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SCSL-04-15-T
(18933 - 18939)

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THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

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

Registrar: **Mr. Lovemore Green Munlo, SC**

Date filed: **18th May 2006**

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 04 – 15 – T

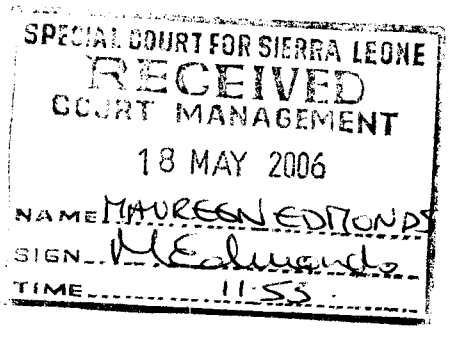
DEFENCE REPLY TO PROSECUTION RESPONSE TO MOTION TO REQUEST THE TRIAL CHAMBER TO RULE THAT THE PROSECUTION'S MOULDING OF THE EVIDENCE IS IMPERMISSIBLE AND A BREACH OF ARTICLE 17 OF THE STATUTE OF THE SPECIAL COURT

Office of the Prosecutor

Desmond De Silva QC
Christopher Staker
Peter Harrison

Defence

Wayne Jordash
Sareta Ashraph
Chantal Refahi



Moulding of the case ("Trial by Ambush")

1. The Prosecution have deliberately ignored the substance of the Defence complaint. This is the fourth time. The Prosecution appears to want to disguise, from the Trial Chamber and the public, its conduct by obfuscating the issue.[1] The Prosecution's Response ("The Response") is intentionally opaque, frivolous and an abuse of process within the meaning of Rule 46(C) and within the meaning as outlined in *Barayagwiza.*[2]

2. The Defence did not argue (and has never argued) in paragraph 5 of the Motion that that the "Trial Chamber failed (in its previous decisions) to decide expressly whether "re-interviewing" witnesses during proofing is a permissible practice or not" (brackets added). The Prosecution suggestions, to this effect, in paragraph 5, 6, 7, and 8 of the Response are designed to avoid addressing the Defence complaint. The complaint is clearly set out in paragraphs 1, 3, 5, and 11 of the Motion, and has been set out on three other occasions.[3] For the fifth time the Defence re-iterates:

   "The Prosecution owe a duty to the Defence, the Court and the administration of justice, to either refute or admit the explicit allegation that they are engaged in a practice of moulding their evidence to suit the defence challenge as the evidence unfolds"

3. The Prosecution prefer to ignore *this* question because to address it would place them into the inconvenient position of having to admit improper conduct, which has been prohibited, by Trial Chamber I and Trial Chambers at

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[2] *Prosecutor v. Barayagwiza*, Appeals Chamber, Case No. ICTR-97-19-A, 3 November 1999, para. 73 –86.

[3] See *Prosecutor v. Sesay, Kallon, Gbao*, SCSL – 2004-15-T-461 Defence Motion Requesting the Exclusion of Paragraphs 1,2,3,11 and 14 of the Additional Information Provided by Witness TF1-117, Dated 25th, 26th, 27th and 28th October 2005, (17128 – 17137), *Prosecutor v. Sesay, Kallon, Gbao*, SCSL – 2004-15-T-493 Defence Motion Requesting the Exclusion of Evidence (as Indicated in Annex A) arising from the Additional Information Provided by Witness TF1-168 (14th, 21st January and 4th February 2006), TF1-165 (6th/7th 2006) and TF1-041 (9th, 10th, 13th February 2006, 23rd February 2006)(18142-18157), page 1, Para. 1) and *Prosecutor v. Sesay, Kallon, Gbao*, SCSL – 2004-15-T-518, "Public Sesay Defence Response to Prosecution Request for Leave to Call Additional Witnesses and for Order for Protective Measures pursuant to Rules 69 and 73 bis(E)", 20th March 2006, Para. 8 & 9.

the ICTY. Trial Chamber I has clearly ruled that it is unacceptable to mould the case during the trial according to how the evidence unfolds.[4] The Trial Chambers, who have expressed clear condemnation of this process, were quite properly concerned with ensuring that the Prosecution could not mould its case during the trial. They recognised that this conduct, however or whenever it arose, whether through dint of a vague indictment, supplementary statements, and additional witnesses or in whatsoever way, would fundamentally undermine a fair trial.

4. The Prosecution's failure to find any authority to support their improper process speaks volumes about the merits of their position. The fact that they are constrained to shift the debate onto irrelevant and/or uncontested issues is equally compelling.

5. The Prosecution's constant attempt to hide its conduct from the Trial Chamber, the Defence and the public, illustrates that it too recognises that a fair trial is made impossible by the moulding of evidence against an accused in the course of the trial depending upon how the evidence unfolds. The Prosecution's approach, riding roughshod over this prohibition and obfuscating when challenged, amply demonstrates that its concern is limited to obtaining convictions, whether fair or otherwise.

Prosecution Response (paragraph 9 - 16): "Footnote 2 of the Motion cites what, according to the Motion, are three authorities for the proposition that it is "unacceptable to mould the case during the trial according to how the evidence unfolds. However, none of these three authorities supports the position taken in the Motion".

6. The Prosecution's Response in paragraphs 10 – 16 is pure sophistry. How could authorities, which categorically state that the moulding of a case during a trial is unfair and therefore prohibited, not support a Motion, which alleges

[4] *Prosecutor v. Sesay*, SCSL-2003-05-PT-080 Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment; 13th October 2003, Para. 33.

that the Prosecution are engaged in this improper process (and seeks an order that it be ruled impermissible?)

7. In order to avoid admitting any aspect of their wrongdoing the Prosecution fail to take any meaningful stance on the impermissible practice of moulding the case according to how the evidence unfolds. It is not clear from the Response whether the Prosecution deny being engaged with this process or whether they assert that it is permissible and if so under which circumstances. It is a masterly disposition in saying as little as possible whilst appearing to engage in full debate.

8. It matters not that the prohibition expressed in two of the authorities[5] was expressed in the context of a motion concerned with defects in the Indictment. The mischief is the moulding of the case against the accused in the course of the trial depending upon how the evidence unfolds. This simply stated prohibition does not depend upon the manner in which an unfair Prosecutor achieves this objective. It does not matter how or when it arises; what matters is the fact that it happens. It would be absurd on the one hand to theorise that this practice would be unacceptable, if it were to arise due to an impermissibly broad indictment, but then to conclude that it was acceptable in practice if it arose in other circumstances. The unfair prejudice, resulting from the manipulation of the evidence to suit the challenge to it, is at the heart of the prohibition; from whence the process and the ensuing unfairness arose is of little importance.

9. Commonsense thus dictates that the prohibition is of general and practical application. This is amply demonstrated in the third case from which the Defence derive support. In the case of *Brdanin and Talic*[6], the Trial Chamber was concerned with both the breadth of the Indictment and the "policy of avoiding disclosure of as much of that case as possible until as late as

[5] *Prosecutor v. Sesay*, SCSL-2003-05-PT-080, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment; 13th October 2003, Para. 33 & Supra. Para. 11 & *Prosecutor v. Kupreskic*, Appeal Judgement, Case No. IT-95-16-A, 23rd October 2001, Para. 82.
[6] *Prosecutor v. Brdanin and Talic*, IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26th June 2001, Para. 11.

possible". The Trial Chamber went on to say that it drew the inference that the prosecution...(had)... done so to enable it to mould its case in a substantial way during the trial, according to how the evidence" actually turned out.[7] The Prosecution's assertion therefore that, "The relevant passage in this case... has nothing to do with the complaint contained in the Motion, and in no way supports the Defence argument"[8] is utterly bewildering.

10. The Prosecution know that moulding the evidence is unfair but would rather take advantage of the unfairness than engage in sensible debate. Contrary to the Prosecution's assertions in paragraph 15 of their Response the "terminology" "moulding of the factual allegations" or "moulding of the evidence" was not invented by the Defence. Experienced Trial Chambers, recognising that the process causes irreparable damage and prejudice to the accused and the trial process, coined the phrase and logically and rightly prohibited the process it described.

11. How could it ever be fair for a Prosecutor to be allowed to mould his case; seeking out and relying upon additional factual allegation after factual allegation, according to his view of how the evidence unfolded and what unfair advantage could be sought? How could it be fair, for example, for a Prosecutor to allege five unlawful killings at the outset of the trial and when the witnesses have been effectively challenged through the court process then actively, intentionally and calculatedly seek out five more (or five of the same), simply to ensure a conviction? What prospects of an acquittal could any accused, innocent or otherwise, have when the goal posts endlessly move and such movement is the product of a prohibited practice?

12. How could it ever be fair for a Prosecutor, when challenged to admit such a policy, then to refuse to address the point?

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[7] Supra. Para. 11.
[8] Para. 14 of the Response.

13. The Prosecution disingenuously claim that they do not know why the Defence complain of "moulding of the factual allegations" and then mischievously invite the Defence to confirm whether it is "trying to imply that the Prosecution is seeking to "coach" witnesses or otherwise influence their testimony."[9] Whilst it ill behoves the Prosecution to ask of the Defence that which it refuses to give, namely clear and unambiguous answers to questions, the Defence will reiterate for the sixth time.

14. This Motion is not alleging that the Prosecution is coaching its witnesses or otherwise influencing their testimony. It is alleging that the Prosecution have and continue to deliberately seek additional factual allegations so to mould the factual allegations to suit the evidence as it has unfolded. The word "mould" should be given its ordinary English meaning[10]. It is submitted that the interests of justice would benefit from a forthright and straightforward response to this oft repeated allegation.

Request

15. The Defence respectfully request that the Trial Chamber:

(a) Order the Prosecution to address the issue and either admit or deny the allegation that they are engaged in a practice of moulding their evidence to suit the evidence as it unfolds[11] and/or

(b) Rule that this practice is impermissible.

Dated 17th May 2006

Wayne Jordash
Sareta Ashraph
Chantal Refahi

[9] Paragraph 15 of the Response.
[10] The New Collins English Dictionary defines "mould" inter alia as, "shape, form, design, or pattern".
[11] Please see Para. 1 & 2 of the Motion.

Book of Authorities

Prosecutor v. Barayagwiza, Case No. ICTR-97-19-A, Decision of Appeal Chamber, 3 November 1999 (available on ICTR website)

Prosecutor v. Sesay, Kallon, Gbao, SCSL – 2004-15-T-461 Defence Motion Requesting the Exclusion of Paragraphs 1,2,3,11 and 14 of the Additional Information Provided by Witness TF1-117, Dated 25th, 26th, 27th and 28th October 2005, (17128 – 17137), 12th January 2006.

Prosecutor v. Sesay, Kallon, Gbao, SCSL – 2004-15-T-493 Defence Motion Requesting the Exclusion of Evidence (as Indicated in Annex A) arising from the Additional Information Provided by Witness TF1-168 (14th, 21st January and 4th February 2006), TF1-165 (6th/7th 2006) and TF1-041 (9th, 10th, 13th February 2006, 23rd February 2006) (18142-18157), 23 February 2006.

Prosecutor v. Sesay, Kallon, Gbao, SCSL – 2004-15-T-518, "Public Sesay Defence Response to Prosecution Request for Leave to Call Additional Witnesses and for Order for Protective Measures pursuant to Rules 69 and 73 bis(E)", 20th March 2006.

Prosecutor v. Sesay, SCSL-2003-05-PT-080 Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment; 13th October 2003

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Prosecutor v. Brdanin and Talic, IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26th June 2001 (available on ICTY website)