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SCSL-2003-07-PT
(1183-1191)

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SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge
Judge Pierre Boutet
Judge Mutanga Itoe

Registrar: Robin Vincent

Date: 29th day of September 2003

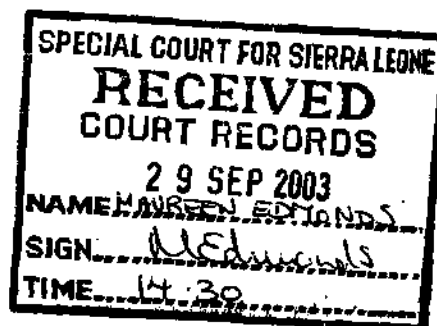
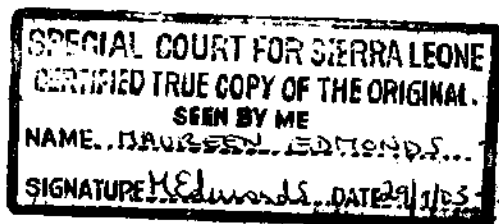
The Prosecutor against

Morris Kallon
(Case No.SCSL-2003-07-PT)

**DECISION ON THE MOTION FOR LEAVE TO APPEAL ORDER ON THE
DEFENCE APPLICATION FOR EXTENSION OF TIME TO
FILE REPLY TO PROSECUTION RESPONSE TO THE FIRST DEFENCE
PRELIMINARY MOTION (LOMÉ AGREEMENT)**

Office of the Prosecutor:
Mr. Luc Côté, Chief of Prosecutions

Defence Counsel:
Mr. James Oury
Mr. Steven Powles



THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court")

SITTING as the Trial Chamber ("the Chamber"), composed of Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet, and Judge Benjamin Mutanga Itoe;

CONSIDERING the Defence Preliminary Motion Based on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by Lomé Accord of the 16th day of June 2003 ("the First Preliminary Motion (Lomé Agreement)") and the Prosecution Response thereto of the 23rd day of June 2003 ("the Response to the First Preliminary Motion (Lomé Agreement)");

CONSIDERING the Defence Application for Extension of Time to File Reply to Prosecution Response to the First Defence Preliminary Motion (Lomé Agreement) of the 30th day of June 2003 ("the Application for Extension of Time"), the Prosecution Response thereto of the 4th day of July 2003, and the consequential Defence Reply thereto of the 9th day of July 2003;

CONSIDERING the Defence Request of Order for Disclosure from the Prosecution of the 9th day of July 2003 ("the Request for Disclosure");

CONSIDERING the Order on the Defence Application for Extension of Time to File Reply to Prosecution Response to the First Defence Preliminary Motion (Lomé Agreement) of the 16th day of July 2003 ("the Order on Extension of Time"), dismissing "the Application for Extension of Time" and declaring "the Request for Disclosure" moot;

SEIZED of the Defence Motion for Leave to Appeal "Order on the Defence Application for Extension of Time to File Reply to Prosecution Response to the First Defence Preliminary Motion (Lomé Agreement) of the 24th day of July 2003 ("the Motion"), the Prosecution Response thereto of the 31st day of July 2003 ("the Response") and the consequential Defence Reply of the 4th August 2003 ("the Reply");

CONSIDERING the Decision of the 14th day of June 2003 dismissing the Defence Motion for an Extension of Time to File Preliminary Motions;

CONSIDERING the Order on the Defence Further Application for Extension of Time to File Preliminary Motions of the 9th day of July 2003;

CONSIDERING the Order on the Defence Application for Extension of Time to File Reply to the Prosecution Response to Preliminary Motions of the 24th day of June 2003 and the subsequent Order on Time Limits to File Reply to the Prosecution Response to the Preliminary Motions of the 27th day of June 2003;

CONSIDERING the Order on the Defence Request for *Subpoena Duces Tecum* on the 24th day of September 2003;

CONSIDERING FURTHER the Defence Preliminary Motion Based on Lack of Jurisdiction: Establishment of the Special Court Violates Constitution of Sierra Leone of the 16th day of June 2003;

CONSIDERING the entire provisions of Rule 72 and Rule 73 of the Rules of Procedure and Evidence ("the Rules") as applicable at the time of filing of "the Motion" and as consequently amended pursuant to the 3rd Plenary Meeting of the Special Court ("the 3rd Plenary Meeting") on the 1st day of August 2003;

NOTING THE SUBMISSIONS OF THE PARTIES

The Defence Motion

1. Pursuant to Rule 73 (B) of "the Rules", the Defence seeks leave to appeal "the Order on Extension of Time" on the ground that reconsideration from the Appeals Chamber of such order is vital and without doubt very much in the interest of a fair and expeditious trial as guaranteed by Article 17 of the Statute of the Special Court ("the Statute").
2. The Defence, in fact, asserts that "the Order on Extension of Time" is flawed and denies Morris Kallon ("the Accused") his fundamental right to adequate time and facilities for the preparation of his defence in that "the Chamber" rejected its request for extension of time to obtain a body of various documents from the Government of Sierra Leone and the Office of the Prosecutor and, consequently, precluded the Defence to formulate a comprehensive reply to the Prosecution "Response to the First Preliminary Motion (Lomé Agreement)".
3. In particular, the Defence disputes "the Chamber"'s reasoning on the "Order on Extension of Time" asserting that:
 - (i) Many of the sought documents are not in the public domain and the Defence should therefore be granted the opportunity to obtain all such documents;
 - (ii) As explained in the "Application for Extension of Time" the importance of the sought documents was clear. The Defence attempted to explain the necessity and importance of such documents in the most concise and clear manner that it could with a view not to overburden "the Chamber" with a verbose and lengthy application. Moreover, these documents would have enabled the Defence to rebut several assertions raised by the Prosecution in its "Response to the First Preliminary Motion (Lomé Agreement)";

(iii) "The Chamber" has no insight whatsoever into what the Defence seeks to put into its reply to the Prosecution "Response to the First Preliminary Motion (Lomé Agreement)";

4. Lastly, the Defence also submits that "the Chamber" will ultimately rule on the Defence "First Preliminary Motion (Lomé Agreement)" and whichever party loses could subsequently seek leave from the same "Chamber" to appeal such decision and further argues that leave will then almost certainly be granted on the basis of being "a substantial issue relating to jurisdiction". Consequently, at that appeal stage the Defence will still need sight of the requested documents in order to advance its argument before the Appeals Chamber.

The Prosecution Response

5. In its "Response", the Prosecution submits that the "Order on Extension of Time" was valid, reasoned and in accordance with applicable international law and, more particularly, with "the Rules";

6. The Prosecution further submits that, contrary to the Defence arguments, nowhere within the relevant filed pleadings had the Defence provided an explanation as to the relevance of the sought documents. According to the Prosecution, the Defence "does not assert any new grounds to support the allegation that the Chamber erred in its findings, but rather re-states that the documents sought are necessary for its reply".

The Defence Reply

7. In its "Reply", the Defence reiterates that it is incontrovertible that the documents it requests are of fundamental importance to the furtherance of its case and it is therefore clearly in the interest of a fair trial that the defence is granted access to the documents before filing a reply to the Prosecution "Response to the First Preliminary Motion (Lomé Agreement)".

AFTER HAVING DELIBERATED:

Background

8. As mentioned in the foregoing, the Defence filed on the 16th day of June 2003 its "First Preliminary Motion (Lomé Agreement)", to which the Prosecution responded on the 23rd day of June 2003;

9. After having been granted extensions of time to file its reply to the Prosecutor Response to "the First Preliminary Motion (Lomé Agreement)" on the 24th and on the 27th day of June 2003, the Defence, on the 30th day of June 2003, sought with its "Application for Extension of Time" to be granted additional extension of time to file such reply on the basis that it was seeking to obtain a body of various documents pertaining to the Lomé Accord from both the Prosecution and the Government of Sierra Leone. To this aim, the Defence further filed, respectively, "the Request for Disclosure" and "the Request for Subpoena Duces Tecum".

10. With its "Order on Extension of Time", this "Chamber" dismissed the Defence "Application for Extension on Time" and, furthermore, declared "the Request for Disclosure" moot. Subsequently, "the Chamber", with its "Order on the Request for Subpoena Duces Tecum", dismissed "the Request for Subpoena Duces Tecum".

11. In its "Order on Extension of Time", "the Chamber" found that the Defence "Application for Extension of Time" was not supported by neither any exceptional circumstance nor any good cause in that, *inter alia*, the nature of the documents which disclosure was sought for its reply were very broad and vague, there was no peremptory causation between the sought documents and the Prosecution "Response to the First Preliminary Motion (Lomé Agreement)" the Defence intended to reply to and, lastly, that the Defence sought to introduce new elements or issues that the Defence itself failed to directly address in its "First Preliminary Motion (Lomé Agreement)".

On the Applicable Law

12. At the times the Defence filed its "Motion" the applicable provisions of Rule 73 (B) of "the Rules" on the leave to appeal decisions rendered by "the Chamber" read as follows:

"Decisions on such motions are without interlocutory appeal save where leave is granted by the Trial Chamber on the grounds that a decision would be in the interest of a fair and expeditious trial".

13. At "the 3rd Plenary Meeting", these provisions have been consequently amended as follows:

"Decisions on such motion are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a staying of proceedings unless the Trial Chamber so orders".

14. The amendments have introduced a more restricted test for "the Chamber" in granting leave to an interlocutory appeal on decision.

15. Furthermore, at the times the Defence filed its "Motion" the applicable provisions of Rule 72 of "the Rules" on the determination of preliminary motions read as follows:

(A) *Preliminary motions by either party shall be brought within 21 days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(i).*

(B) *Preliminary motions by the accused are:*

(i) *Objections based on lack of jurisdiction;*

(ii) *Objections based on defects in the form of the indictment;*

(iii) *Applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82 (B);*

(iv) *Objections based on the denial of request for assignment of counsel; or*

(v) *Objections based on abuse of process.*

(C) *The Trial Chamber shall, except as provided by (D) and (E) below, dispose of preliminary motions before the trial, and such decisions shall not be subject to interlocutory appeal.*

(D) *Preliminary or other motions made in the Trial Chamber prior to the Prosecutor's opening statement, if in the opinion of that Chamber, they raise:*

(i) *a substantial issue relating to jurisdiction; or*

(ii) *an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings,*

may be referred to the Appeals Chamber, where they will proceed to a determination as soon as practicable.

(E) *The Trial Chamber shall certify the issue for appeal, which will proceed if, within seven days of such certification, any party files a notice of appeal. Such notice shall not operate as a stay of the Trial proceedings unless the Trial Chamber so orders.*

(F) *Failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.*

(G) *Objections to the form of the indictment, including an amended indictment, shall be raised by a party in one motion only, unless otherwise allowed by a Trial Chamber.*

16. "The 3rd Plenary Meeting" also repelled these provisions and issued the following:



(A) *Preliminary motions by either party shall be brought within 21 days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(i).*

(B) *Preliminary motions by the accused are:*

- (i) *Objections based on lack of jurisdiction;*
- (ii) *Objections based on defects in the form of the indictment;*
- (iii) *Applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82 (B);*
- (iv) *Objections based on the denial of request for assignment of counsel; or*
- (v) *Objections based on abuse of process.*

(C) *Objections to the form of the indictment, including an amended indictment, shall be raised by a party in one motion only, unless otherwise allowed by the Trial Chamber.*

(D) *The Trial Chamber shall, except as provided by Sub-Rules (E) and (F) below, dispose of preliminary motions before the trial, and its decisions thereon shall not be subject to interlocutory appeal.*

(E) *Preliminary motions made in the Trial Chamber prior to the Prosecutor's opening statement which raise a serious issue relating to jurisdiction shall be referred to the Appeals Chamber, where they will proceed to a determination as soon as practicable.*

(F) *Preliminary motions made in the Trial Chamber prior to the Prosecutor's opening statement which, in the opinion of the Trial Chamber, raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial shall be referred to the Appeals Chamber, where they will proceed to a determination as soon as practicable.*

(G) *Where the Trial Chamber refers a motion to the Appeals Chamber pursuant to Sub-Rules (E) or (F) above,*

- (i) *the party who filed the motion shall file any additional written submission within 14 days of the date of the reference to the Appeals Chamber;*
- (ii) *any response to submissions filed under Sub-Paragraph (i) above shall be filed within 14 days;*
- (iii) *any reply to the response shall be filed within 7 days.*

Any extension of time may be granted by the Appeals Chamber.

(H) *References by the Trial Chamber pursuant to Sub-Rules (E) and (F) above shall not operate as a stay of proceedings. Such references shall not operate as a stay of the trial itself unless the Trial or Appeal Chamber so orders.*

(I) *This Rule shall be deemed to have entered into force on the 7th of March, 2003.*

17. In accordance with Rule 6 (D) of "the Rules", these amendments entered into force immediately. "The Chamber", however, finds that, at the time of filing its "Motion", the Defence was unaware of these changes in the procedure for both the determination of preliminary motions and for an application for leave to appeal decisions rendered before this "Chamber" and could not foresee them. However, in fairness for the Accused, "the Chamber" is of the opinion that in the present case the less stringent test that existed at the time of filing "the Motion" for the granting of leave to appeal a "Chamber" decision shall apply to the instant application.

On the merits of the Motion

18. This "Chamber" is mindful of the fundamental rights of "the Accused" to a fair trial and to be tried without undue delay as such rights are reflected in "the Statute". However, it should be noted that there are also obligations for the parties to the proceeding to proceed expeditiously.

19. "The Chamber" notes that, in its "Motion", the Defence, contrary to its previous filings regarding its "Application for Extension of Time", has now substantially expanded its assertions.

20. "The Chamber" hereby reiterates its findings of its "Order on Extension of Time". Albeit for different reasons, it should be observed that "the Chamber" granted on different occasions the Defence with extensions of time to prepare its reply to the Prosecution "Response to the First Preliminary Motion (Lomé Agreement)". The Defence, ultimately in its "Motion", failed however to satisfy "the Chamber" that the nature and the aim of the documentation it sought disclosure from both the Prosecution and the Government of Sierra Leone, in connection with the preparation of its reply to the Prosecution "Response to the First Preliminary Motion (Lomé Agreement)" would justify the Defence application as exceptional or for good cause.

21. "The Chamber" concludes that "the Motion" fails to satisfy both the present and the previous test for the granting of leave to appeal the decision rendered by "the Chamber" pursuant to Rule 73 (B). More precisely, "the Motion" has failed to convince "the Chamber" that a decision from the Appeals Chamber on "the Order on the Extension of Time" would be in the interest of a fair and expeditious trial or that there existed exceptional circumstances or that irreparable prejudice could be caused to "the Accused".

22. "The Chamber", however, notes that, as a result of the new procedure on the determination of preliminary motions established pursuant to the recent amendment of

“the Rules”, “the First Preliminary Motion (Lomé Agreement)” which raises a serious issue about lack of jurisdiction is to be referred to the Appeals Chamber for determination. Hence, the granting of leave to appeal would in these circumstances be of no necessity, even if it were justified in principle, as these matters and issues could be raised more fully and completely in the additional submissions that can now be made pursuant to the provisions of new Rule 72 (G) of “the Rules”.

FOR ALL OF THESE REASONS

THE CHAMBER

HEREBY DISMISSES the Defence “Motion”.

Done at Freetown, Sierra Leone, this 29th day of September 2003

The Trial Chamber

Judge Pierre Boutet

