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SCSL-04-15-T
(24205-24216)

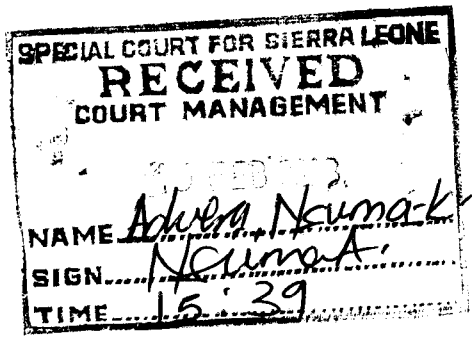
24205

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Acting Registrar: Mr. Herman von Hebel

Date filed: 15 February 2008



THE PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

PROSECUTION RESPONSE TO "KALLON MOTION ON CHALLENGES TO THE FORM OF THE INDICTMENT AND FOR RECONSIDERATION OF ORDER REJECTING FILING AND IMPOSING SANCTIONS"

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I. INTRODUCTION

1. The Prosecution files this response to the "Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions" (the "**Motion**"), filed on behalf of Morris Kallon ("**Accused**") on 7 February 2008.[1]
2. The Motion seeks reconsideration of the Trial Chamber's "Order Relating to Kallon Motion Challenging Defects in the Form of the Indictment and Annexes A, B and C", dated 31 January 2008 (the "**Trial Chamber's Previous Order**"),[2] to the extent that it ordered the "Kallon Motion Challenging Defects in the Form of the Indictment and Annexes A, B and C" (the "**Earlier Defence Motion**"),[3] filed on 28 January 2008, to be removed from the court record for failing to comply with the Practice Direction on Filing Documents before the Special Court for Sierra Leone (the "**Practice Direction**").[4] For the reasons given in Section II below, this request should be rejected on its merits.
3. The Motion also seeks reconsideration of the Trial Chamber's Previous Order to the extent that it ordered, pursuant to Rule 46(C) of the Rules of Procedure and Evidence (the "**Rules**") that the Defence for the Accused (the "**Defence**") not be paid by the Defence Office the fees or costs associated with the Earlier Defence Motion. For the reasons given in Section III below, this request should also be rejected on its merits.

II. THE DEFENCE CHALLENGE TO THE FORM OF THE INDICTMENT

4. The Motion is expressed to be a motion seeking "reconsideration" of the Trial Chamber's Previous Order which held that the Earlier Defence Motion exceeded the page limit for motions and that it should be removed from the court record. The Defence has advanced no basis for ***reconsideration*** of this aspect of the Trial Chamber's Previous Order. The Earlier Defence Motion was clearly in excess of the maximum permitted page and word limits under Article 6 of the Practice Direction. The Motion does not suggest otherwise. The Trial Chamber found that it had the power, under Rule 54 of the Rules, to order that a

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[1] *Prosecutor v Sesay et al*, SCSL-04-15-T-970, "Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions," 7 February 2008.
[2] *Prosecutor v Sesay et al*, SCSL-04-15-T-965, "Order Relating to Kallon Motion Challenging Defects in the Form of the Indictment and Annexes A, B and C," 31 January 2008.
[3] *Prosecutor v Sesay et al*, SCSL-04-15-T-960, "Kallon Motion Challenging Defects in the Form of the Indictment and Annexes A, B and C," 28 January 2008.
[4] Adopted 27 February 2003 (as amended).

motion be removed from the record on the ground that it is deficient due to being overlength. (This power is also evident in Rule 5, read in conjunction with Rule 54.) The Motion does not suggest that the Trial Chamber lacks this power. Contrary to what is suggested in paragraph 4 of the Motion, the power of a Trial Chamber to order an overlength motion to be removed from the record is not limited to cases where the filing of the motion is found to constitute conduct of the type to which Rule 46(C) applies. Even if the filing of an overlength motion in a given case does not amount to conduct that is frivolous or an abuse of process for the purposes of Rule 46(C), the Trial Chamber nonetheless has the power to order that it be removed from the trial record on the ground that it fails to comply with the Practice Direction. The Motion advances no reason why the Trial Chamber in any way inappropriately exercised this power in relation to the Earlier Defence Motion. The request for reconsideration of the Trial Chamber's Previous Order should therefore be rejected.

5. However, the Prosecution acknowledges that where a motion is rejected without consideration for failing to comply with the page limits prescribed by the Practice Direction, this does not preclude the party from filing a subsequent motion (that complies with the Practice Direction) seeking the same relief. In the present case, the Motion sets out in its paragraphs 5-23 substantive arguments challenging the form of the Indictment in this case. In the particular circumstances of this case, the Prosecution would not object to the Motion being treated as a substantive motion seeking the leave of the Trial Chamber to bring a challenge to the form of the Indictment at this stage of the proceedings, rather than as a motion seeking reconsideration of the Earlier Defence Motion. However, if the Motion is so considered, it is submitted that it should be rejected on its merits.

6. It is clear from the structure of the Rules that challenges to the form of the indictment must be brought by way of a preliminary motion under Rule 72(B)(ii) ***at the pre-trial stage***. This is clear from the fact that Rule 72 is in Part V of the Rules, entitled "Pre-Trial Proceedings". The reasons for this requirement are obvious. The purpose of Rule 72 is to ensure that any issues relating to the sufficiency of the indictment are cleared up before the trial begins, so that the trial can proceed on a proper indictment, and to ensure that a

situation will not arise where trial proceedings are found to have been conducted in vain because they were conducted pursuant to a defective indictment.

7. Footnote 11 of the Motion and its accompanying text suggest that a Defence objection to the form of the indictment will be timely, even if it is made at the stage of final trial submissions, or even for the first time on appeal. This is not correct. The Prosecution acknowledges that in exceptional circumstances, a challenge to the form of the indictment may be brought after trial has commenced (for instance, if during the course of the trial itself, a defect became apparent that was not apparent before). Thus, it has been held that the Trial Chamber can reconsider an earlier interlocutory decision on alleged defects in the form of the indictment if either (1) a clear error of reasoning has been demonstrated, or (2) it is necessary to do so to prevent an injustice.[5]

8. However, this can occur only in circumstances that are genuinely exceptional and where good cause for entertaining a late challenge to the indictment has been established. Furthermore, even if circumstances do arise during the course of the trial that could justify a late challenge to the form of the indictment, there is an obligation on the Defence to raise the issue at the earliest opportunity, to allow the defect to be remedied as efficiently as possible if a defect is found to exist. The Prosecution submits that it is not tenable to allow a trial to proceed to a very late stage, or to the end of the trial, and for the Defence to then be permitted at such a late stage to raise an allegation of defects in the form of the indictment that could have been raised at the pre-trial stage, or, if necessary, at a much earlier stage during the trial.[6]

9. The Prosecution is entitled to proceed on the basis that after the deadline for the filing of preliminary motions has passed, and in particular once trial has commenced, issues as to the form of the Indictment have been settled, unless the Trial Chamber otherwise orders. The Defence cannot, simply by filing a motion alleging defects in the indictment at a late stage of the trial, require the Prosecution and the Trial Chamber to treat issues as to the

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[5] *Prosecutor v. Kajelijeli,* ICTR-98-44A-A, "Judgement," 23 May 2005, paras 203 and 204; *Prosecutor v. Brima et al, Ntagerura et al.*, ICTR-99-46-A, "Judgement", Appeals Chamber, 7 July 2006, para. 55; *Prosecutor v.* SCSL-04-16-T-613 ("***AFRC* Trial Judgement"),** 21 June 2007, para. 24.

[6] See *Prosecutor v. Brdanin,* ICTY-99-36-T, "Judgement," Trial Chamber, 1 September 2004, para. 48. See also **AFRC Judgement, Dissenting Opinion of Justice Doherty**, para. 10: "Whilst I do have no doubt of the fundamental nature of the accused's right to be informed of the nature and cause of the charge against him, the defence is under a corresponding duty to raise the issue prior to the commencement of trial or at the earliest opportunity thereafter. I do not consider it to be in the interests of justice to allow the accused to invoke this right to quash an indictment after the case has closed, without showing that he was materially prejudiced."

form of the Indictment as now reopened, and require the Prosecution to respond on the merits to the Defence allegations of defects in the Indictment. If the Defence could do this, it would in effect be able to litigate alleged defects in the form of the Indictment at any stage of the proceedings at its own choosing. Where the Defence seeks to challenge the form of the Indictment at a late stage, it must first seek the leave of the Trial Chamber to do so, upon a showing of good cause. If the Trial Chamber decides to give leave to the Defence to bring a late challenge to the form of the Indictment, the Trial Chamber should put the Prosecution on notice that this is the case, and then allow the Prosecution adequate opportunity to deal fully with substance of the Defence arguments. Otherwise the Prosecution should not be required to address the merits of a Defence motion unilaterally filed at a late stage seeking to challenge the form of the Indictment.

10. In this case, the Accused did not file a preliminary motion at the pre-trial stage challenging defects in the form of the Indictment.[7] Consistent with the above principles, the Defence cannot be permitted to do so at this stage, without showing good cause why it was unable to file such a motion earlier, and without showing that it raised the issue of defects in the Indictment at the earliest opportunity.

11. The Motion gives three reasons why the Defence allegedly could not challenge defects in the Indictment earlier.

12. First, the Motion argues that the Defence was not afforded the opportunity to bring a preliminary motion challenging the form of the Indictment following the filing of the Corrected Amended Consolidated Indictment.[8] This is not correct. Rule 50(B)(ii) and (iii) provide that where an indictment is amended to contain ***new charges***, the accused has 10 days from the date of disclosure of the Rule 66(A)(i) materials pertaining ***to the new charges*** to file preliminary motions relating ***to the new charges***. The Corrected Amended Consolidated Indictment did not contain any new charges.[9] The Rule 66(A)(i) disclosure that had previously been made in respect of earlier versions of the Indictment remained the Rule 66(A)(i) disclosure for the purposes of the Corrected Amended Consolidated

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[7] Which the Trial Chamber noted in *Prosecutor v. Sesay et al,* SCSL-04-15-T-83, "Kallon – Decision on Motion for Quashing of Consolidated Indictment," 21 April 2004, para. 20.

[8] Motion, para. 5(i). The Corrected Amended Consolidated Indictment was filed on 2 August 2006, not on 13 May 2004, as stated in the Motion, see: *Prosecutor v. Sesay et al,* SCSL-04-15-T-619, "Corrected Amended Consolidated Indictment," 2 August 2006, and *Prosecutor v. Sesay et al,* SCSL-04-15-T-122, "Amended Consolidated Indictment," 13 May 2004.

[9] See "Kallon – Decision on Motion for Quashing of Consolidated Indictment," *supra.*

Indictment. Accordingly, the filing of the Corrected Amended Consolidated Indictment did not confer on the Defence any new right to file preliminary motions. The filing of an amended or corrected indictment does not provide a new opportunity to the Defence to challenge aspects of the form of the Indictment that remain unchanged from the earlier Indictment, and which could have been challenged by way of a preliminary motion relating to the earlier versions of the Indictment. In any event, the Corrected Amended Consolidated Indictment was filed on 2 August 2006, over 18 months ago, and it cannot be suggested that a challenge brought now is one that has been brought at the earliest opportunity.

13. Second, the Motion argues that much of the jurisprudence cited in support of the Motion postdates the start of the RUF trial, in particular, the *AFRC* Trial Judgement.[10] However, the AFRC Trial Judgement was decided in June 2007, nearly 8 months ago. A challenge to the indictment brought now based on new law established in the *AFRC* Trial Judgement cannot be said to be a challenge that has been brought at the earliest opportunity. Furthermore, the Motion does not identify any specific new principle of law that has emerged from recent case law that provides the Defence with a basis that previously did not exist for challenging the form of the Indictment. Nor does the Motion show that it has been filed at the earliest opportunity after the alleged new principle was established in the case law. Furthermore, developments in the case law could only justify a late motion challenging the form of the Indictment that is confined to the effects of those new developments in the case law. The mere fact that a new legal principle has emerged in the case law cannot entitle the Defence at a late stage to challenge the form of the Indictment on any grounds at all, regardless of whether or not they relate in any way to the alleged new developments in the case law.

14. Third, the Motion argues that objections to the form of the Indictment can be raised by the Defence in the Defence closing argument or on appeal.[11] This is not a justification for the filing of the Motion at this stage, for all of the reasons given above.

15. The arguments in paragraphs 6-23 of the Defence Motion are all arguments that a diligent Defence could have raised before the Trial Chamber at the pre-trial stage in this case. Indeed, the substance of these arguments was in fact raised in a preliminary motion

[10] Motion, para. 5(ii).
[11] Motion, para. 5(iii).

alleging defects in the form of the Indictment filed by Sesay,[12] which arguments were rejected by the Trial Chamber in its decision on the Sesay preliminary motion.[13] The Motion provides no valid justification for permitting the Accused to seek at this stage to re-litigate issues that have already been decided by the Trial Chamber over four years ago. The Motion does not demonstrate any clear error of reasoning in the *Sesay* decision, or that it is necessary to reconsider the *Sesay* decision to prevent an injustice.[14]

16. In addition, there is no point in allowing a challenge to the form of the Indictment to be brought at this point in time when the Judgement of the Appeals Chamber in the *AFRC* case is due to be given on 22 February 2008. If any new legal principles are established in the *AFRC* Appeals Judgement a Defence motion might potentially be justified, if it is brought at the earliest opportunity and the motion seeks to argue the implications of those new legal principles for the Indictment in this case. Any such motion brought before the handing down of the *AFRC* Appeals Judgement would be premature.

17. The Motion also ignores the Trial Chamber's Previous Order of 17 January 2008, dismissing a Gbao filing which sought leave to challenge the Indictment, stating:

> RECALLING the previous Decisions of this Trial Chamber concerning the making of objections to the form of the Indictment, including the Oral Decision on RUF Motions for Acquittal Pursuant to Rule 98 rendered on the 25th of October 2006;
>
> CONSIDERING that in all the circumstances it would be more appropriate for the Trial Chamber to address any objections to the form of the Indictment at the end of the case rather than during the course of the trial;[15]

18. For all of the above reasons, if the Motion is treated as a motion for leave to bring a late challenge to the form of the Indictment at this stage of the proceedings, the Motion should be denied.

19. Alternatively, for the reasons given above, if the Trial Chamber were to give the Defence leave to bring a challenge to the form of the Indictment at this stage of the proceedings, it is submitted that the Trial Chamber should only give a ruling to that effect, and should

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[12] *Prosecutor v. Sesay,* SCSL-2003-05-PT-55, "Preliminary Motion for Defects in the Form of the Indictment," 23 June 2003.
[13] *Prosecutor v. Sesay,* SCSL-2003-05-PT-80, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment," 13 October 2003.
[14] See paragraph 7 above.
[15] *Prosecutor v. Sesay et al,* SCSL-04-15-T-965, "Order Relating to Kallon Motion Challenging Defects in the Form of the Indictment and Annexes A, B and C," 31 January 2008.

provide the Prosecution with the subsequent opportunity to address the substance of the Motion before giving any ruling on the merits of the Motion.

III. THE TRIAL CHAMBER'S DECISION UNDER RULE 46(C) OF THE RULES

20. The Motion seeks reconsideration of the ruling in the Trial Chamber's Previous Order that the Defence not be paid the fees or costs associated with the Earlier Defence Motion.

21. The Motion misunderstands the Trial Chamber's reasoning. The title given to the order itself answers the complaints made in the Motion; it states "Order Relating to Kallon Motion Challenging Defects in the Form of the Indictment and Annexes A, B and C." It is not an order relating to the Prosecution's motion, filed on 29 January 2008, "Urgent Public Prosecution Motion for Relief in Respect of the Kallon Motion Challenging Defects in the Form of the Indictment,"[16] ("**Prosecution Motion**").

22. It is clearly within the Trial Chamber's jurisdiction to review a filing to determine whether it complies with a Practice Direction. This is so whether the opposing party complains of the filing or does not. Where a filing violates a Practice Direction the Trial Chamber can order that it be struck from Court Management records. The fact that the Prosecution Motion was filed does not alter the principle that the Trial Chamber is entitled to control its own process. The Trial Chamber's Previous Order is not a decision relating to the Prosecution Motion, it is an order of the court that a document was improperly filed. The Accused Kallon confused the matter before him by thinking he was denied a right of reply. He was not entitled to a right of reply because the Trial Chamber did not rule on the Prosecution Motion. The ruling was based on an impermissibly long motion being filed and the Trial Chamber's right to enforce a Practice Direction by having the filing struck from the records of Court Management.

23. The same logic governs the Trial Chamber's decision to direct that counsel fees be withheld pursuant to Rule 46(C). There is nothing in the Rules, and no other law is cited in the Motion, to suggest that a hearing must be held before Rule 46(C) can be applied. On the facts in this application, it would be surprising if anyone could justify a hearing.

24. Paragraph 1 of the Motion states that the Accused filed the "Ex Parte Kallon Application

[16] *Prosecutor v. Sesay et al,* SCSL-04-15-T-961, "Urgent Public Prosecution Motion for Relief in Respect of the Kallon Motion Challenging Defects in the Form of the Indictment," 29 January 2008.

for Leave to Make a Motion in Excess of the Page Limit," ("**Ex Parte Motion**")[17] on 4 December 2007, and attached to the Ex Parte Motion was a draft motion alleging defects to the Indictment. The Ex Parte Motion was dismissed and the Trial Chamber stated "the Defence can address the issues raised in the [m]otion within the [ten] page limit ... prescribed by the Practice Direction."[18]

25. The Accused did not do as directed by the Trial Chamber. Instead, the Accused filed a 38 page motion challenging defects to the Indictment, but sought to circumvent the Trial Chamber's earlier direction by dividing their application into one part called a motion, and three Annexes. The filing is obviously a 38 page application containing arguments and submissions throughout. Assuming counsel were paid for their work on the draft motion attached to the Ex Parte Motion, there would be no reason for them to submit an account for the 28 January Motion. They had already been paid for their work.

26. Even if not paid for their work on the draft motion that was attached to the Ex Parte Motion, filing a document which so obviously ignores a previous order and a Practice Direction, is an abuse of process. The court and its processes are entitled to respect, and they must be complied with. It could not have been made clearer to the Accused Kallon. He was told that his intended application could be filed in no more than 10 pages, and he was referred to the Practice Direction.

27. Bringing on the current Motion, calls into question whether Rule 46(C) should again be invoked. The Trial Chamber is entitled to direct the Registrar that if defence counsel were compensated for preparing the draft motion attached to the Ex Parte Motion, then there should be no fees paid for arguments repeated in the current Motion.

28. In the Trial Chamber's Previous Order, the Trial Chamber found that the Motion was "an unacceptable violation of the Practice Direction and of an Order of this Trial Chamber and amounts to an abuse of process."[19]

29. The Motion does not in any way seek to argue that the Earlier Defence Motion was in compliance with the page limits prescribed by Article 6 of the Practice Direction, and appears to concede that the Earlier Defence Motion was oversize. The Motion advances

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[17] Footnote 2 of the Motion cites this motion as *Prosecutor v. Sesay et al*, SCSL-04-928, "Kallon Application for Leave to Make a Motion in Excess of the Page Limit," 4 December 2007. Court Management records show it was filed *ex parte*.

[18] Quoted at para. 1 of the Motion.

[19] Trial Chamber's Previous Order, p. 3.

no argument to suggest that the Trial Chamber was not entitled to conclude that this was "an unacceptable violation of the Practice Direction and of an Order of this Trial Chamber and ... an abuse of process", other than to state that the Trial Chamber did not find that there was any "malicious intent" on the part of the Accused. However, the authorities cited in footnote 8 of the Motion do not support the proposition that the Trial Chamber must make an express finding of a "malicious intent" before imposing sanctions under Rule 46(C). The Trial Chamber clearly found that the Earlier Defence Motion was a deliberate attempt to violate an earlier order of the Trial Chamber. This is sufficient justification for the Trial Chamber to exercise its discretion under Rule 46(C).

IV. CONCLUSION

30. The Motion should be dismissed in its entirety.

Done in Freetown,
15 February 2008
For the Prosecution,

P. H. Ha
for Christopher Staker
Deputy Prosecutor

P. H. Ha
Pete Harrison

Index of Authorities

Cases

Prosecutor v Sesay et al, SCSL-04-15-T-970, "Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions," 7 February 2008.

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Prosecutor v. Sesay et al, SCSL-04-928, "Kallon Application for Leave to Make a Motion in Excess of the Page Limit," 4 December 2007.

Prosecutor v. Sesay et al, SCSL-04-15-T-83, "Kallon – Decision on Motion for Quashing of Consolidated Indictment," 21 April 2004, para. 20.

Prosecutor v. Sesay, SCSL-2003-05-PT-55, "Preliminary Motion for Defects in the Form of the Indictment," 23 June 2003.

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Prosecutor v. Brima et al, SCSL-04-16-T-613, "Judgement," Trial Chamber, 21 June 2007.

Prosecutor v. Kajelijeli, ICTR-98-44A-A, "Judgement," Appeals Chamber, 23 May 2005 http://69.94.11.53/default.htm

Prosecutor v. Ntagerura et al., ICTR-99-46-A, "Judgement", Appeals Chamber, 7 July 2006 http://69.94.11.53/ENGLISH/cases/Ntagerura/judgement/060707.pdf

Prosecutor v. Brdanin, ICTY-99-36-T, "Judgement," Trial Chamber, 1 September 2004. http://www.un.org/icty/brdjanin/trialc/judgement/brd-tj040901e.pdf

Rules and Practice Directions

Rules of Procedure and Evidence, Rules 5, 46(C), 50, 54, 66 and 72.

"Practice Direction on Filing Documents before the Special Court for Sierra Leone," adopted 27 February 2003 (as amended).