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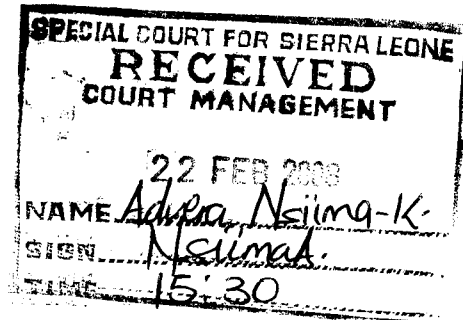
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: Mr. Herman von Hebel

Date filed: 22 February 2008



THE PROSECUTOR

Against

Issa Hassan Sesay

Morris Kallon

Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC
PROSECUTION RESPONSE TO KALLON APPLICATION FOR LEAVE TO MAKE A MOTION IN
EXCESS OF THE PAGE LIMIT

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I. INTRODUCTION

1. On 14 February 2008, the Accused Kallon filed a “Public with Confidential Annex Kallon Application for Leave to Make a Motion in Excess of the Page Limit,”¹ (“Application”). The Confidential Annex attached to the Application is an 82 page motion. The Application should be dismissed on the basis that the Accused has failed to demonstrate “exceptional circumstances” that would justify leave being granted to file an 82 page motion.

II. THE PRACTICE DIRECTION

2. Article 6(C) of the Practice Direction on Filing Documents Before the Special Court of Sierra Leone (“Practice Direction”) provides that motions “shall not exceed 10 pages or 3,000 words whichever is greater.”² Article 6(G) states:

A Party, State, organisation or person seeking to file a document which exceeds the page limits set out in this article shall obtain authorisation in advance from a Judge or a Chamber and shall provide an explanation of the **exceptional circumstances** that necessitate the oversize filing.³ [bold added]

3. Exceptional circumstances must be demonstrated by the applicant and a mere assertion that “the detail of the factual and legal issues raised in the indictment and in the Trial Chamber’s judgement of 22 February 2001 and the interests of justice,”⁴ are not sufficient to demonstrate exceptional circumstances. Sitting as a Pre-Appeal Judge, Mr. Justice Shahabuddeen dismissed an application to increase the page limit of an appeal brief from 100 to 250 pages.⁵ The appellant said that an enlargement in the page limit was warranted because 172 grounds of appeal would be argued. Mr. Justice Shahabuddeen observed that:

Given the limitations on brief length as well as the greater effectiveness of cohesive and well structured arguments, it is useful for appellants to organize their various allegations of error rather than simply setting them

¹ *Prosecutor v. Sesay et al*, SCSL-2004-15-T-985, “Public with Confidential Annex Kallon Application for Leave to Make a Motion in Excess of the Page Limit,” 14 February 2008

² Practice Direction on Filing Documents Before the Special Court of Sierra Leone, adopted 27 February 2003, as amended, Article 6(C).

³ Practice Direction, Article 6(G).

⁴ *Prosecutor v. Kunarac et al*, IT-96-22&23/1-A, “Decision on Joint Request for Authorisation to Exceed Prescribed Page Limits,” Pre-Appeal Judge, 10 July 2001, p. 2, where the Defence application was dismissed.

⁵ *Prosecutor v. Brdjanin*, IT-36-A, “Decision on Appellant’s Motion for Extension of Time to File a Consolidated Brief and for Enlargement of Page Limit,” 22 June 2005.

forth seriatim in no particular groupings. Even a cursory look at the Appellant's original and supplemental Notices of Appeal reveals that many of the 172 'separate' grounds of appeal are in fact related to one another in subject matter, and could be addressed effectively in a brief containing fewer than 172 separate subsections.⁶

4. Mr. Justice Shahabuddeen held that it would not be helpful for the purposes of determining "exceptional circumstances" to simply divide the number of pages by the number of grounds of appeal, nor can the number of grounds of appeal be considered "exceptional circumstances," and concluded that:

The Appellant has offered no satisfactory reason why his appeal involves issues that are so complex and difficult that they cannot be addressed sufficiently within 100 pages; nor has he demonstrated, as required by the Practice Direction, that the nature of these issues makes his case "extraordinary" in comparison with other cases addressed by the Appeals Chamber, which are generally complex and difficult. It is not sufficient to point to the extensiveness of the trial record or the length of the trial; these facts are not especially "extraordinary" in the context of the Tribunal's cases, and moreover do not bear directly on the issue of the space necessary to discuss the issues on appeal.⁷

5. The Application seeks an 8-fold enlargement of the 10 page limit for motions proscribed by the Practice Direction. The draft motion is almost three times the page limit proscribed for interlocutory appeal briefs.⁸
6. In *Martic* the Prosecution sought leave to file a 60 page Pre-Trial Brief, ten pages longer than the 50 pages stipulated in the practice direction. The Indictment was complex, charging the Accused with participating in a joint criminal enterprise and having "committed crimes during the course of two separate wars, in Croatia and in Bosnia and Herzegovina, over a five-year period."⁹ This is a similar time period to the RUF trial, yet the Prosecution motion failed to meet the "exceptional circumstances" test and was dismissed by the Pre-Trial Judge, even though the motion was unopposed.¹⁰ Similarly, a Prosecution application to enlarge its final trial brief from 200 to 500 pages was dismissed in *Kvočka et al*, even though there were five co-accused on trial, because "the

⁶ *Ibid*, para. 10.

⁷ *Ibid*, para. 12.

⁸ Practice Direction, Article 6. The page limit is 30 pages.

⁹ *Prosecutor v. Martić*, IT-95-11-PT, "Decision on Prosecution's Motion for Leave to File Pre-Trial Brief of Sixty Pages," 5 May 2004, p. 1.

¹⁰ *Ibid*, p. 2.

volume of evidence which has been and remains to be presented during the trial falls squarely within the parameters of an average case before the Tribunal.”¹¹

7. An application to file a 300 page appellant’s brief, where the Practice Direction stated that the limit was 100 pages, was dismissed because the assertion that the “length of the Trial Judgement and the attached separate opinion of Judge Nieto-Navia, and the fact that he intends to challenge every factual finding in the Trial Judgement...”, do not constitute exceptional circumstances.¹² A Prosecution application to file a 100 page pre-trial brief, instead of the 50 pages contemplated by the practice direction, was dismissed in circumstances where the Prosecution claimed that it was a political leadership case with a 14 count indictment, and that 50 pages were inadequate to summarize the evidence from the large number of documents which required discussion and to outline the forms of criminal responsibility and to state the law. The Trial Chamber held that “the explanation provided by the Prosecution in the above-mentioned points (a), (b) and (c) for requesting an oversized filing is not satisfactory as the Prosecution must in all cases summarize its evidence, outline the form of responsibility incurred by the accused and state its legal position.”¹³
8. The Accused refers to *Krstic* in support of his Application,¹⁴ but that was a case of the Prosecution as Respondent being permitted to exceed the page limit by 35 pages because the accused Appellant had failed to make any legal argument, made almost no reference to the trial record, and the Appellant did not limit his filing to the issue of additional prejudice as he had been directed to do by the Appeals Chamber. Importantly, the Accused did not oppose the enlargement of pages sought by the Prosecution.¹⁵
9. The context in which this Application needs to be considered is suggested by the *Bagosora* case relied on by the Accused. There it was held that:

6. The Defence is expected, however, to make a timely objection to evidence whose admissibility it challenges. Failure to do so, particularly on grounds of lack of notice of a material allegation, deprives the

¹¹ *Prosecutor v. Kvočka et al*, IT-98-30/1-T, “Decision on Motion for Variance of Length of Prosecution’s Final Brief,” 29 March 2001, p. 2.

¹² *Prosecutor v. Galic*, IT-98-29-A, “Decision on Defence’s Request for Leave to Exceed Page Limit in Defence’s Appellant’s Brief,” Pre-Appeal Judge, 19 May 2004, p. 2.

¹³ *Prosecutor v. Stakic*, IT-97-24-PT, “Decision on Prosecution’s Motion for Variation of Length of Pre-Trial Brief,” 14 November 2001, p. 2.

¹⁴ See Application para. 5; *Prosecutor v. Krstic*, IT-98-33-A, “Order on Extension of Pages,” 12 May 2003.

¹⁵ *Krstic, supra*, p. 2.

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Prosecution of the opportunity to make a motion for an adjournment or amendment of the indictment. Failure to make a contemporaneous objection does not constitute an absolute waiver of the rights of the Accused, but shifts the burden of proof to the Accused to show that lack of notice has been prejudicial.¹⁶

10. The objections stated in the draft motion, should it subsequently be filed, are brought over 18 months after the Prosecution closed its case. The objection will not be timely and the Prosecution is clearly deprived of an opportunity to seek an adjournment or amend the indictment. The significance of taking timely objections is reinforced by Rule 5 of the Rules of Procedure and Evidence (“Rules”):

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

11. It is clear from the words of Rule 5 that objections should be taken at the earliest opportunity.

III. APPLICATION IN REALITY IS ONE ALLEGING DEFECTS IN THE INDICTMENT

12. Paragraphs 9 and 10 of the Application advises the court that the “basic premise” of the Application is that the Accused is facing allegations of crimes for which he has not been charged, and that issues of defective pleading constitute exceptional circumstances. The Accused has already filed a motion alleging defects to the Indictment,¹⁷ which was filed after first seeking leave to file an enlarged document. That application was dismissed, and the Accused then filed, without leave, a 38 page motion that sought to circumvent the Practice Direction by simply dividing up the motion into three annexes attached to the first few pages of the motion. A duplicity of motions before the Trial Chamber on alleged defects to the Indictment does not promote judicial economy. The current application also chooses to ignore a recent Decision of the Trial Chamber dismissing a Gbao application to raise alleged defects in the Indictment, where the Trial Chamber held:

RECALLING the previous Decisions of the Trial Chamber concerning

¹⁶ *Prosecutor v. Bagosora et al*, ICTR-98-41-T, “Decision on Exclusion of Testimony Outside the Scope of the Indictment,” 27 September 2005, para. 6.

¹⁷ *Prosecutor v. Sesay et al*, SCSL-03-15-T-970, “Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions,” 7 February 2008.

the making of objections to the form of the Indictment, including the Oral Decision on RUF Motions for Acquittal Pursuant to Rule 98 rendered on the 25th of October 2006;

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CONSIDERING that in all the circumstances it would be more appropriate for the Trial Chamber to address any objections to the form of the Indictment at the end of the case rather than during the course of the trial;¹⁸

13. The Prosecution disagrees with the Accused's claim that issues of "defective pleading represent exceptional circumstances..."¹⁹ Although, the Accused relies on the *Seselj* decision,²⁰ the Accused did not cite the paragraph in that decision which preceded the one quoted in the Application. *Seselj* represented himself. Properly read, the *Seselj* discussion makes clear that the Trial Chamber of the ICTY took the view that it is important that additional consideration be given to self-represented accused:

NOTING Section 7 of the Practice Direction on the Length of Briefs and Motions ("Practice Direction") which states that a Trial Chamber may grant authorization to exceed the page limits in the Practice Direction if the party seeking authorization provides "an explanation of exceptional circumstances that necessitates the oversized filing";

NOTING that, although the Accused's Second Request does not provide such an explanation, the Trial Chamber has, in view of the fact that the Accused conducts his own defence, carefully reviewed the exceptional circumstances which might necessitate a variation from the page limits foreseen in the Practice Direction;

CONSIDERING that the Trial Chamber, bearing great importance on the principle of equity, equality and the rights of defence, is of the firm belief that the matters raised by the Accused in his Second Request, namely challenges to jurisdiction and allegations of defects in the form of the indictment ("Matters"), could be classified as exceptional circumstances under Section 7 of the Practice Direction and justify exceeding the page limit foreseen the Practice Direction.²¹ [underlining added]

14. The Application says that "issues of defective pleading represent exceptional circumstances" and that overstates the law. *Seselj* stands for the lesser proposition that

¹⁸ *Prosecutor v. Sesay et al*, SCSL-04-15-T-944, "Decision on Gbao Request for Leave to Raise Objections to the Form of the Indictment," 17 January 2008.

¹⁹ Asserted at para. 10 of the Application.

²⁰ Application para. 9; *Prosecutor v. Seselj*, IT-03-67-PT, "Decision on Certification to Appeal to Extend the Deadline for Filing Certain Preliminary Motions," 18 November 2003.

²¹ *Seselj, supra*, p. 2.

challenges to the Indictment could be classified as exceptional circumstances. Of greater significance though is that Seselj was representing himself. His application did not even address the issue of providing an explanation of the exceptional circumstances that necessitate an oversized filing, nonetheless the court observed that the principle of equity required it to review whether in the context of an accused representing himself exceptional circumstances might exist.

15. The Accused is represented by four counsel and the *Seselj* decision is of little assistance. Those counsel have an understanding of the law and how to present arguments in a concise manner, which Seselj could not be expected to share.
16. This Trial Chamber has previously considered the degree of specificity which should be plead in Indictments.²² The Chamber held that:

The fundamental question in determining whether an Indictment was pleaded with sufficient particularity is whether an Accused had enough detail to prepare his defence.

The Indictment must state the material facts underpinning the charges, but need not elaborate on the evidence by which such material facts are to be proved. What is material depends on the facts of the particular case and is not decided in the abstract.²³

17. The Trial Chamber's Judgement in *Fofana and Kondewa* further held that "challenges to the form of the Indictment should be raised as preliminary motions,"²⁴ and that "the Defence should be limited in raising challenges to alleged defects in the Indictment at a later stage for tactical reasons."²⁵ The Trial Chamber, nonetheless, went on to consider such objections in the final brief to "ensure the integrity of the proceedings and to safeguard the rights of the Accused ... [but] given that the Defence has provided no explanation for its failure to raise the objections at trial, the burden has shifted to the

²² *Prosecutor v. Sesay*, SCSL-2003-05-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment," 13 October 2003; *Prosecutor v. Kanu*, SCSL-2003-13-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment," 19 November 2003; *Prosecutor v. Kondewa*, SCSL-2003-12-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment," 27 November 2003; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-PT-46, "Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment," 1 April 2004; *Prosecutor v. Norman et al.*, SCSL-004-14-T, "Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence," 24 May 2005.

²³ *Prosecutor v. Sesay*, SCSL-2003-05-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment," 13 October 2003, para. 6.

²⁴ *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T-785, "Judgement," 2 August 2007, para. 26.

²⁵ *Ibid.*, para. 28.

Defence to demonstrate that the Accused's ability to defend himself has been materially impaired by the alleged defects."²⁶

18. The current Application is not timely. The *Fofana and Kondewa* Judgement is limited to the proposition that the Trial Chamber may consider challenges to the Indictment in final briefs. The Trial Chamber has already dismissed a Gbao request to raise defects in the Indictment, and there is no principled reason why that Decision should not be followed. To suggest otherwise would be to apply different standards to different accused and ignore judicial economy. Proceeding with the Kallon motion at this time may not foreclose Sesay and Gbao from raising similar arguments in their final briefs, and the same issues may subsequently require further judicial consideration.
19. The Prosecution is not aware of an exhaustive definition of what constitutes "exceptional circumstances" in the context of an application to increase the number of pages of a motion. However, where the motion itself is one which cannot be filed pursuant to the Rules because the time for filing such motions is at the pre-trial stage, or in certain instances as part of a final brief to ensure the integrity of the process, then there can be no exceptional circumstances to file an oversized document in support of such relief.

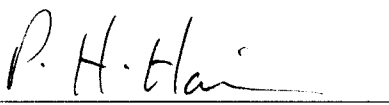
IV. CONCLUSION

20. The Application for leave to file the draft 82 page motion attached to the Application should be dismissed.

Filed in Freetown,

22 February 2008

For the Prosecution,



Pete Harrison

²⁶ *Ibid*, para. 29.

List of Authorities**Decisions and Judgements**

Prosecutor v. Sesay et al, SCSL-2004-15-T-985, “Public with Confidential Annex Kallon Application for Leave to Make a Motion in Excess of the Page Limit,” 14 February 2008.

Prosecutor v. Sesay et al, SCSL-03-15-T-970, “Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions,” 7 February 2008.

Prosecutor v. Sesay et al, SCSL-04-15-T-944, “Decision on Gbao Request for Leave to Raise Objections to the Form of the Indictment,” 17 January 2008.

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

Prosecutor v. Kanu, SCSL-2003-13-PT, “Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment,” 19 November 2003.

Prosecutor v. Kondewa, SCSL-2003-12-PT, “Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment,” 27 November 2003

Prosecutor v. Brima, Kamara and Kanu, SCSL-04-16-PT-46, “Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment,” 1 April 2004.

Prosecutor v. Norman et al, SCSL-004-14-T, “Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence,” 24 May 2005.

Prosecutor v. Fofana and Kondewa, SCSL-04-14-T-785, “Judgement,” 2 August 2007.

Prosecutor v. Seselj, IT-03-67-PT, “Decision on Certification to Appeal to Extend the Deadline for Filing Certain Preliminary Motions,” 18 November 2003.
<http://www.un.org/icty/seselj/trialc/decision-e/031118-2.htm>

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Prosecutor v. Martić, IT-95-11-PT, “Decision on Prosecution’s Motion for Leave to File Pre-Trial Brief of Sixty Pages,” 5 May 2004.
<http://www.un.org/icty/martic/trialc/decision-e/040505.htm>

Prosecutor v. Brđjanin, IT-36-A, “Decision on Appellant’s Motion for Extension of Time to File a Consolidated Brief and for Enlargement of Page Limit,” 22 June 2005.
<http://www.un.org/icty/brdjanin/appeal/decision-e/050622.htm>

Prosecutor v Sesay, Kallon, Gbao, SCSL-2004-15-T

Prosecutor v. Kvočka et al, IT-98-30/1-T, “Decision on Motion for Variance of Length of Prosecution’s Final Brief,” 29 March 2001.
<http://www.un.org/icty/galic/appeal/decision-e/040519.htm>

Prosecutor v. Galic, IT-98-29-A, “Decision on Defence’s Request for Leave to Exceed Page Limit in Defence’s Appellant’s Brief,” Pre-Appeal Judge, 19 May 2004.
<http://www.un.org/icty/galic/appeal/decision-e/040519.htm>

Prosecutor v. Stakic, IT-97-24-PT, “Decision on Prosecution’s Motion for Variation of Length of Pre-Trial Brief,” 14 November 2001.
<http://www.un.org/icty/stakic/trialc/decision-e/11114F117075.htm>

Prosecutor v. Krstic, IT-98-33-A, “Order on Extension of Pages,” 12 May 2003.
<http://www.un.org/icty/krstic/Appeal/order-e/030512.htm>

Prosecutor v. Bagosora et al, ICTR-98-41-T, “Decision on Exclusion of Testimony Outside the Scope of the Indictment,” 27 September 2005.
<http://69.94.11.53/ENGLISH/cases/Kabiligi/decisions/270905.htm>

Rules and Practice Directions

Practice Direction on Filing Documents Before the Special Court of Sierra Leone, adopted 27 February 2003, as amended