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THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

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

Registrar: Mr. Lovemore Green Munlo, SC

Date filed: 31st January 2007

The Prosecutor

-v-

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No: SCSL – 04 – 15 – T

Public
Reply to the Prosecutor's Response to Defence Application for an Adjournment of the 16th February 2007 Filing

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1. The Sesay Defence (the "Defence") files this Reply to the Prosecution's Response (the "Response"[1]) to the "Defence Application for an Adjournment of the 16th February 2007 Filing" (the "Motion").[2]

Prosecution suggestion

"Prosecution suggests that the Defence be ordered to file the documents required by the Scheduling Order for those witnesses that have been assessed, with leave to file addendums to the required documents within two weeks"[3]

2. The Prosecution's approach presupposes that a criminal case can be efficaciously prepared incrementally. It is submitted that the optimum approach to the preparation of a case (either Defence or Prosecution) is to assess which witnesses and which exhibits are to be relied upon when *all* the evidence has been collated. At this stage the totality of the case will be known and proper decisions can be made about which evidence ought to be adduced and how. There is little value (or forensic rigour) in a case which expands incrementally or one in which many of the factual assertions are unknown at the outset. There is much lost in the coherence of a case where more than a very few pieces of evidence remain outstanding at the time decisions are made about which evidence is to be relied upon. The Motion is specifically (but not exclusively) predicated upon at least 22 (and probably closer to 30) outstanding witnesses, some of whom may be hugely significant (for example G5's and MP's), *within* the framework of the overall evidence to be called. The Defence is also expecting a significant number of exhibits from these witnesses.

3. The Prosecution's claim that there "is no logical reason why the deadline of 16 February 2007 should be postponed for only this proportionately small number of witnesses"[4] is misconceived. It is submitted that the logic is clear – a party ought to know its case before going to trial. Moreover the Defence is

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[1] Prosecutor v. Sesay et al, Prosecutor's Response to Defence Application for an Adjournment of the 16th February 2007 Filing, 29th January 2007, SCSL-04-15-T-699.
[2] SCSL-04-15-T-692, 25th January 2007.
[3] Para. 3 of the Response.
[4] Para. 12 of the Response.

aiming to call (live) about 100 witnesses and thus the number of witnesses outstanding, potentially from its core list, is likely to be a quarter of its overall case. This is not proportionally small.

Prosecution suggestion

The Defence had sufficient time to prepare its case[5]

4. The Prosecution's suggestion is a bold assertion devoid of any relevant reasoning or proper analysis. It is surprising to observe the Prosecution, which had 2 years to investigate before the commencement of its case and which was still investigating in 2006, suggesting that the Defence ought to be ready, with one investigator with its case fully investigated, six and a half months after the end of the Prosecution case.

5. It must not be forgotten that one of the most important Prosecution witnesses, TF1- 371, accompanied by the usual plethora of supplementary statements, was only called to testify in late July 2006. At this stage and at long last, the Defence knew the totality of the evidence against it. At this stage the Defence could comprehensively address *all* the factual allegations. If several hundred factual allegations had not cascaded upon the Defence *throughout* the Prosecution case, the Defence would not have to apply for the present adjournment. Equally the Defence would not have been placed into the invidious position of having to endanger our client's right to an expeditious trial by applying to start the Defence case in April 2007 (rather than January 2007). These are problems created by the Prosecution's rolling disclosure program and our lack of resources, not through any lack of diligence on the part of the Defence.

6. The Defence also respectfully urge the Trial Chamber to compare the AFRC and CDF trials[6]. As the Prosecution correctly observes in the AFRC case the Defence for the First Accused Brima had 6 months to file the witness list and other material from the date of the end of the Prosecution case. In the Norman case the Defence had 4 months and 3 weeks to file its list. The Prosecution

[5] Para. 4 of Response.
[6] Para. 8- 9 of the Response.

however neglects to highlight the pertinent information. In the Brima case, the Defence team was engaged in preparing a case which, at its highest was expected to involved approximate 45 witnesses (with the total expected number for the AFRC Accused being 90 witnesses). In the Norman case the number was 77[7]. The Defence is trying to prepare approximately 250 witnesses (including back up witnesses). In these circumstances the requested 7 months (until 5th March 2007) compares extremely favourably with those cases and illustrates the diligence and commitment on the part of the Defence to be prepared as soon as is practicable.

Prosecution Assertion

The Prosecution needs sufficient time to prepare[8]

7. The Prosecution makes this claim without proper analysis. It is specious to claim that the original Scheduling Order allows for about "52 working days to prepare for 300 to 400 witnesses (based on Defence estimates of witnesses)".[9] First, this exaggerates the number of witnesses which are involved in the Sesay case. The fact that the Prosecution has been constrained to exaggerate the position is instructive. Even if this were not correct, the Defence is requesting an adjournment of only 17 days. This has been requested for a very specific reason which the Prosecution has not suggested is lacking in merit. It is submitted that, in the face of such a concrete demonstration of prejudice, the Prosecution ought to have been able to state exactly (or accurately) what would be lost rather than relying upon bold, but unsupported and caricatured assertion. It is instructive that the Prosecution had not, at the 27th October 2006 Status Conference or elsewhere, asserted that 2½ months was the minimum notice they required to avoid prejudice. The fact that it does so now illustrates nothing other than an attempt to capitalise on the defence difficulties.

8. Second, the Prosecution inflates, by implication, the work which could be done upon the filing of the witness summaries. It is not the case that upon the

[7] Prosecutor v. Norman et al, Norman Disclosure Materials Filed Pursuant to the Consequential Order, 5th December 2005, SCSL-04-14-T-499
[8] Para. 13 – 14 of the Response.
[9] Para. 13 of the Response.

filing of the summaries the Prosecution will need to *commence* investigation for all the witnesses which appear on both the core and back up lists. The filings will contain rebuttal evidence relating to the Prosecution's factual allegations. The fact that the Prosecution has been investigating the *same factual allegations* for 4½ years (since prior to July 2002) with the luxury of both an army of investigators and little, if no, opposition (in the field) is significant.

9. Finally, the Prosecution was ordered to file its summaries on the 26th April 2004[10]. The Prosecution case commenced on the 5th July 2004. This provided the Defence, with one investigator, who had commenced his investigations in late November 2003, with 69 days in which to begin focusing its preliminary investigations. The Defence request for a postponement until the 5th March 2007 would still provide the Prosecution with 58 days' notice. Given the Prosecution has been investigating the conflict since before July 2002 and has, at present, at least 12 investigators to call upon, this would appear to place its claims of lack of time in context. The assertions are flimsy at best and opportunistic at worst.

Conclusion

10. The Prosecution has failed to provide any cogent reasons why it would be prejudiced by this short delay. The suggestion that the Defence be ordered nevertheless to provide some of the information fails to appreciate the undesirability and impossibility of preparing a coherent case in a piece-meal manner. The Defence has amply demonstrated the reasons for the delay and is not attempting to disadvantage the Prosecution by delaying the filings. The Defence therefore reiterates its request to adjourn the filings until the 5th March 2007.

[10] Order to the Prosecution to File Disclosure Materials and other Materials in Preparation for the Commencement of the Trial, 1st April 2004, SCSL-04-15-T-70

Dated 31st January 2007

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Wayne Jordash
Sareta Ashraph

Book of Authorities

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Prosecutor v. Sesay et al, Prosecutor's Response to Defence Application for an Adjournment of the 16th February 2007 Filing, 29th January 2007, SCSL-04-15-T-699

Prosecutor v. Sesay et al, Defence Application for an Adjournment of the 16th February 2007 Filing, 25th January 2007, SCSL-04-15-T-692

Prosecutor v. Norman et al, Norman Disclosure Materials Filed Pursuant to the Consequential Order, 5th December 2005, SCSL-04-14-T-499

Prosecutor v. Sesay et al, Order to the Prosecution to File Disclosure Materials and other Materials in Preparation for the Commencement of the Trial, 1st April 2004, SCSL-04-15-T-70