SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

Freetown - Sierra Leone

Before:

Hon. Justice Benjamin Mutanga Itoe, Presiding

Hon. Justice Bankole Thompson

Hon. Justice Pierre Boutet

Registrar:

Mr. Herman von Hebel

Date filed:

5 June 2008

THE PROSECUTOR

Against

Issa Hassan Sesay

Morris Kallon

Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

PROSECUTION RESPONSE TO SESAY REQUEST TO HEAR EVIDENCE CONCERNING THE PROSECUTION'S WITNESS MANAGEMENT UNIT

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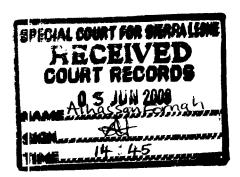
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I. Introduction

- 1. On 30 May 2008, the Accused Sesay filed a motion¹ to request the Trial Chamber to hear evidence concerning the Prosecution Witness Management Unit ("Motion").² Since June 2004 the Prosecution has, on an ongoing basis, disclosed to the Defence information showing disbursements made to or on behalf of witnesses by the Office of the Prosecutor. These disbursements, and the documents disclosed by the Prosecution were often referred to by Defence Counsels during cross-examination of Prosecution witnesses and those witnesses were asked about disbursements made to them by the Office of the Prosecutor. This same disclosure and approach by the Defence to cross-examining Prosecution witnesses has been common to all of the trials before the Special Court for Sierra Leone.
- 2. The issue raised in this Motion has, therefore, been known to the Defence for over three years. A general requirement of pleading is that objections be taken in a timely manner. Rule 5 codifies this requirement:

Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the <u>earliest opportunity</u>, the Trial Chamber or the Designated Judge may grant relief if the non-compliance has caused material prejudice to the objecting party. [underling added]

3. This matter was not raised at the earliest opportunity. The Defence chose not to raise it during the Prosecution case, nor to raise it during the course of the First Accused's case. The Defence has not offered any reason for its delay. In *Prosecutor v. Orić* the Trial Chamber held:

Provided that an alleged non-compliance with the Rules is proved and that it has caused material prejudice to the objecting party, Rule 5(B) of the Rules grants a Trial Chamber the discretion whether or not to grant relief where an objection is not made at the earliest opportunity. Furthermore, there being no indication of a material prejudice to the Accused considering that the same information was already available to him, the Trial Chamber would not in any event see the need to grant any relief to the Defence. [footnote omitted]³

¹ The motion is 11 pages long. The Practice Direction states that motions cannot exceed 10 pages and that motions exceeding the page limit were not to be accepted for filing.

² Prosecutor v. Sesay et al, SCSL-04-15-T-1161, "Public Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payments to Witnesses," 30 May 2008. It was supported by the Defence of the Second and Third Accused on 3 June 2008. Prosecutor v. Sesay et al., SCSL-04-15-1165, "Kallon Defence Response to Motion requesting the Trial Chamber Hear Evidence Concerning the Prosecution's Witness Management Unit and Its Payment to Witnesses", 3 June 2008; Prosecutor v. Sesay et al., SCSL-04-15-1167, "Gbao Notice of Support to Sesay Motion requesting the Trial Chamber Hear Evidence Concerning the Prosecution's Witness Management Unit and Its Payment to Witnesses", 3 June 2008.

³ Prosecutor v. Orić, IT-03-68-T, "Decision on Ongoing Complaints About Prosecutorial Non-compliance with Rule 68 of the Rules", 13 December 2005, para. 31.

The Defence did not prove non-compliance with the Rules by the Prosecution pursuant to Rule 5, nor does the Defence plead a material prejudice arising from such non-compliance. The relief sought in the Motion is pursuant to Rule 54, which grants the Trial Chamber discretionary powers. Rule 54 grants a discretion to a Judge or a Trial Chamber to issue orders or other relief as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. The Rule states:

Rule 54: General Provision

At the request of either party or of its own motion, a Judge or a Trial Chamber <u>may</u> issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. [underlining added]

5. Rule 5 confers on a Trial Chamber a discretion not to grant a remedy where non-compliance with Rules is proven and material prejudice is shown, but where the objection is not made at the earliest opportunity. There was compliance with the Rules in this case, no material prejudice has been demonstrated, and the objection is not timely. If the issue was significant to the First Accused he could have called witnesses as part of his case. The discretion conferred under Rule 54 should not be exercised.

II. BASIS FOR CONFIDENTIAL FILING

6. The Motion quoted the Closed Session testimony of TF1-362 from *Prosecutor v. Taylor*. Closed Session testimony cannot be reproduced publicly and it is a breach of an order of the Court to do so. The Motion should be refiled as a confidential document.

III. PART IV OF THE RULES

7. Rule 39, which grants the Prosecutor extensive authority with respect to potential witnesses and sources, is found within Part IV of the Rules. Part IV was given the heading "Investigations, Rights of Suspects and Accused," however, the heading does not adequately describe the scope of Part IV. For example, Rule 46, given the heading "Misconduct of Counsel," provides that a Chamber may impose sanctions against or refuse audience to counsel where counsel has engaged in specified conduct. Rules 46(B) to (H) establish further discretionary powers for a Chamber to sanction counsel, at any time, and powers to establish a Code of Conduct. Obviously Rule 46 encompasses

⁴ Motion paras. 30(vii) and (viii).

⁵ Rule 46(A).

⁶ Rule 46(B) to (H).

conduct that is pre-trial, during trial and post-trial.

- 8. Rule 45 empowers the Registrar to establish a Defence Office "for the purpose of ensuring the rights of suspects and accused." Although, not stated in the Rule it is incontrovertible that this duty imposed on the Defence Office continues from pre-trial proceedings though to and including any appeal or review.
- 9. Rule 44 refers to the appointment of defence counsel, and Rule 44(B) advises that counsel are subject to the relevant provisions in various statutory instruments. Obviously this obligation continues from the pre-trial phase through to and including any appeal or review.
 - 0. The heading given to Rule 41 is "Preservation of Information" and the Rule states:

Rule 41: Preservation of Information

- (A) The Prosecutor shall be responsible for the preservation, storage and security of information and physical evidence obtained in the course of his investigations.
- (B) The Prosecutor shall draw up an inventory of all materials seized from the accused, including documents, books, papers, and other objects, and shall serve a copy thereof on the accused. Materials that are of no evidentiary value shall be returned without delay to the accused.
- 11. The Rule charges the Prosecutor with the responsibility of preserving, storing and security of information and physical evidence obtained during investigations. This Rule applies not just to the investigatory stage, but through all stages of the judicial process including appeals and reviews.
- 12. The Prosecutor is given further powers under Rule 39, "Conduct of Investigations." This Rule is not limited in time, and it states:

Rule 39: Conduct of Investigations (amended 7 March 2003)

In the conduct of an investigation, the Prosecutor may:

- i. Summon and question suspects, interview victims and witnesses and record their statements, collect evidence and conduct on-site investigations;
- ii. Take all measures deemed necessary for the purpose of the investigation, including the taking of any special measures to provide for the safety, the support and the assistance of potential witnesses and sources;
- iii. Seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL); and

⁸ Rule 44(B).

⁷ Rule 45.

- iv. Request such orders as may be necessary from a Trial Chamber or a Judge.
- 13 Rule 39(ii) grants to the Prosecutor a wide and unfettered discretion. The Prosecutor is permitted to "Take all measures deemed necessary for the purpose of the investigation...." It is for the Prosecutor, and the Prosecutor alone, to determine what measures are necessary for an investigation, including measures to ensure the safety, support and assistance to witnesses. Moreover, it is not confined to witnesses, the Rule also applies the same discretionary power on the Prosecutor with respect to sources.
- 14. Interpreting Rule 39(ii) is facilitated by turning to the definition section of the Rules, where "investigation" is defined as:

All activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after approval of an indictment;⁹

- 15. The Prosecutor, given the definition of "investigation" in the Rules, has the statutory authority to take measures deemed necessary for the safety, support and assistance of potential witnesses and sources, before and after approval of an indictment. It must also be remembered that some witnesses have testified in three trials. At various times their safety, support and assistance fell under the Office of the Prosecutor, and at other times they may have been assisted by the Witnesses and Victims Section. The Prosecution will not discuss specifics about sources, as named in Rule 39(ii), or their identities, but in principle, there is nothing to prevent a witness also acting as a source.
- 16. With respect to the witnesses who testified in the RUF trial, information was disclosed to the Defence about Prosecution disbursements to witnesses. The Defence were also at liberty to request Witnesses and Victims Services for disclosure of the disbursements made to witnesses, and they availed themselves of this right. To the extent that the Defence wished to challenge the credibility of witnesses on the theory that witnesses did not tell the truth because they received disbursements from the Prosecutor or from the Witnesses and Victims Section, they were given a very wide latitude by the Trial Chamber to do so.
- 17. The suggestion made in the Motion that Rule 39(ii) is operative only during the investigative stage, erroneously restricts the meaning of investigation as defined in the

- SCSL Rules.¹⁰ The Prosecutor is permitted under the Rules to assist and support potential witnesses and sources both before and after the approval of the indictment. And it is not limited to the gathering of evidence; in Rule 2, the definition section, the definition of "investigation" states that it encompasses "All activities undertaken by the Prosecutor ... for the collection of <u>information</u> and evidence..." [underling added].
- 8. The version of Rule 39(ii) enacted by the Special Court for Sierra Leone gives a much broader authority to the Prosecutor than does the companion Rule at the ICTY, which states:
 - (ii) undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial, including the taking of special measures to provide for the <u>safety</u> of potential witnesses and informants; [underling added]
- 9. Rule 39 (ii) of the Rules of Procedure and Evidence of the ICTR is more in keeping with Rule 39(ii) of the Special Court, but significantly whereas Rule 39(ii) of the Special Court authorizes the Prosecutor to take special measures to provide for the <u>safety</u>, <u>support</u> and <u>assistance</u> of potential witnesses and sources, the ICTR Rule refers only to the safety of potential witnesses and informants. The ICTR Rule states:
 - (ii) Take all measures deemed necessary for the purpose of the investigation and to support the prosecution at trial, including the taking of special measures to provide for the <u>safety</u> of potential witnesses and informants; [underling added]
- 20. It also clear from the versions of Rule 39(ii) from the ICTY and the ICTR that, in the context of international criminal courts, "investigation" encompasses any undertakings of the Prosecution "for the purpose of the investigation and to support the prosecution at trial", meaning before and after approval of an indictment.
- 21. This discretion, properly conferred on the Prosecutor, is balanced by the right of disclosure to the Defence of any disbursements made to witnesses. Having disclosed that information, the Defence possesses all relevant information which it may employ to challenge the credibility of witnesses.
- 22. Practice directions are inferior legislation, and therefore, subordinate to the Rules. They cannot override authority conferred on a party by the Rules, or of course, any powers conferred on a party by Statute. The "Practice Direction on Allowances for Witnesses

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¹⁰ Motion, para. 6.

and Expert Witnesses," ("Practice Direction") advises that:

- (A) The costs of allowances necessarily and reasonably incurred by witnesses and expert witnesses as a result of testifying before a Chamber shall be met by the Special Court as set out in the Practice Direction, subject to the budgetary provisions, rules and regulations, and practice set by the Special Court.¹¹
- 23. Taking the words in their common meaning, the Practice Direction is limited to paying allowances as a result of testifying. No mention is made of allowances for traveling to Freetown for interviews, or meetings with the Prosecution, which fall within Rule 39. To investigate and present its case the Prosecution must meet with witnesses, and witnesses who are asked to travel to meet with the Prosecution forego earnings and incur expenses.
- 24. The limited scope of the Practice Direction is again stated in Article 4 (A):
 - (A) The Special Court shall provide witnesses residing in Sierra Leone with an attendance allowance as compensation for wages, earnings and time lost as a result of testifying. Witnesses shall not be required to submit a request or any supporting documentation in order to receive the attendance allowance. 12
- 25. The attendance allowance is only triggered for earnings lost while testifying. Again to suggest that the Prosecutor is not permitted under the power conferred on it by Rule 39 to facilitate witness or source interviews by reimbursing them for earnings lost while meeting the Prosecution is untenable. The Prosecutor clearly has the authority to "take all measures deemed necessary" by the Prosecutor, "for the collection of information and evidence, whether before or after approval of an indictment," including to "provide for the safety, the support and the assistance of potential witnesses and sources."
- 26. The Defence ignores the Statute when it suggests in Paragraph 3 of the Motion that the Registry has supervision or oversight over the Prosecutor. Article 15 states, "The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or any other source" [underlining added]. Registry supervision or oversight of the functions of the Prosecutor, including those under Rule 39, would violate of the plain language of this Article.

III. WITNESSES REFERRED TO IN THE MOTION

27. The term "wasted time" found in some of the attachments to the Motion refers to lost

¹¹ Practice Direction, Article 2 (A).

¹² Practice Direction, Article 4 (A).

earnings. It is an expression used by Sierra Leoneans and Sierra Leonean staff at the Office of the Prosecutor have used the term in that context. It is a payment of support or assistance which the Prosecutor is authorized to make under the Rules. Paragraph 14 refers to such an entry for TF1-108. The entry actually states "Payment to Witness for Time wasted and Meals" and then the entry 10,000 Leones. Therefore, understood in its context, a payment of 10,000 Leones was made to a witness for lost wages and meals. The First Accused was entitled to put to the witness that because the witness received 10,000 Leones for lost wages and meals the witness was not telling the truth.

- 28. The Motion refers to similar disbursements, at paras. 15, 16, 18, and 20, all of which the Prosecutor was authorized to make, and the First Accused, to whom the information had been disclosed, was entitled to question.
- 29. Paragraph 17 refers to disbursements made on behalf of TF1-141, a child witness, who testified in April 2005. The last payment made was in September 2004, over 7 months before the child witness testified. Subsequent to the September 2004 payment, TF-141 was then supported by the Witnesses and Victims Section. The Prosecutor was authorized to make these disbursements, and the First Accused was in possession of the information so as to be able to question such disbursements.
- 30. Paragraph 19 refers to disbursements to TF1-371 for source information or information concerning potential witnesses. The last payment referred to in para. 19 is from December 2005. The application to add this witness to the Prosecution witness did not even take place until 10 March 2006. The allegation is absurd. The Prosecutor is authorized to make such disbursements under Rule 39(ii), and the First Accused was in possession so as to be able to question such disbursements.
- 31. Paragraphs 21, 22, 24 and 26 refer to persons who did not testify in the RUF trial and therefore, are irrelevant to any issue before the Trial Chamber. The reference to disbursements on 23 October 2002 and 1 November 2002, referred to in para. 24 happened at a time the Rules had not been enacted and no Witnesses and Victims Service has yet been constituted. The disbursements on 8 and 10 March 2003, happened within days of the enacting of the Rules on 7 March 2003. The disbursements referred to in

¹³ Prosecutor v. Sesay et al, SCSL-04-15-T-513, "Prosecution Request or Leave to Call Additional Witness and for Order for Protective Measures Pursuant to Rules 69 and 73bis(E)," 10 March 2006.

- para. 26 are from December 2002, before the WVS was established and before the Rules were enacted. In any event the Prosecutor was authorized to make these disbursements, and the First Accused was in possession so as to be able to question such disbursements.
- 32. Paragraph 23 refers to payment of 40,000 Leones as "this large sum." The payment was made in February 2005, but the witness did not testify until July 2005. The Prosecutor was authorized to reimburse the witness for funds lost as a result of not working and meeting with the Prosecution, and the First Accused was in possession so as to be able to question such disbursements. This person also testified in three trials.
- 33. Paragraph 25 refers to TF1-139. He was extensively cross-examined on disbursements. Nothing further can be served in light of that testimony, and the disbursements, which the Prosecutor was authorized to make, were made long before he testified.
- 34. Paragraph 27 refers to disbursements made to a person after their testimony, and who was used as a source for information. The Prosecutor is authorized to make such disbursements, and the First Accused was in possession so as to be able to question such disbursements.
- 35. Paragraph 28 refers to disbursements made to a witness, the last payment being made on 17 November 2004. This witness was added to the Prosecution witness list by a decision of 11 February 2005.¹⁴ The assertion being made in the Motion is absurd.
- 36. Paragraph 29 refers to a Defence witness who agreed to take money from the Office of the Prosecutor after having advised them that he feared for his family's safety in Liberia if he spoke to the Prosecution. He took the money to bring his family to safety, after which he would feel safe to talk to the Prosecution. Instead he took the money and then testified on behalf of the First Accused He was not, nor has he ever been a Prosecution witness. The Prosecutor was authorized to make the payment under Rule 39(ii).
- 37. Paragraph 30 refers to evidence elicited during the trial of *Prosecutor v. Taylor*. It is frequently taken out of context and lists witnesses, TF1-337, TF1-532 and TF1-548 who did not testify in the RUF trial, and therefore, is irrelevant to the evidence before this Trial Chamber. Other witnesses do not differentiate between disbursements from the Prosecutor and those from WVS, for most persons it is the Special Court. TF1-334

¹⁴ Prosecutor v. Sesay et al, SCSL-04-15-T-320, "Decision on Prosecution Request for Leave to Call Additional Witnesses and to Disclose Additional Witness Statements," 11 February 2005.

provided ongoing assistance to the AFRC Prosecutors. Statements were not taken from him but he was asked about certain areas of evidence that arose in the AFRC trial and the Prosecutor, as authorized under Rule 39(ii), provided support and assistance to this former witness who was providing assistance to the AFRC Prosecutors.

IV. CONCLUSION

- 38. The Motion is without merit and should be dismissed. Rule 39(ii) is a broader Rule then the companion Rules at the ICTY and ICTR. It authorizes the Prosecutor to provide for the safety, support and assistance of potential witnesses and sources both before and after the Indictment. Article 15 of the Statute mandates that the Prosecutor act independently in carrying out his functions.
- 39. Some potential witnesses were forced to be relocated on an emergency basis because of threats to their safety or those of their family. Some have been forced to relocate and give up employment and contact with friends and families. Others were inconvenienced to the extent of being asked to come to Freetown 3 or 4 times to testify, only to be told that they were being stood down to the next session because the Trial proceeded slower than expected. Bringing to trial persons accused of war crimes, in the country where the war was fought, is a large undertaking, witnesses are essential to that task. Bringing forth witnesses who are willing to relive their ordeals in testimony before the Special Court is a challenging responsibility, which would be impossible to fulfil if witnesses had to suffer financially because of their decision to testify. In this context, it is obvious that the drafters of the Rules deemed it essential to give the Prosecutor the powers set forth in SCSL Rule 39. The Prosecutor has acted within the authority granted to him, and the relevant information has been disclosed to the Defence to permit them to raise those issues they deem significant. The inflammatory language adopted in the Motion does not mask the absence of substance.

Filed in Freetown, on 5 June 2008

For the Prosecution,

Pete Harrison

List of Authorities

Decisions and Judgements

Prosecutor v. Sesay et al, SCSL-04-15-T-1161, "Public Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payments to Witnesses," 30 May 2008.

Prosecutor v. Sesay et al., SCSL-04-15-1165, "Kallon Defence Response to Motion requesting the Trial Chamber Hear Evidence Concerning the Prosecution's Witness Management Unit and Its Payment to Witnesses", 3 June 2008

Prosecutor v. Sesay et al., SCSL-04-15-1167, "Gbao Notice of Support to Sesay Motion requesting the Trial Chamber Hear Evidence Concerning the Prosecution's Witness Management Unit and Its Payment to Witnesses", 3 June 2008.

Presecutor v. Sesay et al, SCSL-04-15-T-513, "Prosecution Request or Leave to Call Additional Witness and for Order for Protective Measures Pursuant to Rules 69 and 73bis(E)," 10 March 2006.

Presecutor v. Sesay et al, SCSL-04-15-T-320, "Decision on Prosecution Request for Leave to Call Additional Witnesses and to Disclose Additional Witness Statements," 11 February 2005.

Presecutor v. Orić, IT-03-68-T, "Decision on Ongoing Complaints About Prosecutorial Non-compliance with Rule 68 of the Rules", 13 December 2005. http://www.un.org/icty/oric/trialc/decision-e/051213.htm

Statute and Rules

Statute of the Special Court for Sierra Leone, Article 15.

Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 27 May 2008, Rules 2, 5, 39, 41, 44, 45, 46, 54.

Ru es of Procedure and Evidence of the ICTY, as Amended 28 February 2008, IT/32/Rev. 41. http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev41eb.pdf, 39.