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SCSL-2003-05-PT-042
(878-886)



SPECIAL COURT FOR SIERRA LEONE

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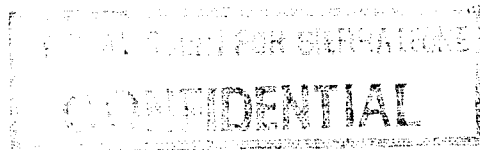
THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated Judge Pursuant to Rule 28 of the Rules

Registrar: Robin Vincent

Date: 30th May 2003

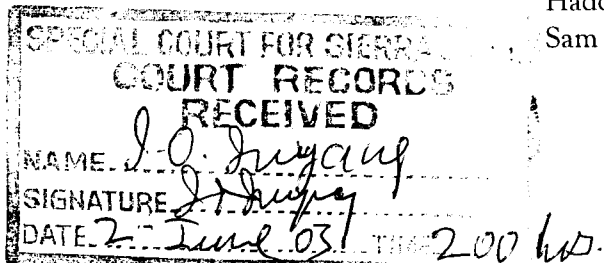
The Prosecutor Against: Issa Hassan Sesay
(Case No. SCSL-2003-05-PT)



**DECISION ON REQUEST OF DEFENCE OFFICE
FOR ORDER REGARDING CONTACT WITH ACCUSED**

Office of the Prosecutor:
Luc Côté, Chief of Prosecutions
Brenda J. Hollis, Senior Trial Counsel

Defence Office:
John R.W.D Jones, Acting Chief of Defence
Office
Claire Carlton-Hanciles, Defence Associate
Ibrahim Yillah, Defence Associate
Haddijatou Kah-Jalloh, Defence Associate
Sam Scratch, Defence Intern



THE SPECIAL COURT FOR SIERRA LEONE (“the Special Court”)

JUDGE BANKOLE THOMPSON, sitting as a single Judge designated pursuant to Rule 28 of the Rules of Procedure and Evidence (“the Rules”) on behalf of the Trial Chamber;

BEING SEIZED of the Extremely Urgent and Confidential Request of the Defence Office for an Order Regarding the Accused herein, Issa Hassan Sesay (“Request”), and of the “Briefs” (“Written Submissions”) with attachments in support of the said Request, filed on the 16th April 2003, and specifically for a permanent order that the Office of the Prosecutor cease interview of the Accused and that any further contact with the said Accused be made through the appropriate channel, namely, through the Defence Office, until a permanent Defence Counsel is assigned;

CONSIDERING the Response filed by the Prosecution on 23rd April 2003 to the aforementioned Defence Request in respect of Issa Hassan Sesay (“Response”);

CONSIDERING further the Defence Reply on Over-Sized Filing by the Prosecution filed on 29th April 2003 and the Reply to the Prosecution’s Response Regarding Contact with the Accused therein filed on even date (“Reply”);

WHEREAS acting on the Chamber’s Instruction, the Court Management Section notified the parties 1st May 2003 that the merits of the Defence Request, the Prosecution’s Response thereto and the Defence Replies thereto would be considered and determined on “Briefs” (Written Submissions) and attachments of the parties **ONLY** pursuant to Rule 73 of the Rules;

HAVING EXAMINED the Registrar’s Confidential Report dated 13th May 2003 on the subject matter of this Motion/ Request as requested by the Chamber on 1st May 2003;

TAKING NOTE of the Order to Temporarily Cease any Questioning of the Accused, dated 30th April 2003.

COGNISANT of the Statute of the Special Court (“the Statute”) particularly Articles 16 (2) and 17 (4) (g) thereof, and specifically Rules 45 and 54 of the Rules;

NOTING THE SUBMISSIONS OF THE PARTIES

The Defence Motion/ Request:

1. By the aforementioned Motion or Request, the Defence seeks an Order “regarding contact by the Office of the Prosecutor (“OTP”) with Accused persons in general and with Issa Hassan Sesay in particular” (paragraph 1 of Motion).
2. The Defence avers that its Office is aware that the OTP is currently conducting interviews with the Accused herein. It contends that Mr.Sesay is an accused person, who is pending

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assignment of permanent Counsel, and legally represented by members of the Defence Office; that he was represented by members of the Defence Office at his Initial Appearance to whom he had given a Power of Attorney, the OTP then having attended the Initial Appearance themselves. The Defence contends that in these circumstances, it was improper for the OTP to approach Mr. Sesay directly for the purpose of ascertaining whether he was willing to be interviewed by the OTP (paragraph 2 of Motion).

3. The Defence submits that, in the circumstances, the correct procedure would have been for the OTP to have approached the members of the Defence Office, as the legal representatives of the Accused and requested the Office to transmit to the Accused the OTP's request to interview him. The Defence submits, in addition, that there is clear authority that once a person has been indicted and the process has begun, from that point on, the indictee should only be approached by the adverse party through his legal representative (paragraph 3 of Motion).

4. As its final submission, the Defence argues that the procedural due process in the case of the Accused has been breached, and that the breach is continuing with each interview conducted by the OTP; hence the instant Request that such interview cease and that in future requests for interviewing indictees be addressed to the Defence Office for transmission to the indictees.

5. Relying on the decision in *The Prosecutor v. Miroslav Kvocka and Mladen Radic*, Case No. IT-95-14-I, Order on Representation by Counsel, Kvocka and Radic, 15th April 1998 rendered by Judge Rodrigues of the International Criminal Tribunal for Yugoslavia, where the "Prosecutor allegedly attempted to question the Accused even though neither of them had Counsel", and where the Tribunal ordered that "the questioning of either of the Accused by the Prosecutor may not proceed before he (the Accused) has received the permanent assignment of Counsel", the Defence submits that Mr. Sesay's position is the same as was in that case in that since he does not yet have permanent representation, the OTP should, therefore, not contact him or should only do so through the Defence Office. In support of their position, the Defence also cites some authorities from national legal systems.

The Prosecution Response:

6. In their Response filed on 24th April 2003 to the aforesaid Defence Motion, the Prosecution urges the Court to dismiss the Motion for the following reasons:

1. The Motion seeks to create a new "right" which does not exist in international law, practice, or standards of justice.
2. There has been no violation of the Accused's universal right to the assistance of Counsel;
3. The Motion is premature.

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4. The Acting Chief's alleged procedural due process requirement is not supported by the limited national authorities attached to the Motion.
5. The Acting Chief of Defence and Legal Adviser (Acting Chief) has no standing to file the Motion or request the relief sought. Furthermore, conflict of interest issues may preclude the Acting Chief from filing the Motion." (paragraph 1 of Response).

The Defence Reply:

7. In their Reply filed on 29th April 2003 to the Prosecution's Response to the aforementioned Defence Motion, the Defence strenuously contends that (i) the Office of the Prosecutor misrepresented the entity filing the request for order or contact, (ii) the Office of the Prosecutor has wrongly asserted that the Defence Office has no standing to file Motions on behalf of the Accused, and (iii) on the question of professional courtesy, the main issue is that where an Accused has appointed a legal representative, the Office of the Prosecutor is not entitled to approach the Accused directly but through his legal representative, and that there is clear authority in national jurisprudence as well as international jurisprudence for this proposition.

8. As to the first main contention, the Defence submits as follows:

Nothing on the face of the Defence Request suggested that it had been filed by the Acting Chief of the Defence Office in his official capacity or in any other capacity. The title of the Defence Request made it clear that it was filed *by the Defence Office*, not by the Acting Chief. Indeed, virtually every paragraph of the Defence Request referred to the *Defence Office* and the Defence Request was signed under the heading, "DEFENCE OFFICE. Hence, the Defence further submits that it is abundantly clear from the Defence Request that the submissions were those of the Defence Office, an entity established pursuant to Rule 45 of the Rules of the Court, with the competencies and functions set out in that Rule. In a further submission, the Defence contends that this misconception may explain in part the OTP's erroneous allegation of lack of standing. It is not a question of whether the "Acting Chief" has standing to submit Motions. The *Defence Office* clearly has standing to file motions on behalf of Accused persons, particularly until they have been assigned permanent Counsel.

9. On the second main contention that the OTP has wrongly asserted that the Defence Office has no standing to file motions on behalf of the Accused, the Defence submits that (a) it has filed pleadings on behalf of the Accused persons, including Mr. Sesay, without any objection raised by the OTP, thereby having waived its right to object, (b) they hold a Power of Attorney signed by the Accused, (c) Rule 45 obliges them to act for the Accused, and (d) they are not in any position of conflict. On the issue of professional courtesy, their contention is the issue is as stated in paragraph 7 above. They also contend that the Prosecutor's Response violates the Registrar's Practice Direction of 27th February 2003, to wit section 9 (c), thereof, by exceeding the six (6) pages limitation stipulation.



10. As regards this last contention, I agree with the Defence and strongly urge the Office of the Prosecutor to be in reasonable compliance with the stipulation in future filings.

HAVING EXAMINED the Registrar's Confidential Report dated 13th May 2003 on the subject matter of this Motion/ Request as requested by the Chamber on 1st May 2003;

AND HAVING DELIBERATED AS FOLLOWS:

11. Pursuant to Article 16 of the Statute, the Registry shall be responsible for the administration and servicing of the Special Court; and the Registry shall consist of a Registrar and *such other staff as may be required (my emphasis)*.

Further, Rule 45 of the Rules provides, *inter alia*, that,

“the Registrar shall establish, maintain and develop a Defence Office, for the purpose of ensuring the rights of suspects and Accused. The Defence Office shall be headed by the Special Court Principal Defender.”

Further, the aforesaid Rule states that,

“the Defence Office shall, in accordance with the Statute and Rules, provide advice, assistance and representation to:

(ii) Accused persons before the Special Court”

12. According to Rule 54 of the Rules, at “the request of either party or of its own motion, a Judge or a Trial Chamber may issue such Orders, summons, subpoenas, warrants and transfer Orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.”

13. Article 17 of the Statute sets out the Rights of the Accused including *inter alia*, the right

“not to be compelled to testify against himself or herself or to confess guilt.”

As designated Judge, I take cognisance of Rule 44 (A) of the Rules which legitimises the professional standing of Defence Counsel in relation to a Suspect or an Accused by the mandatory requirement of the filing of a Power of Attorney at the earliest opportunity.

14. Convinced that the Special Court's régime of norms allows for some limited degree of judicial monitoring of the conduct of investigations by the Office of the Prosecutor as evidenced by Rules 42 and 43 of the Rules of the Court, two preliminary questions and one key question fall

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to be judicially determined in resolving the instant dispute between the Defence Office and the Office of the Prosecutor. The preliminary questions are:

1. whether the Defence Office has *locus standi* in bringing the Motion;
2. whether, granted the Defence Office can properly file the Motion, the Motion is premature; and
3. whether, assuming the Motion is not premature, there was a breach of professional courtesy on the part of the OTP, to wit, that the OTP should have approached the Accused only through his legal representative (the Defence Office at the material time).

15. The key issue for determination is whether there exists under international law, practice, or within the parameters of universally recognised and accepted standards of justice a right in favour of counsel for an accused to require that contacts between his client and the Prosecution for the purposes of interviews be made only through him/her, and to interpose his subjective evaluation as to the propriety of the accused's choices, where such an accused has voluntarily and knowingly waived his right to the presence of Counsel at such interviews, such waiver being perceived by counsel as illogical and detrimental to the interests of the accused.

16. Addressing briefly the first of the preliminary questions for determination set out in paragraph 14 above from the perspective of my judicial appreciation of the cumulative effect of Articles 16 and 17 of the Statute and Rules 44 (A), 44 (B), 45, 54 of the Rules, let me make shortshrift of the Prosecution's argument by ruling straightaway that the Defence Office does have *locus standi* to file the instant Motion. The Power of Attorney issued to that Office reinforces this position. It is trite law that such an authority can only become extinguished by revocation or expiration. The premises underlying the Prosecution's submission that there is no such standing are, with all due respect, misconceived. The submission is, therefore, meritricious.

17. As regards the second issue, pursuant to the aforementioned Articles and Rules, the Defence can, during the conduct of the investigation phase, properly seek judicial intervention in favour of an accused if it appears that any of his or her rights guaranteed by Article 17 of the Statute of the Court is being, or is about to be, infringed. In the instant case, the relevant right is the right "not to be compelled to testify against himself or herself or to confess guilt." The Defence does not have to wait until the alleged damage is done. It can preemptorily invoke the jurisdiction of the Court to, as it were, nip in the bud, the perceived detriment.

18. It should be emphasized that, historically, the right not to incriminate oneself has acquired an inviolable sacrosanctity, having its juridical roots in antiquity as far back as Roman times. It is embodied in the Latin expression '*nemo tenetur prodere seipsum*', translated 'no one should be compelled to betray himself in public'. Its doctrinal evolution under English law can be traced back to the 16th and 17th centuries at the time of the infamous and unpopular ecclesiastical Courts,

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the Star Chamber and the High Commission designed to suppress religious and political dissent¹. In its contemporary or modern context, the right *at the pre-trial phase as well as the trial phase* has always been a basic feature of the common law, now internationally acknowledged and recognized as a due process right of an accused inextricably linked with the presumption of innocence²: that an accused person has a right to remain silent before his or her accusers. Viewed from a different perspective, it is a limitation on police or prosecutorial authority to investigate crime. The implication is that there is no law enforcement or prosecutorial right in law to compel an accused person to provide the police and the Prosecution with answers to their questions. Where an accused decides to speak to a "person in authority" during the course of an investigation the law places the onus on the Prosecution to establish that the statement was made freely and voluntarily, without fear or promise of favour. It is, therefore, expected that where counsel for an accused person perceives, rightly or wrongly, that this fundamental right of his client is in jeopardy at the *pre-trial stage*, there is clearly a professional obligation to seek to protect it. Hence, the Defence Motion is not premature.

19. At this stage, I join the determination of the merits of the third preliminary issue with that of the key issue before me. I do so because there is, in my judgement, a logical nexus between both questions. The Defence contends that where an accused has appointed a legal representative, the OTP is only entitled to approach the accused through his or her legal representative and not directly, this being a matter of professional courtesy; and that any departure from this position constitutes a breach of professional ethics on the part of the OTP. The position is articulated in this way: that once an accused has been indicted, he is, therefore, in an adversarial position *vis-à-vis* the OTP and for that purpose the accused has an appointed legal representative; and so a request for an interview with the accused should be transmitted to the accused through the Defence Office. Granted, *ex arguendo*, that such a professional courtesy exists, the critical question is whether it does vest a right in Counsel for the accused to interpose his subjective evaluation so as to limit the legal choices and options available to his client including those coming from the adversarial party.

20. I have meticulously reviewed the arguments advanced by both sides and also the textual and case-law authorities cited by learned Counsel for the Defence from both international jurisprudence and national jurisprudence. I fail to find any support from those citations for the proposition put forward by the Defence. It is indeed a novel proposition. More specifically, I have searched in vain for some authority to support the contention that where a person has been indicted and the adversarial process has begun, from that point onwards the indictee should only be approached through his legal representative. It is significant to note that the right to dispense with the presence of counsel inheres in the accused and so, consistent with my reasoning in paragraph 18 above, it should be emphasized as to the scope of the accused's right not to be compelled to incriminate himself that it is a key feature of modern criminal laws, national and

¹ See Eileen Skinnider and Frances Gordon. "The Right to Silence: International Norms and Domestic Realities", A Paper presented at the Sino Canadian International Conference on the Ratification and Implementation of Human Rights Covenants, Beijing, October 2001, published by the International Centre for Criminal Law Reform and Criminal Justice Policy, Canada.
² Id.

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international, and that the due process rights of the accused person are, generally, in constant conflict with the interests of the State and the international community in suppressing criminal conduct. Hence, the role of the courts to strive to achieve a balance between those competing rights. In this connection, the consistent judicial trend has been to acknowledge that the accused's right to *pre-trial silence* is not absolute. It is subject to certain limitations. In this respect, one major limitation arises from the practical circumstances of criminal investigations. It is that the right of a person not to incriminate himself when accused of crime does not preclude the police or the Prosecution from questioning him in the absence of his counsel even after the accused has exercised his right to counsel, as long as the police do not deny him his right to choose whether or not to speak to them³. To treat such a right as absolute would unduly burden investigations of criminal activities and render them inefficacious thereby undermining law enforcement capability to detect and investigate criminal conduct.

21. Finally, as regards the instant Motion by the Defence Office, it is necessary to focus on the issue of whether the waiver by the Accused herein of his right to have counsel present at the interviews with the OTP was voluntary and informed. This can only be determined objectively from the Confidential Report of the Registrar. In this regard, I have had the benefit of studying very closely the said Confidential Report of the Registrar dated 13th May 2003 made pursuant to the Order of this Chamber dated 1st May, 2003. Predicated upon the same, I find nothing therein to convince me that the waiver, on the part of the Accused, of his right to have counsel present at the interviews with the OTP was not voluntary and informed. By force of logic, a contrary factual finding would have vitiated the waiver in law.

THEREFORE, BASED ON THE FOREGOING DELIBERATION, I HEREBY DENY THE MOTION OF THE DEFENCE ON THESE GROUNDS:

1. There is no right under international criminal law granted to counsel for an accused person, who has voluntarily and knowingly waived his right to the presence of counsel at an interview between the accused and the Prosecution, to interpose his judgement to prevent the continuation of the interview on the basis of counsel's professional evaluation that the accused has made illogical choices detrimental to his interests.
2. The right not to be compelled to incriminate oneself is not an absolute right; it can be derogated from where an accused voluntarily and knowingly waives his right to legal protection of the said right.
3. That the waiver by the Accused herein of his right to have counsel present at the said interviews was voluntary and informed.

CONSEQUENTIALLY, the Interim Order to Temporarily Cease any Questioning of the Accused of the Special Court in this matter dated 30th April 2003 is hereby revoked.

³ Id.

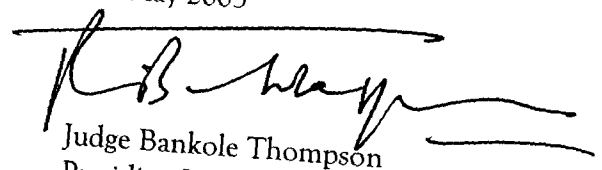
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Done at Freetown

30th May 2003



Judge Bankole Thompson
Presiding Judge, Trial Chamber

