either the rights of the Accused or the interest of justice, the Defence could apply to the Chamber for a severance of the

¹ *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.

² Joinder Decision, 27 Jan. 2004, paras. 28-29.

hearing of that particular witness from the concurrent presentation of common evidence.”

The Prosecutions submits that the Defence has in its possession a summary of the facts on which each witness will testify and the points in the indictment on which each witness will testify, as well as the redacted statements made by Prosecution witnesses. The Prosecution further submits that the identity of, as well as the full statements made by, the Prosecution witnesses will be revealed to the Defence forty two days before the appearance of such witnesses, pursuant to the Trial Chamber’s various witness protection decisions. Hence, any defence counsel could easily and in a timely fashion assess whether in a specific case the testimony of a certain witness could be detrimental to their defence case 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.

Granting the Prosecution Motion would not have the result of a joinder of the trials

7. In paragraph 8 of its Response, the Defence expresses the view that “granting the Prosecution Motion would thus indirectly have the result, at least for a major part, of a joinder of trials, which was deemed against the interest of the Accused in the Decision on the Prosecution’s motion for joinder.” The Prosecution denies that granting its Motion will generate this effect, as what is requested is the mere joining of the physical occurrence in the course of which the ‘crime base’ evidence which is common to both trials will be heard. This evidence will not specifically relate to any of the Accused individuals. 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. Moreover, the Prosecution stresses that in the event its Motion is not granted, this evidence will be presented twice, once in each trial, hence causing the prolongation of each trial.

Granting the Prosecution Motion would not infringe on the principle of individual criminal responsibility

8. In paragraph 9 of its Response, the Defence submits that “granting the Prosecution Motion would infringe the principle of individual criminal responsibility”. The

Prosecution denies that granting its Motion will generate this effect, as what is requested is the concurrent presentation of ‘crime base’ evidence. Subsequently and separately, in each of the two cases, the Prosecutor will present evidence demonstrating the relationship between each individual Accused and the commission of the crimes described by the ‘crime base’ evidence thereby establishing the individual criminal responsibility of each of the Accused. Without proving the ‘link’ between the Accused and the crimes, these crimes may not be attributed to the Accused and the Chamber may not convict the Accused. Accordingly, it is the Prosecution submission, that there is no risk of infringing the principle of individual responsibility by concurrently hearing the common witnesses who will merely present ‘crime base’ evidence.

9. The Defence bases its assertion on the “risk that no clear distinction will be made between the purported individual criminal responsibility of each accused within each group. Such concurrent presentation of evidentiary topics ... may easily transgress into the presentation of some kind of collective responsibility, which notion is not accepted within international criminal law”. The Prosecution submits that the Defence argument is without foundation and re-asserts that the evidence which is requested to be presented concurrently is merely ‘crime base’ evidence which does not go to the criminal responsibility of the Accused. Hence, there is no risk of attempting to establish any form of collective responsibility. The evidence related to these witnesses will have to be linked to the individual criminal responsibility of each Accused during separate hearings.

The Prosecution meets the “same transaction” test

10. In paragraph 8 of its Response, the Defence argues that “[t]he argument with respect to the ‘same transaction’ that would underlie the charges of both the AFRC and the RUF defendants, cannot be deemed decisive for the requested concurrent hearing.”
11. The Prosecution disagrees with the Defence and submits that under Rule 48(C), it is exactly 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”.³ Rule 48(C) permits the Trial Chamber to order a concurrent hearing of witnesses common

³ Joinder Decision, 27 Jan. 2004, paras. 34.

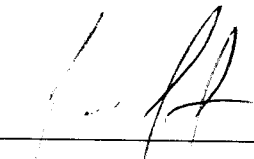
to Accused persons who were separately indicted if they are accused of crimes committed in the course of the same transaction.

III. CONCLUSION


12. The Prosecution reaffirms that it is in the overall interest of justice and in the best interest of the Accused to grant the Prosecution Motion thereby promoting the expedition nature of the proceedings, as stated in its Motion.
13. For the foregoing reasons the Prosecution respectfully requests that the Trial Chamber grant its Motion and dismiss the Defence Response.

Freetown, 5 May 2004

For the Prosecution,



Luc Cote



Robert Petit