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SCSL-04-15-T
(32029-32033)

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**SPECIAL COURT FOR SIERRA LEONE
DEFENCE OFFICE
FREETOWN - SIERRA LEONE**

Before: Justice Benjamin Mutanga Itoe, Presiding
Justice Pierre Boutet.
Justice Bankole Thompson.

Registrar: Mr. Herman von Hebel

Date: 23 November 2007

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
23 NOV 2007	
NAME	Adica Nkumak
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TIME	09:50

THE PROSECUTOR

AGAINST

**MORRIS KALLON
ISSA HASSAN SESAY
AUGUSTINE GBAO**

CASE NO. SCSL-04-15-T

**KALLON SUBMISSIONS IN COMPLIANCE WITH COURT ORDER
IN RELATION TO RULE 16**

Office of the Prosecutor

Peter Harrison
Reginald Flynn

Defence Counsel for Issa Sesay

Wayne Jordash
Sareta Ashraph

For Morris Kallon

Shekou Touray
Charles Taku
Kennedy Ogetto
Lansana Dumbuya

For Augustine Gbao

John Cammegh

1. The Defence for Morris Kallon hereby files its submissions in compliance with the order of the Chamber, issued orally in court, on 22 November 2007, requesting the submissions of the parties regarding the continuance of the trial with a two-judge bench.
2. In the interests of an expeditious trial, the Kallon Defence would in principle support the option to continue the proceedings under Rule 16(B)(i).
3. However, it is noteworthy that continuation of trial proceedings with only two judges for a period other than a short duration seems peculiar only to the Special Court. In the eventuality that a Judge is, for any reason, unable to continue sitting in a “part-heard case” for a period which is “likely to be longer than of a short duration”, the Rules of Procedure and Evidence of the ICTY and ICTR provide only for the replacement of that Judge and that the consent of the Accused be sought as to the continuance of the trial as opposed to the institution of a trial *de novo*.¹ Similarly, the ICC provides for alternate Judges apparently without the option of continuation of proceedings in the absence of one judge.²
4. Rule 16(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“the Rules”) provides, *inter alia*:

¹ Rule 15*bis* of the Rules of the ICTY states, *inter alia*:

(C) “If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the remaining Judges of the Chamber shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of all the accused, except as provided for in paragraphs (D) and (G).”

See also Rule 15*bis*(C) of the Rules of Procedure and Evidence of the ICTR which makes similar provision.

² Rule 39 of the Rules of the ICC states: “[w]here an alternate judge has been assigned by the Presidency to a Trial Chamber pursuant to article 74, paragraph 1, he or she shall sit through all proceedings and deliberations of the case, but may not take any part therein and shall not exercise any function of the members of the Trial Chamber hearing the case, unless and until he or she is required to replace a member of the Trial Chamber if that member is unable to continue attending. Alternate judges shall be designated in accordance with a procedure pre-established by the Court.”

(B) If a Judge is, for any reason, unable to continue sitting in a proceeding, trial or appeal which has been partly heard for a period which is likely to be longer than five days, the President may designate an alternate Judge, as provided in Article 12(4) of the Statute.

(i) If an alternate Judge is not available as provided in Article 12(4) of the Statute, and the remaining Judges are satisfied that it would not affect the decision either way, the remaining Judges may continue in the absence of that Judge

(ii) Where a trial or appeal proceeds in the absence of one Judge, in the event that the decision is split evenly a new proceeding, trial or appeal shall be ordered

5. Under subsection (i) above, the decision to either proceed or suspend the proceedings in the absence of one Judge is entirely a matter at the discretion of the remaining Judges. The parties do not seem to have a say on the question although the Rule does not seem to preclude submissions on the matter.³
6. The Defence interprets Rule 16(B)(i) as meaning that the Chamber shall be satisfied that no prejudice shall be caused to the fair conduct of the trial and to the rights of the Accused at any time throughout the trial by reason of there being one judge absent.
7. The Rules of the Special Court present an approach more flexible in the furtherance of an expeditious trial in comparison with those found at the ICTR and ICTY.⁴ However, there would appear

³ Contrast that to rules of the ICTR and ICTY whereby, under different circumstances, consent of the Accused is sought regarding the continuation of a trial after the commencement of which, a new judge has been appointed.

⁴ See *Supra I*. Additionally, Rule 15bis:

(D) "If, in the circumstances mentioned in the last sentence of paragraph (C), an accused withholds his consent, the remaining Judges may nonetheless decide whether or not to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken directly from the decision to continue proceedings with a substitute Judge or the Appeals Chamber affirms that decision, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings.

substantial difficulty in determining the factors to consider in establishing the absence of prejudice before deciding to proceed in the absence of one judge. Rule 16 does not provide any guidelines.

8. Moreover, while Rule 16 does provide a remedy in the event there is an even split in the final judgement, the position regarding a split in interlocutory decisions is far from clear. The reference to “a new proceeding” under Rule 16(B)(ii) does not seem to lend itself to any useful and/or logical interpretation in this regard. The Defence submits that there is a compelling need to clarify this by way of appropriate amendment to the Rules.
9. While the Defence would, therefore, support a continuation of the trial with the two judges in whom it has the utmost confidence, we would however leave the matter in the hands of the Chamber.
10. If the Chamber is satisfied, as would seem to be required by Rule 16, that there will be no prejudice occasioned by proceeding in the absence of a third Judge, then the Defence supports that decision. This of course does not mean that the Defence has waived the right to raise any issue during the proceedings which, in its view, undermine a fair trial.

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DATED at Freetown this 23 day of November, 2007 Freetown.

For the Defence of Morris Kallon:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned below the text "For the Defence of Morris Kallon:". The signature is somewhat stylized and difficult to read.