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SCSL-04-15-T
(18273-18283)

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

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

Registrar: Mr. Lovemore G. Munlo, SC

Date filed: 7 March 2006

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

Case No. SCSL-04-15-T

PUBLIC
PROSECUTION REPLY TO SESAY RESPONSE TO PROSECUTION APPLICATION FOR LEAVE TO AMEND INDICTMENT

Office of the Prosecutor:
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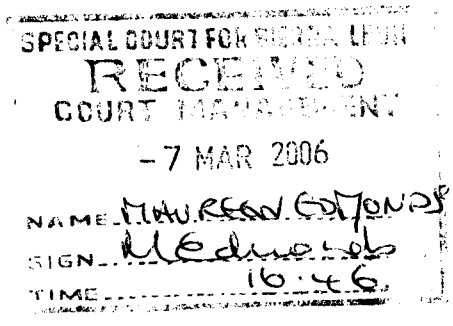

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I. INTRODUCTION

1. The Prosecution files this reply to the Sesay Response[1] to the "Prosecution Application for Leave to Amend the Indictment", filed on 20 February 2006 (the "**Prosecution Application**").[2]
2. The Prosecution arguments in support of its application are set out in the Prosecution Application. The present Reply responds to specific arguments in the Sesay Response.
3. The Prosecution notes that none of the Defence Responses object to the proposed amendment to paragraph 31 of the Indictment. The submissions below relate to the proposed amendment to paragraphs 48, 62 and 80 of the Indictment.

II. REPLY TO SESAY RESPONSE

4. Paragraph 2 of the Sesay Response quotes at length a passage from a decision of the Appeals Chamber in the CDF case (the "**Norman Appeal Decision**"),[3] to the effect that the Prosecution cannot prosecute an accused for every crime in respect of which there exists a *prima facie* case against the accused, and that the Prosecution must therefore be selective in its charging. However, that quote was made in the context of a different situation to that which pertains in the present case. The Prosecution Application to amend the Indictment is not being made in order to enable the Prosecution to bring *additional* evidence of additional crimes. Rather, the Prosecution is seeking to amend the Indictment to make it more consistent with the evidence that is *already* before the Trial Chamber. The Prosecution denies that it is seeking to prosecute Sesay for "every crime in Sierra Leone since 1996", or that it is seeking to charge Sesay for every crime in respect of which the Prosecution considers there is a *prima facie* case against him. However, it is seeking to make the Indictment consistent with the evidence that has been presented in the trial so far. Furthermore, for the reasons given below, the proposed amendments to the Indictment do not add new charges, but concern only the timeframe of existing charges.
5. Paragraphs 3 and 4 of the Sesay Response argue that the Prosecution Application should be

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[1] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-502, "Public Defence Response to Prosecution Application for Leave to Amend the Indictment", 2 March 2006 ("**Sesay Response**"); SCSL-04-15-T-506, "Public Gbao Response to Prosecution Motion to Amend the Indictment", 2 March 2006 ("**Gbao Response**"); SCSL-04-15-T-501, "Public Defence Response to Prosecution Application for Leave to Amend the Indictment on Behalf of the Second Accused, Morris Kallon", 2 March 2006 ("**Kallon Response**"); referred to collectively as "**Defence Responses**".

[2] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-488, "Public Prosecution Application for Leave to Amend Indictment, 20 February 2006 ("**Prosecution Application**").

[3] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-AR73-397, "Decision on Amendment of the Consolidated Indictment", Appeals Chamber, 16 May 2005 ("**Norman Appeal Decision**").

dismissed summarily on the ground that it has not set out the supporting evidence. The Prosecution Application is based on the trial record and, in particular, on all of the evidence presently before the Trial Chamber in this case. The Prosecution does not rely on any other evidence. As noted above, the Prosecution is not seeking to introduce any *additional* evidence before the Trial Chamber as a result of the proposed amendment to the Indictment. The Defence knows what evidence has been adduced in the case so far. It is not correct, as the Sesay Response argues, that the evidence referred to in Annex A is "only a small proportion" of the evidence falling within the timeframe of the proposed amendment. Rather, the evidence in Annex A represents the most significant, and the majority, of the evidence that would be affected by the amendment.[4] The Prosecution Application sets out clearly the amendment that is proposed to be made to the Indictment. From this, the Defence is able to determine whether it would suffer any prejudice as a result of the amendments. The Prosecution denies that its Application is "designed" to prevent the Accused from assessing the prejudicial ramifications of the proposed amendment.

6. Paragraphs 6 and 7 of the Sesay Response are in agreement with the Prosecution Application as regards the existence of the *Dossi* principle. However, they disagree with the Prosecution on how that principle applies in the circumstances of this case. On the one hand, paragraph 7 of the Sesay Response appears to argue that the *Dossi* principle only allows "minor discrepancies" from the timeframe stated in the Indictment, and would not allow a departure of 19 months from the stated timeframe. On the other hand, paragraph 6 of the Sesay Response appears to argue that the question is one of principle, rather than of the magnitude of the departure from the stated timeframe, the principle being whether the Accused has been taken by "surprise", or whether the Prosecution has given "reasonable information as to the nature of the charge".
7. The Prosecution concedes that the amendments it seeks would lead to the stated timeframe for the crimes in question being about four times as long as the timeframe that is presently stated in the Indictment. However, as argued by the Prosecution in its Application, the amendment sought alleges a time frame within the temporal jurisdiction of the Statute; therefore, the time frame alleged is not a material element of the crimes alleged.

[4] It is noted that there may also be evidence where the witness was unable to specify the time frame and where the events described by the witness might fall within the timeframe of the Indictment or outside it, as to which, see also paragraph 14 below.

Furthermore, the *Dossi* principle is not a mathematical formula, under which there is a fixed limit to the amount by which a time stated in an indictment can be departed from, or a maximum factor by which a timeframe stated in an Indictment can be extended by the evidence actually presented at trial.[5] Rather, it must be a question of whether, in all the circumstances there has been prejudice to the Accused. In this case:

(1) The general time frame alleged for the charges against these Accused is "At all times relevant to the Indictment". That time frame is from 16 November 1996,[6] up to 10 March 2003.[7] In Kono Disctrict the Indictment expressly includes various crimes committed between 25 May 1997 and about January 2000.[8] The amendments sought are within these time periods. Furthermore, this Indictment, as with all indictments which charge such crimes, reflects the long term, widespread commission of the crimes alleged - generally charging the Accused with a large number of different crimes committed in various locations over lengthy periods of time against unknown numbers of victims. These circumstances mitigate against a showing of prejudice to the Accused, and favour granting the requested amendments.

(2) The paragraphs of the Indictment that the Prosecution seeks to amend, paragraphs 48, 62 and 80, indicate a general time frame "Between ***about*** 14 February 1998 and 30 June 1998". For the reasons given in the Prosecution Application, simply alleging this timeframe cannot have the effect of making the dates specified in these paragraphs a material matter that must be proved beyond a reasonable doubt in order for an Accused to be convicted. The Defence would presumably not dispute that the Accused could be convicted of crimes under these paragraphs, even if the evidence showed that the crimes were committed several days outside the stated timeframe. The question is thus not ***whether*** the Accused can be convicted of crimes that fall outside those stated dates, but rather, how far a crime may fall outside those stated dates without being unfairly prejudicial to the Defence. The answer to this question must depend on the individual circumstances of each particular case. Given the circumstances of this case, the requested amendments would not unfairly prejudice these Accused.

(3) The timeframe stated in the Indictment covers a period of some four and a half months. As argued in paragraph 12 of the Prosecution Application, it is not always possible to be precise as to exact dates of events in cases of the type that come before international criminal tribunals, and witnesses often have difficulty in being specific about dates. Given the length of the timeframes stated in the Indictment, and the inherent difficulty in being specific about dates, the Defence must expect that the evidence led at trial may well show that crimes charged in the Indictment were

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[5] In the *Rutaganda* case (referred to in footnote 4 of the Prosecution Application), without any amendment to the Indictment, the Accused was found to have distributed weapons on three occasions between 8 April 1994 and 24 April 1994, notwithstanding that relevant paragraph of the Indictment alleged that the accused distributed weapons "on or about 6 April 1994". It could be argued that in this case, the time frame specified in the Indictment (on or about a single day) was expanded 18 times (to a period of 18 days, from 6 April 1994 to 24 April 1994).

[6] Indictment, para. 16.

[7] Indictment, para. 23.

[8] Indictment, para. 71.

committed on dates falling outside the specific dates stated in the Indictment, and that on occasion such departures may be significant. If the Defence considers that it has suffered any prejudice as a result of this, it is open to the Defence to seek appropriate relief from the Trial Chamber.

8. Paragraph 8 of the Sesay Response suggests that the Prosecution is seeking to extend the "temporal jurisdiction" of the Kono crime base. In other words, the Sesay Response suggests that by stating a timeframe in these paragraphs of the Indictment, the Prosecution has somehow limited the Special Court's temporal jurisdiction over crimes committed in Kono. For the reasons given above, and in the Prosecution Application, that is not correct. The question is whether some or all of the crimes of which evidence has been presented to the Trial Chamber falls so far outside those stated timeframes that it would unfairly prejudice the Defence to take them into account. The proposed amendments are consistent with the temporal jurisdiction of the Special Court under the Statute, and are within the scope of the times material to the Indictment.[9]
9. Paragraph 9 of the Sesay Response refers to a finding in the Norman Appeal Decision to the effect that the addition of unlawful killings in 9 towns added something new to the indictment in the CDF case. However, the present case is distinguishable. The Indictment in this case already charges unlawful killings, physical violence and looting and burning within Kono. The evidence has shown that this criminal activity within the Kono crime base extended over a boader time frame than the one specified. Therefore no new allegations of crimes are being made, it is simply that the evidence that was presented at trial has indicated that these crimes occurred over a longer time period than that stated in the Indictment. In the Norman Appeal Decision, what the Appeals Chamber found to be "something new" added to the indictment were two entirely new subparagraphs of the consolidated indictment in the CDF case.[10] The Appeals Chamber did not hold that an amendment of an indictment merely to expand the timeframe of an existing charge of itself necessarily added something new to an indictment. Indeed, the Appeals Chamber in that decision did not focus its attention on the more "minor" amendments set out in paragraph 19 of the Trial Chamber's decision that

[9] See para. 7(1) above.
[10] These are subparagraphs 25(e) and (f) of the present Consolidated Indictment in the CDF case: see Norman Appeals Decision, para. 86.

was the subject of that appeal, which included amendments to timeframes.[11] Furthermore, neither the Trial Chamber nor the Appeals Chamber in that instance gave any consideration to the potential application of the *Dossi* principle, and their decisions cannot be considered as pronouncements on that principle. Additionally, and in any event, the Appeals Chamber in the Norman Appeal Decision *allowed* the two additional subparagraphs to be added notwithstanding that they were found to add something new, and noted that "Amendments that do not amount to ***new counts*** should generally be admitted, even at a late stage, if they will not prejudice the defence or delay the trial process".[12] Following the Appeals Chamber's decision to allow these amendments, no further initial appearance was held on the consolidated indictment in that case.[13]

10. For this reason, and contrary to what is stated in paragraph 10 of the Sesay Response, even if the proposed amendments in this case added something new to the Indictment, the Prosecution submits that no further initial appearance of the Accused would be required. Nor could there be any question of further preliminary motions being filed by the Defence. If the proposed amendments did add something new to the Indictment, then an amendment to the Indictment might be *required* (as opposed to an amendment under the *Dossi* principle, which is a matter of good practice only). However, for the reasons given in paragraph 16 below, the Prosecution submits that the proposed amendments add nothing new.

11. Paragraph 11 of the Sesay Motion identifies what in the Prosecution's submission are the real issues in the case, namely whether the proposed amendments would prejudice the Defence, and/or delay the trial.

12. Paragraph 12 of the Sesay Response argues that the proposed amendments would be "unprecedented", and would prejudice the Defence because they would enable the Trial Chamber in any conviction to take into account additional conduct that "might well carry prison sentences into double figures". However, the fact that something is "unprecedented" does not mean that it necessarily prejudices the accused. The fact that the amendment might lead to additional criminal conduct being taken into account is also not relevantly prejudicial

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[11] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T, "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment", Trial Chamber, 29 November 2004, para 19.

[12] Norman Appeal Decision, para. 88 (emphasis added).

[13] See *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T, "Consequential Order on Amendment of the Consolidated Indictment", Trial Chamber, 25 May 2005, para 1 (deciding that "no further service of arraignment on this Consolidated Indictment is required").

to the Defence—an amendment will not be refused merely because it assists the Prosecution quite fairly to obtain a conviction.[14] The Sesay Response further argues that the proposed amendment would "require the recall of a huge number of witnesses", but does not explain in any detail why the Defence claims that this is so. If alleging prejudice, the Defence carries a burden of persuasion in establishing the existence of such prejudice.

13. Paragraph 13 of the Sesay Response claims that the argument in paragraph 13 of the Prosecution Application is circular. However, it is significant that the relevant time period for Counts 1 and 2 is specified as "At all times relevant to this Indictment".[15] The Prosecution submits that evidence of unlawful killings, physical violence, and looting and burning in the Kono District occurring outside the specific time frames stated in paragraphs 48, 62 and 80 of the Indictment is material to Counts 1 and 2, quite apart from its relevance to Counts Counts 3-5, Counts 10-11 and 14.

14. Paragraphs 14-15 of the Sesay Response refer to differences between the situation in the *Akayesu* case and the situation in the present case. The Prosecution acknowledges these differences. The Prosecution Application does not rely on *Akayesu* as a precedent to be followed. Rather, the Prosecution Application referred to *Akayesu* as a case to be *distinguished* from the present case. The Prosecution Application noted that in *Akayesu*, even an amendment to the Indictment *that added new substantive charges* was permitted to be made more than five months after the trial had commenced.[16] The Prosecution submits that in the present case, the proposed amendments to the Indictment would *not* add substantive new charges. The amendments are not of the type that was made in *Akayesu*, and therefore, in the Prosecution's submission, the possibility of relevant prejudice to the Defence is lower.[17] The Prosecution denies that it has "wilfully misread" the *Akayesu* case, as the Sesay Response suggests, and the Prosecution is not arguing that the present case parallels *Akayesu*.

15. Paragraph 15 of the Sesay Response further argues that the Prosecution has delayed bringing this application. The Prosecution submits that this argument in the Sesay Response fails to acknowledge the essential points (1) that paragraphs 48, 62 and 80 of the Indictment as

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[14] *Prosecutor v. Muhimana*, ICTR-1995-1B-I, "Decision on Motion to Amend Indictment", Trial Chamber, 21 January 2004, para. 4, quoted in Prosecution Application, para. 13.
[15] See Prosecution Application, para. 8.
[16] Prosecution Application, para. 10.
[17] See Prosecution Application, paras. 9-10 generally.

presently drafted are not strictly confined to events occurring within the specific dates mentioned in those paragraphs;[18] and (2) that the Prosecution does not seek to amend the Indictment to add new charges, but in order to make the wording of the Indictment consistent with the evidence that has been presented in the case, in accordance with the *Dossi* principle.[19] If this wording of these paragraphs is to be amended, to reflect the actual evidence given by witnesses in the trial, this necessarily can only be done after the relevant witnesses have testified.

16. Paragraph 16 of the Sesay Response foreshadows that the Defence will seek an adjournment and will seek to recall witnesses who have already testified if the amendment is permitted. The Prosecution submits that this is a matter that would need to be the subject of a Defence motion at the relevant time, showing a sufficient basis.

III. CONCLUSION

17. In summary, the Prosecution position is that paragraphs 48, 62 and 80 of the Indictment, as presently worded, are not rigidly confined to crimes that can be proven to have been committed between 14 February 1998 and 30 June 1998. This is abundantly clear from the inclusion of the word "about" in those paragraphs. This is also clear from the *Dossi* principle, which is recognised in international criminal law. For the reasons given in the Prosecution Application, time is not a material matter to the crimes charged in these paragraphs. If the criminal responsibility of an Accused for a particular crime charged in the Indictment is proved beyond a reasonable doubt, the Accused should not escape conviction for that crime solely on the technical ground that the crime was not proved beyond a reasonable doubt to have occurred during the specific timeframe mentioned in the Indictment.

18. To give an illustration: suppose that on the evidence presented to the Trial Chamber, it is quite possible that a relevant proven crime was committed within the timeframe specified in the Indictment, but that it is also possible that it occurred some time after that timeframe. The Prosecution submits that the Trial Chamber would not be prevented for that reason alone from taking that crime into account in entering any conviction. By specifying a relevant time period in the Indictment, the Prosecution does not impose on itself a burden of proving beyond a reasonable doubt that the crime *did* occur in the specified time period. If in fact the

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[18] See paragraph 7(2) above, and paras. 17-18 below.
[19] See in particular para. 19 below.

crime did occur, or may have occurred, on a different date, then a conviction can be entered for that crime under the *Dossi* principle, subject to the issue of prejudice to the Defence. Or, to give another example, suppose that the evidence presented at trial showed that a relevant proven crime was committed in mid-July 1998, some 2 weeks after the end of the timeframe specified in the Indictment. The Prosecution submits that the Trial Chamber could take that crime into account in entering any conviction, on the basis that it is sufficiently proximate to the timeframe specified in the Indictment, and it is the Prosecution's understanding that even the Defence does not seek to argue to the contrary.

19. Thus, as stated above, the issue is not ***whether*** the Accused can be convicted of crimes that fall outside those stated dates, but rather, ***how far*** a crime may fall outside those stated dates without causing unfair prejudice to the Defence. The Prosecution accepts that if the actual dates of crimes, as established by the evidence, departs significantly from the date specified in the Indictment, this may cause prejudice to the Defence, for the purposes of the *Dossi* principle. The Defence Responses do indeed argue that there would be prejudice to the Defence if the proposed amendment were allowed, on the basis that the proposed increase in the time frame in these paragraphs is too great. However, the Defence has not elaborated on exactly how it would be prejudiced.

20. The Prosecution accepts also as a matter of principle that in some cases the date on which a crime was committed may be so remote from the timeframe specified in an indictment, that it may be considered in reality to be a separate charge to the crimes charged in the Indictment. The Prosecution submits in the instant case that, in all the circumstances, the additional crimes that would be included under the proposed amendment do not constitute charges that are new or separate to the crimes charged in the Indictment. The Prosecution concedes that if the Trial Chamber were to conclude otherwise, it should not grant the Prosecution Application, since the Prosecution Application is not an application to add new charges to the Indictment, but is solely an application to amend the Indictment to make it consistent with the evidence in the case, under the *Dossi* principle.

21. However, even if the Trial Chamber were to conclude that crimes committed as late as 31 January 2000 would fall outside the scope of the *Dossi* principle, this does not mean that the Prosecution Application must be rejected as a whole. The Prosecution submits that the Trial Chamber should in that case consider, in relation to each relevant crime falling outside the

specific timeframe in the Indictment, whether the *Dossi* principle applies. For instance, even if crimes committed as late as January 2000 would fall outside the operation of the principle, that principle might still apply to crimes committed in late 1998,[20] or early 1999.[21]

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7 March 2006

For the Prosecution,

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[20] See Prosecution Application, Annex A, paras. 5-6.

[21] See Prosecution Application, Annex A, para. 2.

List of Authorities

1. *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-502, "Public Defence Response to Prosecution Application for Leave to Amend the Indictment", 2 March 2006.

2. *Prosecutor v Sesay, Kallon, Gbao* SCSL-04-15-T-506, "Public Gbao Response to Prosecution Motion to Amend the Indictment", 2 March 2006.

3. *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-501, "Public Defence Response to Prosecution Application for Leave to Amend the Indictment on Behalf of the Second Accused, Morris Kallon", 2 March 2006.

4. *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-488, "Public Prosecution Application for Leave to Amend Indictment, 20 February 2006.

5. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-AR73-397, "Decision on Amendment of the Consolidated Indictment", Appeals Chamber, 16 May 2005.

6. *Prosecutor v Sesay*, SCSL-2003-05-PT-080, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", Trial Chamber, 13 October 2003.

7. *Prosecutor v Akayesu*, ICTR-96-1-A, "Judgement", Appeals Chamber, 1 June 2001, (http://65.18.216.88/ENGLISH/cases/Akayesu/judgement/Arret/index.htm)

8. *Prosecutor v Rutaganda*, ICTR-96-3-A, "Judgement", Appeals Chamber, 26 May 2003, (http://65.18.216.88/ENGLISH/cases/Rutaganda/decisions/030526%20Index.htm)

9. *R v Dossi*, 13 CR.App.R. 158 (CCA)