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SCSL-2003-07-PT
(1708-1713)
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

1708

IN THE APPEALS CHAMBER

Before: Judge Robertson, President
Judge King, Vice President
Judge Ayoola
Judge Winter
Judge [Unknown at time of filing]

Registrar: Mr Robin Vincent

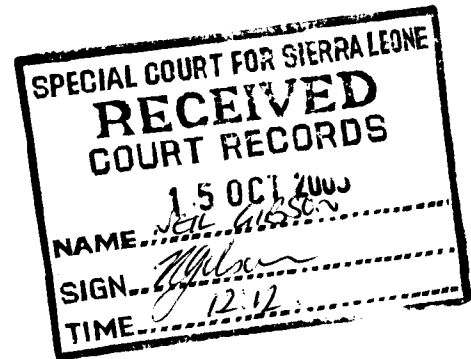
Date filed: 15 October 2003

THE PROSECUTOR

Against

MORRIS KALLON

CASE NO. SCSL – 2003 – 07 – PT



PROSECUTION RESPONSE TO THE DEFENCE
“APPLICATION TO STAY DETERMINATION OF ALL PRELIMINARY
MOTIONS – DENIAL OF RIGHT TO APPEAL”

Office of the Prosecutor:

David M. Crane, The Prosecutor
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Defence Counsel:

James Oury, Co-Counsel
Steven Powles, Co-Counsel

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I. INTRODUCTION

1. The Prosecution files this response to the Defence preliminary motion entitled “Application to Stay Determination of all Preliminary Motions – Denial of Right to Appeal” (the “**Application**”), filed on behalf of Morris Kallon (“the **Accused**”) on 8 October 2003.¹
2. At paragraph 6, the Defence Motion simply seeks to join and adopt the submissions made on behalf of Samuel Hinga Norman in “Application to Stay Determination of all Preliminary Motions – Denial of Right to Appeal”, filed 2 October 2003 (Norman Application). The Prosecution submits that the Defence Application does not present any submissions within the pleading itself and is therefore not an acceptable practice to address issues before the Court. All issues raised should be fully argued within the motion itself. The Prosecution finds itself in the position to assume that the arguments raised by the Norman Application are adopted in their entirety by the Defence and therefore must essentially reiterate its submissions made in its Response

¹ Registry Page 1380 - 1383.

to the Norman Application, “Prosecution Response to the Defense ‘Application to Stay Determination of all Preliminary Motions – Denial of Appeal’”, filed 13 October 2003.

3. Therefore, the Prosecution assumes that the Defence:

- a) Argues that requiring all preliminary motions relating to jurisdiction be referred by the Trial Chamber to the Appeals under Rule 72 of the Rules of Procedure and Evidence (the “**Rules**”) is contrary to and in breach of Article 14(5) of the International Covenant on Civil and Political Rights (“**ICCPR**”) and international human rights norms;
- b) Argues that the hearing at first instance by the Appeals Chamber of preliminary motions relating to jurisdiction is *ultra vires* of Article 20 of the Statute of the Special Court for Sierra Leone (the “**Statute**”), which provides for the jurisdiction of the Appeals Chamber, and not included within the inherent jurisdiction of the Appeals Chamber;
- c) Argues that the amendment to Rule 72 requiring the referral by the Trial Chamber to the Appeals Chamber of all Preliminary Motions relating to jurisdiction is outside the power to amend permitted under Article 14 of the Special Court for Sierra Leone;
- d) Requests a stay of the determination of all preliminary motions filed on behalf of the accused pending determination by the Trial Chamber concerning the *vires* of the proposed procedure; a stay of all time limits pursuant to Rule 72 (G);
- e) Requests further or alternatively a declaration that the amendment to Rule 72 agreed at the August plenary session of the judges of the Special Court for Sierra Leone is *ultra vires* the Statute of the Special Court and/or violates the ICCPR and basic international human rights norms.

II. BACKGROUND

4. The Defence Application is based on an amendment to Rule 72 adopted by a plenary session of the judges of the Special Court in August 2003. Rule 72 was amended to require that preliminary motions “which raise a *serious* issue relating to jurisdiction

shall be referred to the Appeals Chamber” (See Rule 72(E)). During discussion for this proposed amendment, the Prosecution, joined by the Defence Office, voiced its opposition to this proposed amendment indicating that such fundamental issues as jurisdiction should have the possibility to be decided by all the judges of the Special Court.

III. ARGUMENT

5. The title of the Defence Application, “Application to Stay Determination of all Preliminary Motions – Denial of Right to Appeal”, is misleading when you look at the orders sought in paragraphs 8 and 9. On the one hand, in paragraph 8, the Defence seeks a stay “*pending determination of a motion in the Trial Chamber*”. On the other hand, in paragraph 9, the Defence seeks the same declaration from the Appeals Chamber that was asked of the Trial Chamber in an identical motion titled “Motion – On Denial of Right to Appeal”, filed 8 October 2003. It seems inconsistent to seek the same relief from both Chambers at the same time. While the application for stay of the determination of all preliminary motions pending before the Appeals Chamber and for a stay of all time limits pursuant to Rule 72(G) is properly filed before the Appeals Chamber, the request for a declaration that Rule 72 is *ultra vires* is a matter that falls within the competence of the Trial Chamber in the first instance.

A. Defence request for declaration that Rule 72 is *ultra vires*

6. From the outset, the Prosecution argues that the Appeals Chamber should decline jurisdiction to adjudicate on the issue of the legality of Rule 72 (the *ultra vires* argument) since the Defence has properly filed before the Trial Chamber on 8 October 2003 on behalf of Morris Kallon a “Motion – On Denial of Right to Appeal” that seeks the same Order of a declaration that Rule 72 is *ultra vires*. (See “Prosecution Response to the ‘Defence Motion – On Denial of Right to Appeal’”, filed before the Trial Chamber, 15 October 2003).
7. The Prosecution submits that the Defence request for a declaration that Rule 72 is *ultra vires* of the Statute and/or violates the ICCPR and basic international human rights norms falls within the jurisdiction of the Trial Chamber as the first instance

Chamber to decide this issue (See, for example, “Urgent Application for Release from Provisional Detention” in the *Prosecutor Against Moinina Fofana*, SCSL-2003-11-PD-007, 11 June 2003). The only way for the Appeals Chamber to be properly seized of this issue is through a referral by the Trial Chamber under Rule 72 or by leave to appeal after a decision of the Trial Chamber under Rule 73.

8. The Prosecution contends that there are no provisions in the Rules for the Appeals Chamber to hear in the first instance a defence motion challenging the legality of a Rule, except through a referral order by the Trial Chamber. The Defence or the Prosecutor, by merely addressing a request to the Appeals Chamber and asking for certain relief cannot cause the Appeals Chamber to be legally seized of an issue when the Rules do not provide for such a procedure. This request clearly falls within the ambit of the Rules and must be disposed of by the Trial Chamber under the procedures set forth in the Rules.

B. Application to Stay

9. The Defence has requested that the Appeals Chamber grant a stay “of the determination of all preliminary motions filed on behalf of the accused pending determination of the motion in the Trial Chamber concerning the *vires* of the proposed procedure” and “of all time limits pursuant to Rule 72 (G)”. The Prosecution submits that it is within the authority of the Appeals Chamber to grant a stay for the Preliminary Motions filed on behalf of the Accused that are currently before the Appeals Chamber. Rule 72 (G) provides:

Where the trial Chamber refers a motion to the Appeals Chamber pursuant to Sub-Rules (E) or (F) . . . any extension of time may be granted by the Appeals Chamber.

Clearly, the Defence requested stay for Preliminary Motions before the Appeals Chamber is within the ambit of this provision.

IV. CONCLUSION

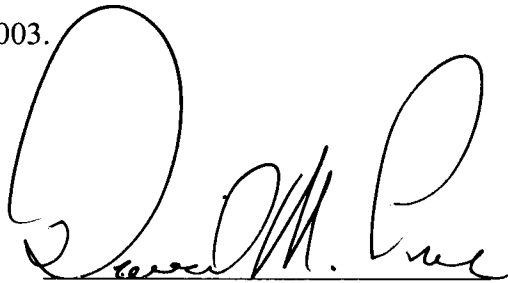
10. The Defense request for a declaration from the Appeals Chamber that the amendment to Rule 72 is *ultra vires* of the Statute and/or violates the ICCPR and basic

international human rights norms is outside the jurisdiction of the Appeals Chamber and should not be considered by Appeals Chamber.

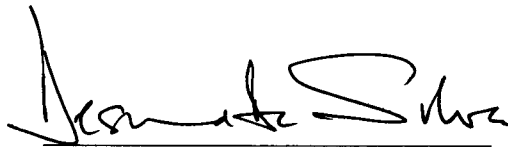
11. However, the Prosecution believes that the Defence Application to the Appeals Chamber for a stay of the determination of the Preliminary Motions currently before the Appeals Chamber until there is a final Decision issued on the Defence Application relative to the legality of Rule 72, as amended, is reasonable. Although the Prosecution argues in its Response to the Defence Motion before the Trial Chamber that it is within the authority of the Judges to amend Rule 72 as they have done, the Prosecution maintains the position that serious issues of jurisdiction are such fundamental questions that they should have the possibility to be decided by all eight judges of the Special Court. This position is consistent with the procedures before the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.

Freetown, 15 October 2003.

For the Prosecution,



David M. Crane
The Prosecutor



Desmond de Silva, QC
Deputy Prosecutor



Luc Côté
Chief of Prosecutions