

Case No. SCSL-2004-15-T
THE PROSECUTOR OF
THE SPECIAL COURT
V.
ISSA SESAY
MORRIS KALLON
AUGUSTINE GBAO

WEDNESDAY, 2 MAY 2007
10.10 A.M.
STATUS CONFERENCE

TRIAL CHAMBER I

Before the Judges:	Bankole Thompson, Presiding Pierre Boutet Benjamin Mutanga Itoe
For Chambers:	Mr Matteo Crippa Ms Nicole Lewis
For the Registry:	Ms Advera Kamuzora
For the Prosecution:	Mr Peter Harrison Ms Penelope-Ann Mamattah Mr Charles Hardaway Mr Vincent Wagona Ms Amira Hudroge (intern)
For the accused Issa Sesay:	Mr Wayne Jordash Ms Sareta Ashraph Mr Jared Kneitel
For the accused Morris Kallon:	Mr Shekou Touray Mr Charles Taku Mr Melron Nicol-Wilson Ms Sabrina Mahtani Mr Alpha Sesay
For the accused Augustine Gbao:	Mr Andreas O'Shea

assistant)

assistant)

Mr John Cammegh.
Ms Lee Kulinowski (legal

Mr Julius Cuffie (legal

1 [RUF02MAY07A - SM]
2 Wednesday, 2 May 2007
3 [The accused Sesay and Kallon present]
4 [Status Conference]
5 [Open session]
6 [Upon commencing at 10.10 a.m.]
7 PRESIDING JUDGE: Good morning, counsel. This Trial
8 Chamber is convened today for the purpose of conducting the
9 status conference in respect of the commencement of the
10 phase of the RUF trial. May I have representations, please?
11 Prosecution.
12 MR HARRISON: Harrison, initials, PH; Ms Mamattah,
13 M-A-M-A-T-T-A-H; Mr Charles Hardaway; and Mr Vincent Wagona
14 the Prosecution.
15 PRESIDING JUDGE: Thank you. First accused.
16 MR JORDASH: For the first accused, Wayne Jordash;
17 Co-counsel Sareta Ashraph; Jared Kneitel; and a new member,
18 Martha Sesay, an intern, supplied by the Defence Office last
19 week.
20 PRESIDING JUDGE: Thank you. Second accused.
21 MR NICOL-WILSON: Your Honours, for the second accused
22 Charles Tako, lead counsel; Melron Nicol-Wilson; Sabrina

Defence

for

Mahtani;

23 and Alpha Sesay.

24 PRESIDING JUDGE: Thank you. For the third accused.

25 MR O'SHEA: May it please Your Honours, Andreas O'Shea,

new

26 with Mr John Cammegh; legal assistant Lee Kulinowski; and a

27 member of the team, Mr Julius Cuffie, a member of the Sierra

28 Leonean Bar, and second legal assistant on our team.

29 PRESIDING JUDGE: Thank you. Are there any other

SCSL - TRIAL CHAMBER I

Principal

1 recognitions to make?

2 MR NMEHIELLE: Your Honours, Vincent Nmehielle,
3 Defender.

4 PRESIDING JUDGE: Thank you. I do understand that there
5 are some new interpreters who are to be sworn.

6 MR SESAY: Yes, Your Honour.

7 PRESIDING JUDGE: We'll proceed with that ceremony.

8 [Interpreters sworn]

status

9 PRESIDING JUDGE: Counsel, the agenda items for this

and

10 conference are as follows: The main one, preliminary issues,

is

11 that will cover health issues and detention issues; the second

12 review of Defence filings; the third is trial logistics.

of

13 These issues will cover a trial schedule: B. Case
14 presentation; C. Upcoming Defence witnesses. For the sake of
15 clarity, under (C), we will cover these issues: 1. Testimony
16 first accused; 2. Disclosure of Defence witnesses names;
17 3. Order of Defence witnesses' testimonies; 4. Common
18 witnesses; 5. Expert witness DIS-250; and 6. Protective
19 measures for Defence witnesses on behalf of the first accused.

discuss

20 The fourth item will be any other matters. We'll

21 outstanding motions and any other submissions of the parties.

22 This trial commenced on 5 July 2004, and the Prosecution
23 closed its case on 2 August 2006, after 182 days of trial. In
24 total, 86 witnesses were heard during the case for the
25 Prosecution.

26 On 25 October 2006, the Trial Chamber delivered its oral
27 decision on Defence motions for judgment of acquittal,
pursuant
28 to Rule 98 of the Rules. Each of the Defence motions was
29 dismissed. However, the Trial Chamber found that no evidence
was

1 adduced by the Prosecution in relation to several geographical
2 locations pleaded in various counts in the indictment.
3 Consequently, each accused has been put to his election to
call
4 evidence, if he so desires.

5 A pre-defence conference was held on 20 March 2007
pursuant
6 to Rule 73ter of the Rules. This status conference is being
held
7 today pursuant to Rule 65bis of the Rules as a follow-up to
the
8 pre-defence conference. According to Rule 65bis, a status
9 conference may be convened by the designated judge, the Trial
10 Chamber or a judge designated among its members. The status
11 conference shall:

12 1. Organise exchanges between the parties so as to
ensure
13 expeditious trial proceedings;

14 2. Reveal the status of his case and to allow the
accused
15 the opportunity to raise issues in relation thereto.

16 I'll now enquire from the Defence teams about the state
of
17 the health of the accused persons. Before I do so, let me
18 observe that the Chamber would like to enquire, in particular,
19 about the health of each accused person but also that the
Chamber

20 is particularly cognisant of the fact that the first accused
21 underwent surgery on 8 February 2007.

22 Mr Jordash, would you like to comment and give us some
23 further update, if you so desire?

24 MR JORDASH: Yes. Firstly, can I explain that Mr Sesay,
as
25 you can see, is not in the courtroom and has elected not to
come
26 to Court today. The reasons for that are to ensure that he is
27 rested for tomorrow.

28 Secondly, in relation to his health, and the first is
29 slightly related to this issue. As Your Honours know, he's
had

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have
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1 the operation. It was a serious operation which lasted for
2 hours under general anaesthetic which involved removing some
3 of -- or I think entering the bone. So it was quite an
4 procedure. Recovery appeared to be going quite well until
5 two weeks ago when, due to extended sitting hours in the
6 Detention Centre, the leg started to ache. As I understand
7 he's been taken to Choithram's last week and was X-rayed and,
8 I understand it, the results of that X-ray are anticipated
9 shortly.
10 I think to sum it up he's recovering but sitting for
11 extended hours does bring about pain. He's assured me that
12 he certainly does not want is to be rising in the middle of
13 evidence, and he's articulated that concern to me a number of
14 times that the last thing he wants is for Your Honours or the
15 public to think he is in some way trying to avoid answering
16 questions; he's not. And I can assure this Trial Chamber that
17 when I've been with him in the Detention Centre over the last
18 two-and-a-half weeks, it's been an ongoing issue, although I
19 to say we have managed to sit for lengthy periods but, by the

20 of the day, the pain has returned. So that's the state of
21 affairs. I anticipate he will largely be okay to sit through
the
22 day, but that's as far as I know.

23 PRESIDING JUDGE: Well, thank you, Mr Jordash.

24 JUDGE ITOE: But if I may informally ask, Mr Jordash,
are
25 you suggesting that he mightn't cope with our sitting
schedules,
26 because normally we come in, we rise, we sit and so on and so
27 forth? Because I understood you've said, you know, that he
28 wouldn't want to be rising too often during the sitting
sessions.
29 Can you give us some explanation on that, please. Because we

1 normally rise for some time and come back. Is that, in terms
of
2 his health, would that be an inconvenience? What would that
3 mean?

4 MR JORDASH: Well, my feeling, having observed him over
the
5 last two-and-a-half weeks, is that the usual breaks would
6 suffice. Having said that, my feeling is after two weeks, if
his
7 evidence goes on longer than that, or even after a week, the
pain
8 is going to get worse as the prolonged sitting day in, day
out,
9 starts to affect the recovery. I may be wrong about that,
10 because I don't know what the diagnosis is at this stage, and
it
11 may be that, in fact, he starts recovering. I'm not quite
sure.

12 If I had to guess, which is what I'm doing, I would say
13 that the breaks would be sufficient, but it may be that
provision
14 will have to be made for him to lie down during the break,
just
15 to take the pressure off the injury.

16 PRESIDING JUDGE: Would this be something that we may
need
17 some medical guidance on?

18 MR JORDASH: Yes, for sure.

19 PRESIDING JUDGE: Second accused, any health issue?

20 MR NICOL-WILSON: Your Honours, the second accused is in
21 good health.

22 PRESIDING JUDGE: Thank you. And counsel for the third?

23 MR CAMMEGH: Your Honour, Mr Gbao is in robust health.

24 He's not here today; I think he's rather depressed at last
25 night's football result. I think it's nothing more than that.

26 PRESIDING JUDGE: Not having his exercises.

27 underline JUDGE ITOE: He's not just in good health, but I

28 the word 'robust'.

29 MR CAMMEGH: That's what I said, yes.

1 JUDGE ITOE: It's very reassuring, isn't it?

2 MR CAMMEGH: Yes.

3 JUDGE ITOE: Thank you, Mr Cammegh.

4 PRESIDING JUDGE: Thank you, Mr Cammegh. Are there any
5 detention issues? Counsel for the first accused, any
6 issues that you would --

7 MR JORDASH: None whatsoever. Except just to say thank
8 you
9 the
10 to Detention for accommodating certain requests of mine over
11 last two-and-a-half weeks.

12 PRESIDING JUDGE: Thank you. Counsel for the second
13 accused, any?

14 MR NICOL-WILSON: None, Your Honour.

15 PRESIDING JUDGE: Counsel for the third?

16 MR CAMMEGH: No, Your Honour.

17 PRESIDING JUDGE: Thanks. Let's move on to the next
18 item,
19 and that's the review of Defence filings. On 30 October 2006,
20 the Trial Chamber ordered that the Defence teams for each
21 accused
22 file certain materials concerning the preparation and
23 presentation of their case. On 7 February 2007, the Chamber
24 granted applications for the postponement until 5 March 2007
25 of

on 21 the deadline for the filing of these materials. Accordingly,
team. 22 5 March 2007, various materials were filed by each Defence
conference 23 On 20 March 2007, the Trial Chamber held a pre-defence
reviewing 24 pursuant to Rule 73ter for the purposes, inter alia, or
to 25 the Defence materials and discussing other issues pertaining
26 the preparation and commencement of the Defence case.
the 27 Subsequently, on 27 March, after hearing the parties at
28 pre-defence conference, the Chamber issued its consequential
Defence 29 orders concerning the preparation and commencement of the

1 case in which it ordered, inter alia, that each Defence team
2 reviews its respective materials with a view to reducing their
3 current witness list, thereby avoiding repetitious evidence or
4 calling an excessive number of witnesses to establish the same
5 fact or facts, or calling witnesses in relation to crime or
6 events outside the scope of the indictment.

filed

7 Accordingly, on 16 February 2007, each Defence team
8 its revised materials comprising, in particular, reviewed and
9 reduced witness lists. As indicated in each of the respective
10 materials, the Defence of the first accused now intends to
11 call a total of 149 core witnesses, of which 34 are indicated as
12 Rule 92bis witnesses.

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witnesses.

of

13 Defence for Kallon now intends to call a total of 83
14 witnesses, of which three are indicated as Rule 92bis
15 and, finally, Defence for Gbao now intend to call a total of
16 core witnesses, of which none are indicated as 92bis
17 In total, the Defence now intends to call 287 core witnesses,
18 which 37 are indicated as Rule 92bis witnesses.

19 The Chamber notes that in its materials filed on 5 March

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20 2007, the Defence indicated a total of 337 core witnesses
21 means that there is now a cumulative reduction of 50
22 The Chamber also notes that each Defence team has indicated
23 it will continue to review its list of witnesses so as to
24 reduction, and that it will communicate any such reduction to
25 Chamber and the Prosecution as soon as possible.

26 The Chamber notes, with some satisfaction, the overall
27 reduction of the total number of Defence witnesses, as well as
28 the Defence undertaking to continue assessing the overall
number
29 with a view to reduction. All we do at this stage is to

1 encourage the Defence strongly to do so in the interests of
2 justice and for the efficient administration and management of
3 the trial proceedings.

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4 Does the Prosecution have any comment in response to
5 narration?

6 MR HARRISON: No, thank you.

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7 PRESIDING JUDGE: Does the Prosecution have any comments
8 specifically in response to the reviewed summaries of Defence
9 witnesses because I remember the pre-defence conference there
10 nothing specific in terms of a response when the issue of the
11 sufficiency in terms of particularisation and specificity came
12 for discussion?

up

say.

13 MR HARRISON: At the present time, we have nothing to
14 Thank you.

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15 PRESIDING JUDGE: Thank you. Does the Defence wish to
16 anything to complete the picture in terms of the state of the
17 records, by way of amendment or revision? I have actually
18 a profile of the state of the records on this issue. Yes,
19 Professor Brown.

20 MR O'SHEA: Yes.

21 PRESIDING JUDGE: I'm sorry, Professor O'Shea.

22 MR O'SHEA: One correction, Your Honour.

23 PRESIDING JUDGE: Yes. And thank you for that
correction

24 too.

25 MR O'SHEA: Thank you, Your Honour. Two corrections,
26 rather.

27 PRESIDING JUDGE: Yes.

28 MR O'SHEA: The correction is there is there is one
92bis

29 witness which is B81 for the Gbao team.

1 PRESIDING JUDGE: Very well. The records will reflect
2 that.

first

3 JUDGE ITOE: Mr Harrison, if the calendar were to be
4 respected, tomorrow we should be taking the evidence of the
5 accused? You have been communicated with the summary of his
6 evidence?

7 MR HARRISON: Yes, that's right.

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8 JUDGE ITOE: You have been communicated. I want to be
9 specific on this, because I don't want us to come wrestling
10 this or that. Do you have any particular comments, because he
11 will be testifying, from what the indications we have from
12 Mr Jordash, maybe for over a week or even two. Maybe under

two.

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13 Are you satisfied with the witness summary that has been
14 on you?

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15 MR HARRISON: Well, we understand it to be a summary,
16 we understand it to be a summary of all of the points. If it
17 should be the case that the evidence goes beyond what is in
18 summary then we would raise it, but we understand the Defence
19 undertaken their best efforts to create a - as they describe

20 summary of the witness's evidence.

21 JUDGE ITOE: Thank you. That's the only clarification I
22 wanted from you.

23 MR JORDASH: Well, could I --

24 PRESIDING JUDGE: Yes, go ahead, Mr Jordash.

25 MR JORDASH: I communicated this to the Prosecution, I
26 think Friday last week. We haven't taken valuable time to
create
summary
27 a summary which covers every point, because, to create a
28 which covers every point, would take many, many, many legal
29 hours, which we do not have. But, as I communicated to the

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1 Prosecution, and I'm sure they must be aware, the evidence of
2 first accused will cover all the issues raised in
3 cross-examination, of which they have taken a very careful
4 all the challenges to each and every allegation, and each and
5 every potential liability. So it will be, and I can say this
6 now, wider than the summary. You will not see in the summary
7 mention of, for example, Mr Sesay killing a man in Bumpah on
8 intervention, but it will be dealt as a matter of course as he
9 travels through his evidence.

10 JUDGE BOUTET: Did you make any indication of that in
11 summary?

12 MR JORDASH: No, but --

13 JUDGE BOUTET: Did you make any general comments that he
14 will testify as to all of these matters, or something along
15 lines? What you are telling the Court this morning, if I hear
16 you well, is new to the Prosecution as well?

17 MR JORDASH: It's not new to the Prosecution.

18 JUDGE BOUTET: Well, that's what I want to know.

19 MR JORDASH: It's not new to the Prosecution. One,

20 they're a professional team who must anticipate an accused --

21 JUDGE BOUTET: No, I know that. They are professionals,
22 just like you are a professional. That's not my question. My
23 question is: Did you discuss that or inform the Prosecution,
in
24 any way, of what you're raising in court this morning?
25 MR JORDASH: Well, it was raised on Friday,
specifically,
26 but, I'm sorry, I assumed that the Prosecution would conclude
27 that an accused giving evidence would seek to rebut the
evidence
28 which had been put against him, which had been challenged
during
29 cross-examine. I didn't assume, and maybe I'm wrong to have
made

would

1 this assumption, but I didn't assume that the Prosecution
2 look at the summary and say, "Well, this is it." If they made
3 that assumption, then clearly they are prejudice. But I would
4 have hoped that assumption wouldn't have been made.

you

5 JUDGE BOUTET: As you understand the question posed to

what

6 and to the Prosecution by my learned brother, Justice Itoe,

particular

7 we are trying to do now is try to avoid, if at all possible,
8 delays and arguments that may be forthcoming on this

was

9 issue. That's the only reason, as to now, whether or not it

conference,

10 sufficient or insufficient. Presumably, as we move along, we
11 will see. But our purpose is today, in this status

12 to try to understand what is happening and try to avoid
13 unnecessary delays, as such. They are entitled, just like you
14 were entitled, to have all necessary information for the
15 preparation of, in their case, the cross-examination of your
16 client, as such. So this is the practice of all that.

know

17 Now, I don't know how we are going to do it. I don't

18 if it will satisfy them. We are only raising these matters to
19 try to avoid, as I say, arguments that may not been required,

see. 20 that's all. So whether it will be sufficient or not, we'll
or 21 I'm in no position to say yes or no; if the Court is satisfied
22 not satisfied.
23 MR JORDASH: Well, I suppose the information lies purely
24 within the Prosecution camp. If they say until Friday they
were 25 unaware that the first accused's evidence would go beyond that
not 26 summary, then, clearly, they've been prejudiced. If they are
that 27 saying that, and if they made an assumption many weeks ago
allegations, 28 the first accused's evidence would cover the salient
what 29 then they are not prejudiced. It is a matter for them as to

1 reasonable conclusions they drew from the indication that the
2 first accused would give evidence.

3 JUDGE BOUTET: Well, as you know, these summaries,
4 Mr Jordash, are sort of a compromise. We have not asked the
5 Defence to give any statement produced by any of your
witnesses
6 to the Prosecution. That has been our position all along in
this
7 trial and the other trials that we have been involved in, and,
8 therefore, we feel that summaries that are sufficient will
meet
9 the requirements that the Prosecution needs to properly
prepare
10 their cross-examination and/or investigations.

11 Now, I know the accused who is giving evidence is a
special
12 witness in that sense, and he is likely to testify as to
issues
13 that are related to the indictment, as such. The indictment
14 being the map that covers the whole area, as such. I don't
know,
15 he may testify as to something that is not even there, and all
of
16 a sudden something new comes up. That's really the concern
that
17 we have and that may raise some difficulties. Now, I don't
know
18 how you have prepared this examination-in-chief. We will have
to

19 wait and see.

20 MR JORDASH: Well, the issue, as I see it, is one of
21 notice. The Prosecution have had sufficient notice through
22 cross-examination, which is why the accused falls into this
23 separate category, which is why we didn't seek to put each and
24 every point we'd raised in contention in the summary, because
25 presumed the Prosecution would have notice through
26 cross-examination.

27 JUDGE BOUTET: The best comparison I can give you is,
28 you were cross-examining witnesses called by the Prosecution
29 a statement, where you had been provided with a statement, and

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1 the witness was giving evidence on a matter that was not
2 contained therein, as such, you were objecting, and rightfully
3 so. In most instances, we have supported your objection in
this
4 respect and ordered the Prosecution to either provide
additional
5 information, or grant an adjournment, or whatever.

6 So we're trying to see and avoid any unnecessary delays
in
7 this respect. That's the kind of matters we are trying to
8 determine today, if we can, before we get there. Now, if
you're
9 saying they have all the information that is likely to come
out,
10 that's fine. I'll just take it there. That's all I can say.

11 MR JORDASH: Well, we will have to wait and see what
stance
12 the Prosecution want to take.

13 PRESIDING JUDGE: Counsel for the Prosecution.

14 MR HARDAWAY: Yes, Your Honours. Thank you. As it
relates
15 to the communications that counsel for the first accused has
16 referenced to the Bench, I've been the focal point for the
17 Prosecution in communications with counsel for the first
accused.
18 We have no communication, to our recollection, from Friday,
19 stating what Mr Jordash has stated. If there is an email
which

it
20 he can refer to me on that, I would stand corrected, but, as
21 stands now, we have no information as it relates to the point
22 that the evidence would be going far beyond the summary that
we
23 have.

24 MR JORDASH: The Prosecution are fully entitled to say
now,
25 if they want, that they have proceeded on the basis that the
26 summary was the only evidence that Mr Sesay would cover. They
27 know what their preparation has involved over the last few
weeks.

28 It would appear reasonable to me to assume that they're
29 preparation has gone a bit wider than the summary, but I don't

1 know what happens in the Prosecution camp.

2 PRESIDING JUDGE: Yes. I think perhaps the best thing
to
3 do is to wait and see. We'll move on.

4 The Chamber notes that protected Defence witnesses for
the
5 first accused are given the pseudonym letters DIS, while
6 witnesses for the second accused are given the pseudonym

7 DMK, and, finally, witnesses for the third accused are given
the
8 pseudonym letter B. The Chamber directs that, for reasons of
9 consistency and efficient trial management, each of the
protected
10 witnesses for the third accused shall be referred to in these
11 proceedings by the pseudonym letters DHE.

12 Let's move on to the next agenda item: Trial logistics.

13 JUDGE ITOE: DAG is Defence for Augustine Gbao? It is
not
14 a Director of General Administration in French.

15 PRESIDING JUDGE: Trial schedule. As indicated in the
16 consequential orders, after this status conference today, the
17 trial will begin tomorrow, 3 May 2007, at 9.30 a.m. The hours
of
18 court operation will be as follows: Tuesdays, Thursdays and
19 Fridays from 9.30 a.m. to 5.30 p.m., with a break for lunch
from

on

20 1.00 to 2:30 p.m. On Wednesdays, the hours of court operation
21 will be from 9:30 a.m. to 1.00 p.m. The Chamber will not sit

trial

22 Mondays. Repeat, the Chamber will not sit on Mondays.

23 The Chamber will also issue, as soon as possible, a

24 schedule for the period May to July 2007.

junction,

25 Another issue of some importance is that, at this

parties

26 the Chamber would like to request the cooperation of all

27 to the proceedings to speak slowly, so as to avoid multiple

28 speakers at one time, while making submissions in court or

Court

29 examining witnesses, in order to facilitate the work of the

1 interpreters and the Court reporters.

2 The Chamber is in possession of a request from the Court
3 reporters to make appropriate interventions at any stage when
4 they observe multiple speaking. I'm not sure whether this is
5 something that we need to insist upon, but a request for an
6 intervention has come. The Chamber is of the view that an
7 to parties and counsel to avoid this situation is the best way
8 handle the matter, at this stage. Of course, we are not
9 to rule out if the situation does not improve, the possibility
10 interventions on the part of the Court reporters.

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11 Let's move on to the other item: Case presentation.

12 The Defence case in this trial will start with the
13 statement by Defence for the first accused, followed by that
14 Defence for the third accused. Perhaps we should mention that
15 the Chamber is seized of a motion pending for the postponement
16 the opening statement for the third accused.

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17 At this stage, it would seem necessary, since the motion
18 has not yet been disposed of, for Mr O'Shea to provide some
19 clarification as to precisely the rationale behind that motion

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20 and, in effect, the Bench is excepting some kind of indication
21 the reason why this motion should, in fact, be granted.
22 we've read the arguments in support, but, for the purpose of
23 status conference, we would like you to provide some further
24 clarification why it is necessary to postpone the making of
25 statement on behalf of the third accused.

26 MR JORDASH: Sorry to intervene. I was wondering if I
27 might make a remark for the record about the trial schedule?

28 PRESIDING JUDGE: You mean -- we have given a directive.

29 MR JORDASH: No, I appreciate that.

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1 JUDGE THOMPSON: Just for the record. I hope -- this is
2 not a matter that we are prepared to reopen or debate. There
3 a directive from this Chamber, and if you're remark is meant
4 ask for reconsideration, I don't think the Bench is disposed
5 even consider that. But if it's just for the record --

6 MR JORDASH: Well, it's --

7 JUDGE THOMPSON: If it's for the record, we'll hear it.

8 MR JORDASH: Well, it's a combination. The Defence for
9 Mr Sesay was deeply of the hope that we could sit the same
10 that we sat during the Prosecution case. We are deeply of the
11 hope that we finish this case this year, and losing a day
12 week is a significant --

13 PRESIDING JUDGE: I will stop you. We do not intend,
14 Mr Jordash, to hear any representations. Further, there is a
15 directive from this Bench that those are the court hours and
16 nothing said will, in fact, shift our position on that. It
17 something taken after we weighed all the pros and cons; a
18 decision reached after a lot of soul-searching. After
19 all the imponderables and all the problems and difficulties, a
20 Court that has to adjudicate several cases, having a heavy

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any
21 judicial workload, has to find some kind of compromise. It's
22 best compromise we've reached, and I'm sorry that, clearly,
23 appeal will fall on deaf ears.

24 MR JORDASH: The point is clear.

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25 JUDGE ITOE: Let me assure you that it is because of the
26 extreme considerations that we are given that we are even
27 the Defence case on at this time and on schedule. The first
28 option was for us to adjourn this case and to be done with
29 matters, which are equally important, but we did not think

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1 we should inconvenience your Defence or delay the conduct of
2 Defence beyond what could be acceptable. So I think that we
3 very generous with the taking of just one day.

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4 PRESIDING JUDGE: Shall we proceed then. Mr Jordash,
5 perhaps you need to -- I apologise, Mr Jordash. We want
6 Mr O'Shea now. The motion before us is for the postponement
7 the opening statement of your client. Would you like just to
8 clarify a little more in case we may have missed something
9 the motion papers and the supporting submissions?

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opening

10 MR O'SHEA: Yes.
11 PRESIDING JUDGE: Why is it so necessary that we should,
12 fact, grant a motion asking for the postponement of his
13 statement?

14 MR O'SHEA: Yes. Well, Your Honour, if I could sort of
15 phrase the question in a different way?

16 PRESIDING JUDGE: You're at liberty to do that.

to

17 MR O'SHEA: The opening statement is a statement which
18 comes from the defendant through his counsel. It is the
19 defendant's opportunity to outline the scope of the evidence
20 the Chamber. In my submission, it is a matter which, really,

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21 unless the Chamber or the Prosecution has some cogent reason
22 opposing, it is a matter which should, to the extent possible,
23 within the prerogative of the Defence.
24 Your Honour will see my submissions in relation to the
25 interpretation of the Rule. It is our submission that,
26 it is possible for Your Honours to allow it and it's a matter
27 discretion. The question is, rather than why should the
28 discretion be exercised, I would ask why the discretion should
29 not be exercised. My principle point would be that there is

1 prejudice to the Chamber, to the Prosecution, or to the other
2 parties if the opening statement of Mr Gbao were to be made at
3 the beginning of his evidence. That would be point number
one,
4 in my submission.

5 The Prosecution, in their response, have raised one
issue.
6 They've raised the issue of common witnesses, which is why the
7 Gbao Defence team put in a notice that we have no intention of
8 having any common witnesses. We have attempted to identify
9 common witnesses, have identified some, and have disposed of
10 them, in the sense that we have made agreements with the other
intention
11 teams as to who will take which witnesses. It is our
12 that if any new common witnesses are discovered, that we do
13 everything in our power to ensure that they are not common
14 witnesses.

15 PRESIDING JUDGE: Shall I stop you there?

16 MR O'SHEA: Yes.

17 PRESIDING JUDGE: Could you squire that submission now,
if
18 it's a submission, with what is on the document itself, the
19 motion paper?

20 MR O'SHEA: Yes. I don't have it in front of me, Your
21 Honour.

in

22 PRESIDING JUDGE: Well, let me quote something on what,
23 fact, you indicated. Yes, I think that was on 24 April 2007,
24 that, "Those witnesses identified as common with other accused
25 are no longer common, and the Defence for Gbao has no
26 of sharing any Defence witnesses with other accused unless the
27 situation becomes unavoidable."

intention

28 It is precisely this kind of legal equivocation that
29 worries us. Where are we precisely with you on the issue of

1 common witnesses?

2 MR O'SHEA: Let me answer that question, Your Honour, by
3 tying it specifically to the opening statement.

4 JUDGE ITOE: Let me take it further, because the result

of

5 this motion will depend on your position as to whether you're
6 going on with common witnesses or not throughout the Defence
7 status. Because if you want to equivocate and to say, unless

it

8 becomes necessary, then it becomes very difficult for the

Chamber

9 to really give any credit to your motion. Because I don't

want

10 to get to a particular stage of the proceedings and be

confronted

11 with a request, "Oh, we have a common witness," when you have

12 clearly indicated that you don't have any connection with

calling

13 common witnesses with other Defence teams. We want you to

assure

14 us that there is no equivocation on this point.

15 PRESIDING JUDGE: This is precisely the reason why we

need

16 this clarification. We read the document. We understood your

17 submissions, but there was this little catch somewhere which,

of

18 course, the Bench was not able to figure out and to

understand.

regard

19 MR O'SHEA: Well, Your Honour, that phrase was meant to
20 deal with the unexpected. Can I be very, very clear with
21 to our intention. We have absolutely no intention whatsoever
22 sharing witnesses with the other two accused. That is our
23 intention, and as --

of

position;

24 PRESIDING JUDGE: In short, if we can cut things short,
25 you've moved from a qualified position to an absolute
26 is that what you're saying?

27 MR O'SHEA: We have -- well, it's --

28 PRESIDING JUDGE: Because that's what it is.

29 MR O'SHEA: Yes.

moving

1 PRESIDING JUDGE: Speaking conceptually, are you now
2 from a qualified position to an absolute?

Somebody

3 JUDGE ITOE: Mr O'Shea, there is a paper there.
4 is sharing some views with you. It's there.

point

5 MR O'SHEA: I want to just deal with the equivocation

how

6 first, and then I want to answer Your Honours' question about
7 it ties into the opening statement.

8 PRESIDING JUDGE: Thank you.

9 MR O'SHEA: I think this is important.

10 PRESIDING JUDGE: Thank you.

we

11 MR O'SHEA: With regard to equivocation, if the document
12 that we filed gave the impression that we wanted to hedge our
13 bets, that was not what was meant. In terms of our intention,
14 have made a firm decision that we do not want any common
15 witnesses with the other two accused, and that includes the
16 expert witness. We have made that professional decision.

your

17 JUDGE BOUTET: Before you move on with this particular
18 issue, I want to be assured and reassured that, as part of

or

19 case for Mr Gbao, you will not be calling any of the witness

I'm 20 witnesses that have already testified for other witnesses.
21 just warning you that a common witness -- in other words, when
call a 22 you open your case at that time for your client, if you do
23 witness that was already called by other witnesses, I'm just
Bench. 24 informing you that you'll have some difficulties with this
25 MR O'SHEA: Well, yes. I understand --
not 26 JUDGE BOUTET: However, you want to call that common or
27 common. To me, a common witness is a witness who testifies on
deal 28 matters that are common to all people. So how you want to
29 with that, this is what we want to be assured of. Given the

we

being

to

that

the

not

be

1 very, very high number of witnesses that all parties intend to
2 call at this particular moment, we want to be reassured that
3 will not be faced with this repetitive aspect of witnesses
4 called.

5 MR O'SHEA: Your Honours, can I please move specifically
6 how this ties into the opening statement, if I may, because I
7 think it's important.

8 PRESIDING JUDGE: Right, counsel. We'll restrain
9 ourselves. Go ahead and let's hear your submissions on that.

10 MR O'SHEA: We don't know of the existence of any common
11 witnesses. Now, presumably, the prejudice that arises with
12 regard to the common witness issue, as I understand it, is
13 if there is any common evidence, it should be commented on in
14 opening statement. Now, as things stand at the moment, we do
15 know the existence of any common witnesses. So if we were to
16 give an opening statement tomorrow, we could not refer to any
17 evidence which was common, because we wouldn't know of the
18 existence of that. So, in my submission, that surely has to
19 the point. If counsel is not aware of --

sorry.

20 JUDGE ITOE: Mr O'Shea, let me come in, please. I'm

and

21 This issue came up for detailed discussion on 20 March 2007,

the

22 it was exhaustively discussed. I remember it was raised --

a

23 Chamber remembers it was raised by Mr Nicol-Wilson. There was

24 long participation of all in this debate. The Chamber did

identify

25 encourage all the Defence teams to come together and to

Defence

26 common witnesses so that we are sure of how we move the

27 case. This is very clear on the record. This was the advice

28 that we gave as far back as March 2007.

29 Are you saying that the Defence teams have not met,

1 following the Chamber's advice, to identify common witnesses
for 2 the purposes of conducting the Defence in this matter?

3 MR O'SHEA: Not at all, Your Honour. The Defence teams
4 have met to discuss the issue of common witnesses. Common
5 witnesses were identified. We took the position -- we made
our 6 position clear to the other teams that we did not wish to have
7 any common witnesses, and those witnesses who were identified
as 8 being common were shared between the teams. So that exercise
9 that Your Honour is referring to has been undertaken.

10 Following that exercise, we are not aware of any
witnesses 11 that are common. We have not simply shared the names of our
12 witnesses, because that would be in breach of the protective
13 measures orders, but we have tried to find other ways to
identify 14 common witnesses, and we think that we have identified them.

15 If any further common witnesses come to light, we will
take 16 the position that we do not want those witnesses to be common.
17 We would rather have the witness dealt with by the other
accused 18 and cross-examine that witness.

19 JUDGE ITOE: And if they are common, what do you expect
the

20 Chamber to do?

21 MR O'SHEA: Well, if they turn out to be -- if, for
22 example, a witness for Sesay comes into the stand, and we only
23 just discover that that witness is a witness on our witness

list,

24 what we will do is, we will discuss the matter with the Sesay
25 team. But it would be our intention to withdraw that witness
26 from our witness list, because we would feel that we would be

in

27 a position to deal with that witness, through cross-

examination,

28 probably just as effectively. Does that make sense, Your

Honour?

29 JUDGE ITOE: I must say it doesn't. It complicates

matters

1 for us. I think that -- I mean, it is one of two things. I
2 think the Presiding Judge has been very very clear. It is
either
3 you are moving from the domain of equivocation to that of a
4 definitive position where you don't have to say that if, if,
if
5 it becomes possible. Because if you want to remain in this
6 domain of saying that you will make a determination, you know,
7 later on, then I don't think it helps us the way we want to
8 proceed and the way we have proceeded with the trial that we
have
9 handled before. The precedents we have stated there.

10 MR O'SHEA: May I put it in this way?

11 JUDGE ITOE: This is it. Mr O'Shea, are you taking a
12 definitive position that common interests, common witnesses do
13 not interest you? That is it, as far as the conduct of your
14 client's case is concerned?

15 MR O'SHEA: Common witnesses do not interest us.

16 JUDGE ITOE: Are you stopping there?

17 MR O'SHEA: Yes.

18 JUDGE ITOE: All right. If it is, see, that is a
19 definitive position, then I think that we have understood you
and
20 we will not come back to it, you know, later on in the
21 proceedings.

22 PRESIDING JUDGE: In other words, in familiar television
23 kind of style, is that your final answer?

24 MR O'SHEA: Your Honour, yes. Let me put it in this way
25 because, you know, we are looking at things that we don't --
26 which are not in concrete in the sense that I have indicated

to

27 the Chamber that we are not aware of any common witnesses, so

opening

28 there are no common witnesses that we can discuss in our

29 statement as common witnesses.

1 JUDGE BOUTET: But how, if I may, Mr O'Shea, how can you
2 say that when you just a few moments ago you said Mr Jordash
3 might call a witness and we discover that this witness is on
our
4 witness list. As we speak today you don't know because you
don't
5 know his witness list. He doesn't know your witness list and
you
6 don't know the witness list for the second -- I mean, the
names
7 that are there for the second accused. So how can you say
today
8 I have no common witnesses when the witness on your witness
list
9 may be on the first accused's witness list?
10 MR O'SHEA: I did not say that, Your Honour. I did not
say
11 that. What I said was that we have not identified -- we have
12 identified common witnesses and we have made them not common
13 witnesses. Other than that, we have not identified any
further
14 witnesses that are common. We would not therefore be in a
15 position, during our opening statement, to discuss evidence as
if
16 it were common. If I was to discuss a witness in an opening
17 statement, and then it turns out that that witness later is
the
18 Sesay witness, and we were to withdraw it from our witness
list

our 19 for that reason, we would then have commented on a witness in
20 opening statement which we won't eventually call. In my
21 submission, that lends support to the good sense of having the
22 opening statement at the beginning of the Gbao evidence.

to 23 The real point about this is that we really do not want
24 be discussing our case now.

25 PRESIDING JUDGE: We had a sneaky suspicion that was the
26 case.

be 27 MR O'SHEA: Our investigations are ongoing. There may
28 witnesses that are going to be withdrawn from our list. There
give 29 may be witnesses that we may wish to add to our list. If we

that

the

conception

to

is

- I

statement

that,

1 an opening statement today, or tomorrow, the first point is

2 it will be several, if not more, months prior to beginning of

3 Gbao evidence and, just from the point of view of tidiness --

4 PRESIDING JUDGE: Not strategy; just tidiness?

5 JUDGE ITOE: Mr O'Shea, I don't know what your

6 is of an opening statement. Is the opening statement supposed

7 contain in total detail the case which your client is going to

8 make or it just -- it will just be a question of presenting it

9 skeletally?

10 MR O'SHEA: Presenting it skeletally, but what it does

11 it conveys to the Court --

12 JUDGE ITOE: Because you are not obliged, you know, to -

13 mean, who'll call you to -- who will fault you if you did not

14 mention a particular fact in the presentation of your

15 and you adduced it in evidence later on in the presentation of

16 your case? Do you think that this Chamber will fault you for

17 that?

18 MR O'SHEA: No, but, Your Honours --

19 PRESIDING JUDGE: And I wanted to add, to strengthen

20 isn't it a mere declaration of intention? It is not a binding
21 obligation. It is a mere declaration of intention.

22 MR O'SHEA: Why should we make a statement on the basis
23 that we know that it might not represent the reality later?

This

24 is exactly my point.

25 PRESIDING JUDGE: Then probably --

statement

26 MR O'SHEA: If we are entitled to make an opening

because

27 it is because it has some use to us, and it has use to us

28 it is a tool for persuading Your Honours, in terms of what our

going

29 theory of the case is, and the kind of evidence that we are

1 to be presenting to Your Honours. It is a tool. And it's a
tool
2 we would like to be effective. If we are asked to use that
tool
3 tomorrow it will not be effective, in our submission, because
of
4 the distance in time between the beginning of the Sesay case
and
5 the beginning of the Gbao case a lot of time will pass. I
know
6 it is just a declaration intent.

7 PRESIDING JUDGE: As I took the view.

8 MR O'SHEA: I know Your Honours won't be bound by it but
we
9 would like it to be effective. We would like it to be
10 persuasive. And it will not have that effect if we give it
11 tomorrow. If we give it at the beginning of the Gbao case it
12 will be at a time --

13 JUDGE ITOE: Are you suggesting that if you gave it
14 tomorrow the Court will not have a record of it? That we will
15 forget about it?

16 MR O'SHEA: Of course I don't.

17 JUDGE ITOE: Of course you stand on very strong grounds
18 with that particular argument.

19 MR O'SHEA: No, but we --

20 JUDGE ITOE: This is a court of records.

21 MR O'SHEA: Yes.

22 JUDGE ITOE: And if you made your statement like you are
23 making one today it is on record and the Court is bound to
visit
24 it and to have it on record. You will remember it is making
25 whatever pronouncement it has to make.

26 MR O'SHEA: I don't in any way wish to go behind Your
27 Honours' ability to review records. My point is this: That,
28 first of all, it will, whether it is on record or not, it will
be
29 more effective if it is made at the beginning of the Defence

1 evidence.

2 Secondly, it will represent more accurately what Your
3 Honours are going to hear because, as I have said, we do not

want

4 to go into that now. Whether -- if Your Honours order that,

or

5 if Your Honours do not permit us to defer our opening

statement,

6 we will discuss whether we should be making an opening

statement

7 at all. But we would like to make an opening statement but

not

8 now. And I don't see any good reason why we should be

restrained

9 from that. It does not prejudice the Prosecution, it does not

10 prejudice the other parties and it is our show, and we would

like

11 our show to be effective.

12 JUDGE ITOE: It does not prejudice you either. Not

making

13 one does not prejudice your case on your stand either.

14 MR O'SHEA: Well, that's a difficult --

15 JUDGE ITOE: I suppose we are agreed on that.

16 MR O'SHEA: That's a difficult --

17 JUDGE ITOE: Because you are not bound. The law is not

18 mandatory on that. The rules aren't mandatory. You may, you

may

19 not.

like
do
point?
One
studying
this

20 MR O'SHEA: Yes, but we would like to. But we would
21 to at a time which we would, we believe, we would be ready to
22 it and unless Your Honours can identify any clear prejudice, I
23 would invite Your Honours to permit it.
24 PRESIDING JUDGE: Thank you, counsel. I have --
25 MR CAMMEGH: Forgive me; can I make one additional
26 PRESIDING JUDGE: You have our leave to do that.
27 MR CAMMEGH: I am very grateful. It is simply this:
28 of the features, and I am sure most people who have been
29 this case over the last three years would broadly agree with

exclusive
made
broader

1 is that the Augustine Gbao case is, to a large extent,
2 from the cases of Sesay and Kallon. Where facts have been
3 alleged against Augustine Gbao they have, in the main, been
4 against him individually notwithstanding, of course, the
5 allegations of joint enterprise.

making

6 JUDGE BOUTET: Isn't it something that you should be
7 as part of your opening statement, rather than now?

8 MR CAMMEGH: Well, Your Honour, this is something I am
9 venturing in support of our request that the opening statement
10 for Gbao --

11 PRESIDING JUDGE: Should be postponed.

many

12 MR CAMMEGH: Be postponed until the time which we would
13 suggest respectfully would be more appropriate because, in
14 respects, the Gbao case is in a degree of isolation.

15 PRESIDING JUDGE: A kind of sui generis.

But

16 MR CAMMEGH: Indeed so. I am not very good at Latin.
17 I think that was Latin. I respectfully support --

law
rule.

18 JUDGE ITOE: In those days we never had admissions into
19 faculties without at least a credit in Latin. That was the

20 Oh, yes.

21 PRESIDING JUDGE: And also Roman law.

you

22 JUDGE ITOE: You had to have a credit in Latin before

23 were admitted into a faculty of law.

24 MR CAMMEGH: Yes.

25 PRESIDING JUDGE: All right. Let's go on.

26 MR CAMMEGH: Sorry.

was

27 JUDGE ITOE: I would say in our good old days because I

28 one of the candidates.

29 MR CAMMEGH: Well, I --

1 [Overlapping speakers].

2 PRESIDING JUDGE: Go ahead and buttress your case for
the
3 motion to be granted.

4 MR CAMMEGH: Your Honour, it is simply a case, in my
5 submission, I have used these words before, a matter of
6 commonsense. It may be some time, it may be next year until
the
7 Gbao cases commences; that is one point. But I am just
speaking
8 from a commonsense approach which would be that surely in a
case
9 which is largely in isolation, it would simply be more
10 appropriate, indeed more convenient, for the Trial Chamber to
11 hear the entire representations in respect of Augustine Gbao
12 heard in a timely fashion and, for that reason, I suggest that
it
13 would be more appropriate. It is within Your Honours'
discretion
14 for our opening statement, brief though it may well be, to be
15 heard directly before the Gbao Defence case.

16 PRESIDING JUDGE: Thank you, counsel.

17 MR CAMMEGH: Thank you for hearing me, Your Honour.

18 PRESIDING JUDGE: You will get our response in due
course.

19 We will now move on to the other aspect of this related
aspect,

20 the length of the opening statements.

21 Now, we need to set a time limit, but I would say
22 precedent straightaway that the Bench is minded to follow its CDF

23 of a maximum of 30 minutes; any response, Mr Jordash? Did you
24 intend to go beyond that? Well, 30 minutes is just our CDF
25 precedent and -- because there is room for some little
26 manoeuvring.

27 MR JORDASH: Well, I suppose the point I would make is
that

28 this case is a wider case and potentially liabilities are much
29 wider and I was hoping for anything up to two hours.

1 JUDGE ITOE: Oh, two hours?

2 JUDGE BOUTET: I mean, this isn't the final argument;
this
3 is an opening statement as to what you intend to lead as
4 evidence. I mean, I have -- two hours?

5 MR JORDASH: Well, with these things, they are always
hard
6 to judge but I suspect we could do it in an hour-and-a-half.

7 JUDGE ITOE: Oh.

8 PRESIDING JUDGE: Is 45 minutes, considering the fact
9 that -- I am more or less on a slightly same radar screen that
10 perhaps the complexity or the wider focus itself may justify a
11 more expansive nature in terms of the opening statement, but
it
12 would seem to me that 45 minutes would be reasonable. I mean,
13 knowing -- you are known for your reputation of succinctness
and
14 all that, you can encapsulate in 45 minutes quite a massive
15 amount of information in terms of the response to the
16 Prosecution's case.

17 MR JORDASH: Well, it was my reputation that made me ask
18 for two hours, actually. But if we could have an hour I can
19 assure this Bench we could finish in an hour. Well, if it's -

-

20 JUDGE ITOE: Mr Jordash, I think if you are really
focused,

21 I think that you would not need anything more than 45 minutes.

22 PRESIDING JUDGE: Yes. It's a long time.

23 JUDGE ITOE: It is not a question of reciting all the
24 evidence or all the law, you see. It is a question of just
25 focusing the mind of the judges on the essentials of what your
26 case would be and what your case is, and that is it. Rest of
it
27 will be taken care of in terms of your evidence.

28 PRESIDING JUDGE: Yes. We have accepted the merit of
your
29 position that, clearly, the precedent, the CDF precedent is
not

think

1 quite on our fours. I am prepared to accept that. But I
2 45 is quite a big chunk of time for you, given your reputation
3 for succinctness and condensation, and that kind of thing.

4 MR JORDASH: 45 minutes, I am in Your Honours' hands.

case,

5 JUDGE ITOE: Yes. In fact, we appreciate that your

even

6 as you've said, is a more complex case. That is why we have
7 moved from 30 to 45. Maybe the other Defence teams may take
8 lesser time; who knows? But for you, I think 45 minutes, Mr
9 Jordash, is just reasonable.

10 PRESIDING JUDGE: So that is agreed, is it; 45 minutes?

11 MR JORDASH: Under duress, yes.

that

12 PRESIDING JUDGE: We'll move on to the next. I am sure
13 that the other counsel will find this even beneficial. We'll
14 move on to the other item. Well, we just need to emphasise

respectively.

15 after the conclusion of the opening statement, the Defence for
16 the first accused will proceed to call its Defence witnesses,
17 followed by the Defence for Kallon, and then Gbao,

Defence

18 With specific reference to the testimony of Defence
19 witnesses for Sesay at trial, the Chamber wishes to emphasise
20 that the proposed order of examination would be for the

Gbao

21 for Sesay to examine its witnesses first, followed by
22 cross-examination by Defence for Kallon and by Defence for
23 and then the Prosecution last. Then Defence for Sesay may
24 re-examine the witness on issues evidently raised during
25 cross-examination. That would be the sequence.

testimony

26 Now, the next item is upcoming Defence witnesses;
27 of the first accused. On 19 April 2007, the Defence for Sesay
28 formally indicated that the first accused, Issa Sesay, will
29 appear as a witness in his own Defence. Pursuant to Rule

85(C)

1 of the Rules, an accused appearing on his own defence shall
2 testify before the other witnesses to be called on his behalf.
3 The Defence for Sesay has informed this Chamber that the first
4 accused will testify in Krio. Is there any variation of that,
5 Mr Jordash?

6 MR JORDASH: No. That stays the same.

for

7 PRESIDING JUDGE: Yes. On 23 March 2007, the Defence
8 Sesay disclosed to the Prosecution, and other Defence teams, a
9 summary of the first accused's intended testimony. Will the
10 Prosecution confirm whether they've received this summary?

Well,

11 of course you've already said it; just confirm it.

12 MR HARRISON: Yes.

13 PRESIDING JUDGE: Very well. And members of the other
14 Defence teams, did you receive the summary?

15 MR NICOL-WILSON: Yes, Your Honour.

16 MR O'SHEA: Yes we did.

17 PRESIDING JUDGE: Very well.

2007,

18 Disclosure of Defence witnesses' names. On 23 March
19 the Defence for Sesay informed this Chamber that it disclosed
20 the Prosecution, and the other Defence teams, the names of
21 witness DIS-250, an expert witness, as well as the names of

to

rule

22 witnesses DIS-126 and DIS-258 pursuant to the Rule, 42 days

42

23 disclosure proceeding -- the rolling disclosure procedure of

24 days.

also

25 Subsequently, the Chamber received an email, that was on

26 19 April, in which the Defence for Sesay indicated that it

077,

27 disclosed to the Prosecution, and to other Defence teams, the

28 names of the following witnesses: DIS-072, 073, 074, 075,

176,

29 078, 079, 080, 081, 101, 123, 128, 132, 145, 149, 170, 175,

1 177, 178, 179, 188, 225, 226, 252, 300, 301 and finally 302.

2 Prosecution, can you confirm having received disclosure from
the
3 Defence of the names of these witnesses?

4 MR HARRISON: Yes, that's correct.

5 PRESIDING JUDGE: Very well. Mr Jordash, was there any
6 subsequent disclosure of any other witnesses indicated?

7 MR JORDASH: Yes, there was. I think it was Monday or
8 yesterday, yes. We disclosed DIS-163, DIS-214, DIS-269. We
will
9 inform the Trial Chamber today. We apologise for the delay.

10 PRESIDING JUDGE: Thank you. Any responses from the
11 Defence? Prosecution?

12 MR HARRISON: Mr Jordash actually missed about -- I am
not
13 sure of the number -- but there is quite a number that he
skipped
14 over. There isn't another --

15 PRESIDING JUDGE: Quite a lot of that.

16 MR HARRISON: Ten, maybe 11 more that have been
disclosed.

17 MR JORDASH: Sorry, there are more.

18 PRESIDING JUDGE: Quite. Quite, yes.

19 MR JORDASH: My apologies. DIS-69, 85, 86, 131, 143,
147,

20 156, 157, 161, 169, 281. I think that's everybody.

21 PRESIDING JUDGE: Very well. Thank you. The order of
22 Defence witnesses' testimony, the Defence for Sesay, according
to
23 our records, has not yet filed any document showing the order
of
24 call of its next 15 witnesses as mandated by consequential
order
25 number seven. Can you enlighten us on that, Mr Jordash?
26 MR JORDASH: Well, we anticipate having an indication
from
27 the Prosecution as to the length of cross-examination, and
28 anticipating direct to be approximately five to seven days
that
29 Mr Sesay will testify for anything up to two-and-a-half to
three

then

1 weeks. When we get to the 15-day period before he finishes,
2 we intend to disclose pursuant to the consequential order.

3 PRESIDING JUDGE: Then you'll file.

4 MR JORDASH: Yes; most certainly.

in

5 JUDGE ITOE: You mean you can't give the Prosecution the
6 barest indication, even if you subjected it to certain slight
7 changes, if they do become justified? Because the importance

which

8 this is to give the Prosecution an opportunity of knowing

case

9 witnesses are coming after Sesay for them to prepare their
10 as well.

11 MR JORDASH: Well, let me first of all say this --

12 JUDGE ITOE: And we have not been very rigid on this, as
13 you know. We've always tolerated some changes in the order of
14 calling of witnesses, yes.

it's

15 MR JORDASH: Well, if I can put it this way: Firstly,
16 fair to say that Mr Harrison was always completely

to

17 straightforward and helpful when it comes to -- when it came
18 organising and disclosing the order of the witnesses, and we

19 intend to repay that courtesy. Having said that we are -- and

status

20 these are issues which are going to come up shortly in the

for
not
are
and
These
able

21 conference -- working with a team which is wholly inadequate
22 the job at hand. And so the short answer to it is: We are
23 in a position to give an order of the witnesses, because we
24 trying desperately to get them into Freetown, interview them
25 prepare their testimony and work out who we should call.
26 are issues which go far beyond this single issue. These are
27 issues of funding which is nothing less than, in my view,
28 disgraceful. And so we are not in a position, sadly, to be
29 to assist this Court or the Prosecution at this stage with an

position,
disclosed

1 order of the witnesses. But as soon as we are in that
2 we will disclose that to the Prosecution, and it may be
3 before the 15-day period, if we can.

continue
that
witnesses

4 PRESIDING JUDGE: Right. The next thing to cover is the
5 common witnesses. We have, according to consequential order
6 number 11, this Chamber ordered that all Defence teams
7 to discuss their common witnesses, if any, and in particular
8 they should file with the Court a list of their common
9 no later than five days from the rolling disclosure of each
10 witnesses' identity.

Defence
all

11 Previous discussions regarding witnesses common to
12 teams were also held during the pre-defence conference on 20
13 March this year. On that occasion, it may be recalled that
14 Defence teams undertook to hold discussions on the subject of
15 possible common witnesses because we've already referred
16 extensively to the notice received by the Chamber on 24 April
17 2007, from Defence for Gbao about their position as far as

common
portion

18 witnesses are concerned - I again remember reading that
19 of the notice indicating what Mr O'Shea's position is, I think

discussed 20 we've covered that - and I would say that what we have
of 21 here would be factored into a final determination in disposing
22 the motion before the Chamber.

enlighten 23 Except if anybody wants to add anything useful to
24 us on that subject, but how are the discussions? Are they
25 ongoing or has there been cooperation or in terms of --

26 MR JORDASH: Sorry. I beg your pardon, Your Honour,
27 cooperation in relation to common witness?

28 PRESIDING JUDGE: That's it, because that was one of the
29 positions we took at the pre-defence conference.

1 MR JORDASH: Yes.

2 PRESIDING JUDGE: I think there was a pledge from the
3 Defence teams that -- I remember Mr Melron Nicol-Wilson giving
4 that kind of commitment.

5 MR JORDASH: Yes. Yes.

6 PRESIDING JUDGE: I mean, it's entirely in your court.
7 tell us whether anything has been done.

8 MR JORDASH: I -- discussions have been had, and our
9 position is the same as Mr O'Shea's.

10 PRESIDING JUDGE: Yes.

11 MR JORDASH: From my perspective, I don't wish to have
12 common witnesses --

13 PRESIDING JUDGE: Yes.

14 MR JORDASH: -- with the others. If they call witnesses
15 I'm interested in, I'll cross-examine them.

16 PRESIDING JUDGE: And your position is absolute?

17 MR JORDASH: Absolute, yes.

18 PRESIDING JUDGE: Mr --

19 MR NICOL-WILSON: Your Honours --

20 PRESIDING JUDGE: -- Nicol-Wilson.

21 MR NICOL-WILSON: -- as you can see, we have no choice
22 because the Sesay team has indicated that they do not intend

us

You

to

have 23 share common witnesses, so has the Gbao Defence team, so we

24 no choice.

here, 25 PRESIDING JUDGE: Yes. So there is no corroboration

26 nothing.

27 MR TAKU: Your Honours, I think it raises a serious

witness, 28 situation in which a lawyer or a Defence team contacts a

29 as a potential Defence witness. Now, if that witness came,

1 considering what my colleague said, that he can be disposed of
in
2 cross-examination, if cross-examination will be based on the
3 evidence in chief, he said nothing about the issues of
interests
4 that defends his client. How does he cross-examine about
that?
5 I mean, if cross-examination is based on the scope of the
6 evidence-in-chief, how does he have the trial? I mean, that's
7 just my concern about that. So I think --
8 PRESIDING JUDGE: Well, is it a concern that you should
9 raise before the Bench or is it something that you need to --
10 remember the concept of common witnesses does not necessarily
11 tally with the idea of common defence strategy. It has
nothing
12 to do with it.
13 MR TAKU: Well, I'm --
14 PRESIDING JUDGE: Necessarily.
15 MR TAKU: I'm only just saying, Your Honour, that it
might
16 become necessary in some cases that if a witness who's on a
list
17 can testify for another accused person, and if his evidence
was
18 so material to us, and the issues he testified about in chief,
so
19 that cross-examination would not take care of that, we'll
always,

20 say, inform the Court if we call him or not.

21 JUDGE BOUTET: Well, I'm not sure I understand what's

calls

22 happening here. I want it to be very clear: If Mr Jordash

23 a witness, and you have the same witness on your witness list

24 when you will be calling your case for the second accused, you

because

25 will not be allowed to call this very same witness simply

26 you have not decided to share common interests with the first

27 accused. That's what we mean by common witnesses.

28 Now, whether you or Mr O'Shea or Mr Jordash wants to

29 proceed by cross-examination, well, that's your call. I mean,

determine
1 how you proceed with your case is not for the Court to
2 that. But what we want to avoid is repetition of the same
3 witnesses being called by Mr Jordash, by you, or by Mr O'Shea.
4 That's specifically what we're concerned about. Now, how you
5 exercise that, and how you do it, well, that's your
professional
6 judgment as to how you want to do it.

7 MR TAKU: No. My promise about the scope of the
8 cross-examination, Your Honours, is that we --

March
9 JUDGE ITOE: We were very clear on this issue on 20
10 2007. We said that the issue of common witnesses is a matter
11 exclusively within the domain of the Defence teams and that
the
12 Court does not want to get involved in it. We don't want to
get
13 dragged into who will be a common witness, so on and so forth.
14 That is a matter for the Defence strategy. The Court would
not
15 want to go into that.

16 Your colleagues have made certain statements on this. I
17 think if there are any misgivings that you have, you are free
to
18 raise them in your interactions with your Defence colleagues
and
19 see how you get about it. Because I don't think, at this
stage,

you
the
be

20 the Chamber would like to get itself involved in determining,
21 know, who common witnesses would be, or what would happen in
22 event of this witness being common or not. I mean, that will
23 taking us to a domain that is not ours.

24 PRESIDING JUDGE: And supporting my brother, we would be
25 descending the arena; we are not supposed to do that. I think
26 this is a matter which should be thrashed out at the level of
27 some discussion among yourselves.

my
common

28 MR TAKU: We agree, Your Honours. We have no choice, as
29 colleague says. If my colleagues say that they don't want

1 witnesses, we can't force them. My problem is different here.

2 JUDGE BOUTET: No, no. Because if Mr Jordash is calling
3 witness whatever -- A, B, C, as such -- and this witness is

also

4 on your witness list and you would like to call that

particular

5 witness, nothing precludes you to say when Mr Jordash has

6 finished with his examination-in-chief of that witness, I, on

7 behalf of the second accused, would like to proceed with the

8 examination-in-chief of this witness, because this witness has

9 something in common with us. That's all. How you do it --

that

10 is why I say this is for you to make that decision, not for

11 Mr Jordash, not for Mr O'Shea, for you, on behalf of your

client.

12 That's what we mean by this. It has nothing to do with

13 Mr Jordash agreeing or not agreeing with your position on

that.

14 Mr Jordash, for his client, said, "I don't want to share

anything

15 with the second accused." Well, that's his decision, as such.

16 How he does it -- obviously he has the advantage of being the

17 lead counsel and, therefore, he's the one who will be calling

18 witnesses first. Of these witnesses that will appear on

behalf

19 the first accused, if one or more of them have matters that

are

in

20 of interest to you that you would like to explore in chief,
21 that's what we call common witnesses, common issues. You go
22 chief, not in cross-examination. But how and when, and how
many
23 you do, that is your call, not ours.

24
[Indiscernible]

MR TAKU: Thank you so much, Your Honour.
25 Thank you so much.

26 MR JORDASH: This muddies the water somewhat.

27 JUDGE BOUTET: I don't know how, Mr Jordash. What I've
28 said now is exactly what I've said and explained at the
29 pre-Defence conference; absolutely nothing new.

1 MR JORDASH: Just so I understand, with Your Honours --

2 PRESIDING JUDGE: Yes, let us hear you.

teams

3 MR JORDASH: Are Your Honours saying that the Defence

their

4 for the second and third accused could simply stand up upon

5 election and examine directly Defence witnesses for the first

6 accused?

7 JUDGE BOUTET: Yes, in chief.

8 MR JORDASH: Without seeking the consent of the first

9 accused?

10 JUDGE BOUTET: Absolutely not. There is no ownership in

11 witnesses.

12 MR JORDASH: Well --

you

13 JUDGE BOUTET: That is why we advised and suggested and

14 recommended that there be some discussion. If a witness that

again

15 are calling is also a witness to the second accused, or third

16 accused is intending to call -- and I have been saying that

done

17 this morning -- we'll not allow that this very same witness be

18 called again by the second accused when it could have been

witness

19 when the accused was here being called on behalf of the first

20 accused. Explore whatever you need to explore from this

you

21 when the witness is here and examine that witness in chief if

22 feel that's the way you want to do it.

is

23 MR JORDASH: My concern is twofold: One, is that there

a

24 a clear procedure for seeking consent of a witness to speak to

25 party.

26 JUDGE BOUTET: But that doesn't apply in court when a

27 witness is giving evidence. Absolutely not.

28 MR JORDASH: It ought to, I would suggest, given --

what

29 JUDGE BOUTET: What you have in place, Mr Jordash, and

possible

1 we have tried to accommodate was to give you the maximum
2 protection for your witnesses. But this is not to cause
3 unnecessary delays in the proceedings, simply because you
4 like that witness not to speak or to discuss with another
5 accused, as such.

would

came

protective

witness

6 MR JORDASH: My concern is twofold: That a party could
7 simply stand up without having seen the witness before they
8 into court, without having gone through the carefully laid out
9 procedure, which Your Honours have set down under the
10 measures scheme, and simply -- and I use the word advisedly --
11 hijack the witness by putting to them or by treating them as
12 their own witness, without seeking any contempt from the
13 prior to that, would be wrong, in my submission. It would be
14 against the thrust and tenor of the protective measures; full
15 stop.

case

16 My second concern is this: That I can see the Defence
17 for the first accused then becoming something quite different
18 because, potentially, the other teams can simply stand up and
19 lead evidence during the first accused case. This potentially
20 could lead to the case becoming a joint case when, in fact, we

want

21 have laid down a careful strategy calling witnesses who we
22 to call, with the evidence we want to elicit, in a particular
23 order, in a particular way. And this stands to be potentially
24 destroyed by the intervention of our co-accused, with no
25 indication from them, if they choose not to give us, what are
26 they going to do after each and every witness is called?

dialogue

27 JUDGE ITOE: Mr Jordash, I think this goes back to the
28 basic issue, which is the recommendation of the Chamber that
29 there should be some interaction, there should be some

1 amongst the Defence teams. I think what is troubling, in your
2 position, is that you don't want to share your witnesses at
all.
3 What if your witness, from the statement he has made, also has
4 something exculpatory for another accused person? Would you
not
5 encourage a dialogue between counsel for that accused person
and
6 yourself, for him, at least, to -- with due consultations with
7 him for him to give evidence that would at least be favourable
to
8 that accused person, even if it's your witness?
9 MR JORDASH: We are open to --
10 JUDGE ITOE: It is not good for us to shut the doors
about
11 common witnesses.
12 MR JORDASH: The way to deal with it, in my respectful
13 submission, is that the particular counsel approaches my
office
14 and says, "I would like to speak to your witness." I will
then
15 -- or goes to the Witness and Victims Unit and seeks the
16 witness's consent. They can then interview the witness, if
the
17 witness agrees. If not, then protective measures ought to
18 prevent that happening. That is the point, as I see it, of
these
19 aspects of protective measures.

on
say
your
had
person
has

20 JUDGE BOUTET: I would imagine, if you put the witness
21 your witness list, that you have talked to that witness. I
22 you or some other counsel. If you're listing a witness on
23 witness list, it would appear to me that you have certainly
24 some discussion with that witness and have informed that
25 that, that person, you intend to call him or her as a witness.
26 So I don't understand your position. If the second accused
27 listed witnesses on their witness list that are the same
28 witnesses that you have on your witness list, I would imagine
29 that they have already talked to that witness, and that

1 particular witness already knows that counsel for Kallon is
2 calling him or her. So I don't understand your position on
this.

3 I see Mr Nicol-Wilson agreeing with my comments.

4 I would imagine this would not come as a total surprise
to
5 your witness that -- and, again, what we are saying here
today,

6 Mr Jordash, is what we have said at a pre-trial conference. I
7 spoke and Justice Itoe spoke on this issue. We advised you to
8 discuss these matters. This is the procedure we have followed
in

9 the CDF and this is the procedure we said we intend to follow
10 again here. I don't see why, all of a sudden, this morning
you
11 seem to be taken by surprise by this procedure.

12 MR JORDASH: I am taken by surprise because I've never
13 heard of a procedure in any international court where the --

14 JUDGE BOUTET: Well, there was one international court,
the
15 CDF --

16 PRESIDING JUDGE: Yes.

17 MR JORDASH: -- where the co-accused can simply jump up
and
18 examine in chief.

19 PRESIDING JUDGE: But we've always said --

20 MR JORDASH: Be that as it may --

21 PRESIDING JUDGE: Mr Jordash, we have always said, and
22 that's the precedent we followed in the CDF, that a common
23 witness is a witness that appears on the multiple defendants'
24 witness list. That's our premise. You must be a witness who
25 appears on the list of multiple defendants. That is our
point.

26 MR JORDASH: The problem with this is that witnesses
speak
27 to different parties for a variety of reasons. Witnesses
consent
28 to being interviewed at one point and then withdraw that
consent.
29 Simply because a party has a witness on their list, it does
not,

1 without more, indicate that that consent is ongoing.

2 This is an ongoing problem with these protective
measures.

3 We have a number of witnesses the Prosecution have. We may
have

4 a number of witnesses that the co-accused have, and the
problem

5 is that -- well, the problem has to be negotiated. And, if
6 necessary, to prevent the co-accused from hijacking this first
7 accused's case, and I don't mean that in a pejorative sense, I
8 mean that in a sense of taking their own course with witnesses

in
9 the way suggested, then I will simply speak to my witnesses,
find

10 out whether they consent to that procedure. If they do not
11 consent, I will indicate before each and every witness so the
12 co-accused know perfectly well they are not entitled to do it.

13 At that point, the witnesses will be under the witness
and

14 victim's protection. They will have come to Freetown pursuant
to

15 our case, we will speak to them and find out whether they
consent

16 or not. If they do consent, well, Your Honours have set the
17 order, Your Honours have set the precedent, there is nothing I
18 can do about it. But, it is our duty to protect our witnesses
19 from that type of examination-in-chief if that consent is not

20 ongoing.

would
This
21 JUDGE ITOE: I would imagine that the best hypothesis is
22 that a counsel who detects the commonality of the witness
23 normally approach his colleague and agree on the modalities.
24 That's how it should happen. This is the way I look at it.
25 is my hope.

26 MR JORDASH: It is my hope.

27 JUDGE ITOE: It is my expectation.

certainly,
28 MR JORDASH: Well, it's my hope, but it hasn't,
29 always been that way.

1 JUDGE ITOE: Let us take that as an indication and as a
2 directive -- as an advice from the Chamber, and I hope that it
3 works out fine for all the Defence teams.

4 PRESIDING JUDGE: Yes, Mr Taku.

5 MR TAKU: Your Honours, my understanding is that we've
6 called this witness to come and assist the process, to testify

to

7 what they saw. My understanding, also, is that there may be
8 witnesses that we met several years ago, as soon as this

process

9 started, even before the other co-accused. Now because of the
10 order of presentation, it now appears that that witness will
11 testify first. For us, Your Honour, we don't intend to

restrain

12 any witness from testifying for any other person to any issue
13 that may be relevant to this particular court.

14 Indeed, as the indictment is laid, when they took
15 statements from this witness, they took statements relevant to
16 the issues or to the counts that the client had been charged
17 against. We did it for our own client and we submitted the

list

18 to the Court.

19 Now, it is for these witnesses themselves freely, of

their

20 own free will, to say whether they want to testify or not. I

do

for
would
would
whether I
are

21 not intend to ask the witness whether he intends to testify
22 any other person or not. If I did that, Your Honours, it
23 be unfair and would not be in the interests of justice. I
24 leave the witnesses freely, of their own volition, to indicate
25 whether they intend to testify or not. But to indicate
26 would put the question to them, whether they intend to testify
27 for any other person, Your Honours, I think that will be
28 inappropriate and will not be helping the cause for which we
29 here.

1 As I have seen in other international tribunals, my
2 colleague raised the ICTR, these issues have been resolved in
the
3 way you resolved them at the CDF trial: That the witness
comes,
4 he's led in chief as to the issues for which he's being called
by
5 one of the accused, and upon proof before Your Honours that
that
6 witness appeared on the witness list for another accused
person,
7 you may lead him in chief.

8 To defer to cross-examination, Your Honours, may meet an
9 unexpected problem that Your Honours have a duty to limit
10 cross-examination only to issues in the evidence that have
been
11 adduced in chief. What if he came and said nothing about the
12 co-accused. The cross-examination is shut down. That is why
we
13 say, Your Honours, in the interests of justice, that
possibility
14 should be left open and the suggestion by Your Lordships that
the
15 procedure followed in the CDF trial should be the procedure,
16 first for judicial economy and for the interests of justice.

17 PRESIDING JUDGE: Yes, Mr Jordash.
18 MR JORDASH: Sorry, I don't want to delay things
further,

19 but, as I just heard Mr Taku, he appeared to suggest that he
20 didn't regard their duty as a team when, approaching a
witness,
21 to ask that witness whether they intend to testify for another
22 team. That disturbs me and confirms what I already knew,
which
23 is that their team has been talking to witnesses which belong
or
24 have agreed to testify for the Sesay case. It is a real shame
25 that that team do not see it as a duty to ask that witness
26 whether they've agreed to testify for another party or the
27 Prosecution, because, in my respectful submission, that is
what
28 protective measures imply --

29 JUDGE BOUTET: It would appear, Mr Jordash -- I think we

1 have to confine this argument and not let things go out of
2 control here. Mr Taku has said -- my understanding of what he
3 has just stated was that they have talked to witnesses a long,
4 long time ago, even before protective measures were ever
issued
5 or contemplated. At that time, they did not discuss whether
6 their witness was going to testify on behalf of another, and
so
7 on, and they did not violate any protective measures; they
were
8 not in existence, if they talked to that witness a year and a
9 half or two years ago. That's what he was saying and,
therefore,
10 because they've talked to that witness at that time, that
witness
11 gave them a statement, that witness now appears on their
witness
12 list.

13 It just happened that now, subsequent to that, you or
your
14 team have talked to the same witness and the witness is on
your
15 list. So what are they supposed to do? What violation has
16 happened here? That's what he was saying. So, I mean, my
17 suggestion is, just like Justice Itoe has said, we can only
18 implore you, Mr Jordash, to entertain some discussion with
your
19 colleagues as to how best to deal with these matters. I mean,

particular 20 it's not productive what we are discussing now at this
not 21 moment, as such, whether you accuse them of being unfair and
on 22 respecting the protective measures. I mean, this is not based
23 the facts, as we know them, at this particular moment.

24 I invite you, Mr Jordash, to see, with them, what it is
25 that is common and how best to deal with that, as such. It is
going 26 not by these discussions that we are having now that we are
27 to solve that.

be 28 MR JORDASH: Well, clearly, the Kallon team appears to
29 under the impression that they have a number of witnesses who

1 have given statements to the Sesay defence. In that case,
they
2 will be able to disclose those names of those witnesses to us,
it
3 won't be prejudicial to the witnesses, and it won't be
4 prejudicial to them. And, in due course, if what they say is
5 right about obtaining statements, then those statements ought
to
6 be dated several years ago. So these things can easily be
worked
7 out.

8 JUDGE BOUTET: That is what we are saying, Mr Jordash.
9 That's why we've asked you and all the counsel to get into
some
10 discussion to see what was and was not common and so on, and
try
11 to achieve some progress, that's all.

12 MR JORDASH: I have been in my office for the last three
13 weeks --

14 JUDGE BOUTET: Mr Jordash, I'm not saying you -- I know
you
15 work hard and so on, but I'm saying, you know, this is --
because
16 you are the one who has raised these issues, I'm not accusing
you
17 of being the bad or the good one. I am just saying, I'm
inviting
18 all of you to see if you can achieve some progress, that's
all.

19 MR JORDASH: Well, I'll await the Kallon list.

20 PRESIDING JUDGE: Right. Let's move on. Now, expert
21 witness DIS-250. The Chamber notes that the Defence --

22 JUDGE ITOE: My Lord, did I understand the Prosecution -
23 saw the Prosecution --

24 PRESIDING JUDGE: I'm sorry. I apologise. Did you have
25 any comments on this particular issue?

26 JUDGE ITOE: At a certain stage, I saw you wanting to
27 spring on your feet.

28 MR HARDAWAY: Your Honours, I believe that dealt with

29 issue of communications between the Prosecution and the first

- I

the

that

1 accused as related to the summary of the first accused. And
2 is an issue I had addressed prior, Your Honour. I didn't give
3 any indication; if I did, I apologise.

you
they
had.

4 JUDGE ITOE: Yes, indeed, I saw you. I thought you --
5 know, we watch the movements, if we can, of counsel and when
6 are anxious to put across certain ideas. So I thought you
7 I apologise if I misunderstood your reflexes.

referred
stage,

8 PRESIDING JUDGE: Right. Expert witness DIS-250. The
9 Chamber notes that the Defence for Gbao, in its notice
10 to above, also indicated that it will not be sharing expert
11 witness DIS-250 with the Defence for Sesay. But, at this
12 there has not been an indication from Mr O'Shea as to whether
13 client intends to call any expert witness. Can you enlighten
14 on that?

his
us
Your

15 MR O'SHEA: Well, my position hasn't changed on that,
16 Honour. At the moment, we don't have sufficient information
17 about the military expert for the Sesay team.

18 PRESIDING JUDGE: Very well.

19 MR O'SHEA: To be in a position to say that we will not
be
20 seeking leave to call an expert witness and we will continue
to
21 pursue that avenue. But I know His Honour Judge Boutet
expressed
22 views at the last status conference with regard to the
military
23 expert, and I can assure the Chamber that, you know, we will
do
24 everything to ensure that we don't waste the Court's time. If
we
25 decide to call another military expert it's because we will
feel
26 that there is a need for one. If there's no need for one, we
27 won't call one.
28 PRESIDING JUDGE: But your definitive position is that
you
29 will not be sharing DIS-250?

sharing

1 MR O'SHEA: On that it's absolute; we will not be

2 DIS --

3 PRESIDING JUDGE: Yes, quite. That's what is important
4 also.

5 MR O'SHEA: We will cross-examine --

solo

6 PRESIDING JUDGE: But who knows, you may have your own
7 expert, in due course, if you think that is necessary.

that

8 MR O'SHEA: Yes. It may be that the evidence given by
9 expert, together with our cross-examination, will be

sufficient

10 for our purposes. If it is not, then we'll deal with that
11 when
12 the time comes.

13 PRESIDING JUDGE: Very well.

made,

14 JUDGE BOUTET: In other words, your decision is not
15 at this stage, as to whether one will be called and,
16 therefore,
17 the third accused -- it will depend on how it comes out?

18 MR O'SHEA: That is correct, Your Honour.

19 JUDGE BOUTET: Okay.

for

20 PRESIDING JUDGE: The next thing is protective measures
21 for
22 the Defence witnesses on behalf of the first accused. The

precisely

20 Chamber is seized of a motion filed by Mr Jordash seeking
21 specific protective measures for certain witnesses residing
22 outside West Africa, and the motion was filed on 5 March this
23 year, and the Chamber is quietly deliberating on it. But we
24 would like to have the following questions answered, as
25 as can be done, and if, perhaps, the answers cannot be
26 forthcoming in this proceeding, we still would request them in
27 writing, because they're very important to enabling us to
28 dispose, effectively and impartially, of the motion.

29 The first question is: Can you confirm whether the

1 witnesses who are the subject of the motion are already
included
2 in the current Defence witness list? Because the state of the
3 records, really, is a little perplexing in the sense that the
4 pseudonyms and the redactions of the witness summaries make it
5 difficult to determine whether these witnesses have been
6 included. And, in your reply, I think you stated that a
7 pseudonym has already been given to some of these witnesses
but
8 you do not specify whether the witnesses are listed in there.
So
9 that is question one.
10 MR JORDASH: The answer is, yes, they are.
11 PRESIDING JUDGE: Okay. Then question two.
12 JUDGE ITOE: They're listed?
13 PRESIDING JUDGE: They're listed, okay.
14 JUDGE ITOE: Thank you.
15 PRESIDING JUDGE: Good. Then question two is this: Can
16 you confirm whether these witnesses have, and we emphasise
this
17 formula, indicated their willingness to testify? The
operative
18 formula is: Indicated their willingness to testify for the
first
19 accused. And, again, we couldn't decipher this from the
motion
20 itself and the reply.

that

21 MR JORDASH: The answer to that is, again, yes. But

22 willingness is caveated.

23 PRESIDING JUDGE: In what respect? Qualified?

24 MR JORDASH: In respect that they want --

25 JUDGE ITOE: They want authority from their various
26 structures.

27 PRESIDING JUDGE: Institutions.

28 MR JORDASH: And ongoing protective measures --

29 PRESIDING JUDGE: Very well.

otherwise.

1 MR JORDASH: -- until a time when they indicate

2 PRESIDING JUDGE: Well, that helps. Yes. Thank you.

3 MR JORDASH: Yes. I think it's clear, no-one is on the
4 list who has not agreed to testify.

5 PRESIDING JUDGE: Very well. Yes. That should serve as
a
6 very useful point for us in disposing of the motion.

7 JUDGE ITOE: What you're saying, is that they have
8 agreed
9 and, if they don't come, it means that they have not been
10 given

11 the permission from their -- is that what you're saying? That
12 those of the MOD's --

13 MR JORDASH: Yes. It is contingent upon the permission
14 of
15 their higher authorities, whoever they may be. Yes.

16 JUDGE ITOE: I understand, that's okay.

17 PRESIDING JUDGE: Right. We can move on to any other
18 matters now, except if anybody has anything to talk about in
19 respect of the issues that we have already covered, any
20 collateral matters or ancillary issues coming? Well, let's
move

21 on to the last item on the agenda: Any other matter.

22 Let me read quickly the outstanding motions. The
following
23 motions are currently pending before this Trial Chamber:

on
21 "Prosecution application for leave to appeal majority decision
22 oral objection taken by counsel for the third accused to the
23 admissibility of portions of the evidence of witness TF1-371,
24 filed by the Prosecution on 21 August 2006." "Confidential
25 Defence motion on behalf of Sesay requesting the lifting of
26 protective measures in respect of protected witnesses, filed
by
27 the Defence on 19 January 2007." 3. "Application for leave
to
28 appeal 2 March 2007 decision, filed by Defence for Sesay on
29 5 March 2007." 4. "Sesay Defence motion for immediate

Chamber

Defence

opening

on

objection

the

It

1 protective measures for witnesses, filed by the Defence on
2 5 March 2007." 5. "Defence motion to request the Trial
3 to permit inspection of witness statements, Rule 66(A)(iii),
4 and/or order disclosure pursuant to Rule 68, filed by the
5 for Sesay on 30 March 2007." 6. "Request for the Gbao
6 statement to be given at the beginning of the presentation of
7 evidence for the third accused, filed by the Defence for Gbao
8 16 April 2007." Next, "Defence motion seeking a stay of the
9 indictment and dismissal of all supplemental charges
10 (Prosecution's abuse of process and/or failure to investigate
11 diligently), filed by the Defence for Sesay on 24 April 2007."
12 And, lastly, "Motion requesting reasons for Prosecution
13 to authenticity of the exhibits filed by Issa Sesay, filed by
14 Defence for Sesay on 30 April 2007."

15 So those are the motions pending and certainly will be
16 disposed of as expeditiously as possible. Are there any other
17 submissions? Okay. Any other motions that are forthcoming or
18 that are already filed as of this morning?

19 MR JORDASH: There is another motion coming, actually.
20 hasn't been drafted yet.

21 PRESIDING JUDGE: We do have an avalanche of these
motions.

22 JUDGE ITOE: We don't want to take cognisance of that
one.

23 MR JORDASH: I would hope, actually, that Your Honours
24 could deal with it, perhaps, orally. It concerns the witness
25 statement of witnesses who have been interviewed by the
26 Prosecution and they're also on the Defence list. Presently -

-
27 JUDGE ITOE: I wouldn't want to go with that orally.

28 MR JORDASH: Well, if I can just say quickly what it is.

29 PRESIDING JUDGE: I will reserve my position on that.

1 MR JORDASH: At the moment, the procedure that has been
2 ordered by the Trial Chamber pursuant to the CDF decision --

3 PRESIDING JUDGE: Yes.

4 MR JORDASH: -- is that the Defence can have inspection
of

5 the statements pursuant to Rule 67. I think that, on the
basis

6 that the statements are material to the preparation of the
7 Defence, and so far we have had inspection of two such
8 statements, DIS-126 and DIS-258, the issue is an ongoing
issue.

9 There are now two more witnesses, we have discovered, since
10 disclosure of the names of these Defence witnesses, who the
11 Prosecution have taken statements from at some time in the
last

12 few years. And the difficulty now is that inspection is of
13 little value, given the volume of material which needs to be
14 inspected. The reason for inspection, as I understand it, is
so

15 we can see what's there, but we can only see what's there in a
16 limited way, and what we're asking for is the Prosecution to
17 disclose those statements on the basis that it causes no
18 prejudice to them, but it does assist in our case preparation
in

19 putting the two statements to the side of each other, the
Defence

what 20 statements and those obtained by the Prosecution, and seeing

witness, 21 the true situation is, and whether we want to call that

22 whether there is consistency or not.

statements 23 In addition to that, we'd also like to put those

24 to the witnesses themselves and ask them, "What happened? Why

25 did you say this to the Prosecution?" if it is different. We

26 could inspect the documents, we could sit there all day and

good 27 inspect them and memorise them, but it wouldn't seem a very

28 way forward.

29 So what I would be asking for in a motion, because the

1 Prosecution have refused to disclose the statement, is for the
2 Trial Chamber to order, pursuant to Rule 66(A)(ii), is, "Upon
3 good cause being shown by the Defence, a Judge of the Trial
4 Chamber may order that copies of the statements of additional
5 Prosecution witnesses that the Prosecutor does not intend to
call
6 be made available to the Defence within a prescribed time."
And
7 we would say good cause is clearly made out on the basis that
it
8 makes good sense that we can all deal with this issue in a
much
9 quicker, more efficient way. The Defence can make sensible
10 decisions and the Prosecution are not prejudiced.

11 Now, I can file a motion --

12 PRESIDING JUDGE: Well, file it. I mean, speaking for
13 myself, I would like a motion filed, and then we'll take it on
14 advisement. Yes.

15 MR JORDASH: I can only say this: This may well cause
some
16 delay.

17 PRESIDING JUDGE: That's okay. We certainly will manage
18 some of the --

19 JUDGE ITOE: I hope you are still not writing it, you
know.
20 If you can conclude writing it and file it today, why not?

jobs. 21 MR JORDASH: Well, there's that and a hundred other

22 PRESIDING JUDGE: Does the Prosecution wish to make any
23 comment on this?

24 MR HARRISON: No, thank you.

25 PRESIDING JUDGE: Thank you. Any other submissions from
26 both sides? Yes, Mr Jordash.

funding. 27 MR JORDASH: I want to raise the thorny issue of

28 PRESIDING JUDGE: Yes.

instruct a 29 MR JORDASH: The first issue is this: We cannot

and

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to

Your

accused,

1 military expert until funding is organised. We've got two
2 well-qualified experts ready to come to Sierra Leone, but they
3 are not prepared to do so for a P3 funding. I've communicated
4 with the Office of the Principal Defender about the subject
5 I'm assured, as I have been assured for some months, that the
6 issue is to be resolved in the very near future. That very
7 future keeps getting pushed back.

8 Apparently, the Office of the Principal Defender has put
9 proposal to the Management Committee that experts should be
10 funded for the Defence at a P5 level. That kind of funding,
11 whilst still inadequate, in my view, we might be able to sell
12 our experts, who have a combined experience of probably about
13 35 years. So P3 is derisory and P5 is --

14 JUDGE ITOE: The experts have 35 years' experience --

15 MR JORDASH: A combined experience of 35 years --

16 JUDGE ITOE: Thirty-five years.

17 MR JORDASH: -- in the military field. There was, as

18 Honours will appreciate, a motion on this from the first

19 and Your Honours sent it back to be dealt with by arbitration.

20 The arbitration procedure is an unwieldy mechanism, which can

21 occasion, and be used to occasion, huge delay.

of

22 PRESIDING JUDGE: Because the difficulty by these kinds

23 provisions is that some of those matters are not just issuable

24 until arbitration has been exhausted.

25 MR JORDASH: And the problem with arbitration is that it

26 depends on the goodwill of parties to get the thing moving.

27 PRESIDING JUDGE: Yes. When you finish, we'll ask the

28 Principal Defender just to give a quick response.

we

29 MR JORDASH: But where we are at in relation to that is

1 have chosen not to go down the arbitration route, because it's
2 been a cause of some contention with other issues, which I'll
3 come to in a minute. But, because the Office of the Principal
4 Defender has given us this reassurance that the issue is to be
5 dealt with, hopefully, soon, we are waiting for that to be
6 resolved.

got

7 In my submission, this is a huge problem for us, because
8 this military report underpins the whole of our case. I've
9 no doubt about their having spoken with the experts, having
10 attended a conference with them in London. But, of course, we
11 haven't got that expert evidence because, apparently, the
12 Registry thinks experts with 20 years' experience should be
13 at a level of five- to eight-year qualified professionals
14 for the UN, a decision which baffles me, but, nevertheless, is
15 one which we are living with.

paid

working

isn't

16 PRESIDING JUDGE: But there is also the provision --
17 there the mechanism of negotiation, as an alternative to --

18 MR JORDASH: With whom?

19 PRESIDING JUDGE: -- arbitration.

20 MR JORDASH: Well, there is nothing to negotiate.

21 According to the Office of the Principal Defender, their hands

22 are tied.

23 PRESIDING JUDGE: I wonder why.

24 MR JORDASH: I wonder why, too. But, according to the
25 Registry, there is no money. Surprisingly, the Prosecution
for
26 the Taylor case are able to instruct 11 experts, but
apparently
27 there is no money in the Court.

28 PRESIDING JUDGE: I would have thought that these kinds
of
29 matters, really, and I can speak for myself, that sometimes
the

1 Chamber feels extremely irritated that we have to get so
enmeshed
2 in these kinds of fiscal issues, which, essentially, our role
is
3 that of adjudicators, and we would have thought there should
be
4 sufficient statutory provision for negotiation before
5 arbitration. Normally negotiation precedes arbitration. It's
6 when the parties can't agree or negotiate successfully that
you
7 go to that technical mechanism of arbitration. I'm surprised
8 that these mechanisms are not available. From time to time,
the
9 intervention of the Court or the Chamber is sought on matters
10 which, clearly, from my own experience, should be within the
11 purview of some extra-judicial machinery.

12 MR JORDASH: I agree, but the Office of the Principal
13 Defender says they have no money. They have no money to fund
the
14 Defence expert above a P3. That's their position and, as
often
15 as I ask, that remains their position.

16 PRESIDING JUDGE: Well, let's hear from them because,
quite
17 frankly, I am finding it extremely irksome that we should
18 constantly be asked to intervene in matters which, clearly,
are
19 outside our own purview.

20
opportunity.

MR NMEHIELLE: Your Honour, thank you for the

21
worry

As Principal Defender, I have never hidden my concern and

22 about the resources that are available to the Defence, and at

23 every point in time with my discussions with the Registry.

24
Court

Now, I think the problem, really, of funding in this

25 emanates mainly from the fact that we have to go, cap in hand,

26
contributions.

begging all the time with this so-called voluntary

27
I

But in relation to what counsel has raised regarding experts,

28 was of the view that the P3 level -- experts come in different

29
level,

shapes and experiences, in which case that determines the

1 but, generally speaking, I am of the view that experts at P3
2 level are not adequate and will not afford the Defence the
3 opportunity to have reasonably qualified people. And that was
4 why, in my proposal -- when I came here as Principal Defender,
I
5 found that the Defence was being forced to use P3 in the first
6 experience they had in the AFRC, and I objected to it. But,
7 again, in the relationship that exists between the Registry,
8 having financial fiscal oversight over the Defence office, it
was
9 flatly put "take it or leave it." So that was why we stopped
10 with P3.

11 Of course, I raised the issues all over again that P3
will
12 not be adequate, and made a budget proposal, which I addressed
13 the Management Committee on, when they visited Freetown, that
14 experts and international investigators should not be at
anything
15 less than a P5. P5 can range from an experience of 15 to 25
16 years in the United Nations system. And, therefore, I feel
that
17 a P5 level is reasonable qualification -- I mean, remuneration
18 for an expert and international investigator.

19 And, of course, again, as a result of the hamstringing
we
20 are subjected to in terms of finance, my proposal for

the

21 international investigators to be at P5 level was cut off in

had

22 budget that was submitted to the Management Committee, and I

23 to keep begging and pleading and possibly getting into some

24 fiscal, if you like -- without falling into the trap of being

not

25 discourteous and abrasive, had to literally plead for experts

26 to be reduced to P3 all over again.

made

27 So, what I'm trying to say, a recommendation has been

28 to the Management Committee. Still, we do not have the budget

29 approved, and that has set us back in a number of ways. And I

1 hear that the Management Committee will be making a decision
on
2 the budget very soon, which I don't have any control about.
And
3 I continue to say that the lack of financial independence of
the
4 Defence Office has had an adverse impact, and I have always
5 maintained that resources for the Defence need to be much more
6 available, when they are not, and I don't have control over
the
7 decision as to what I put in my budget proposals. Now, budget
8 proposals, from the time I came here, are with me. Up to this
9 point in time, what have always been approved are entirely
10 different from the proposals that I make in my budget for the
11 Defence teams, and I thought that should be properly recorded.
12 I have assured the Sesay Defence team about the fact
that
13 we could conclude the issue regarding the expert as soon as
the
14 budget is approved. Having in mind, again, the assurance
given
15 to us by the Management Committee that the budget would be
16 approved before the end of March, and, again, we will know
before
17 the end of April the budget will be approved, or we were
thinking
18 that the budget will be approved before the end of May. And
we

19 hear that, at the meeting as of yesterday of the Management
20 Committee, there will be a real likelihood that the budget
would
21 have been approved yesterday. But I have not heard the news
that
22 it has, as yet, been approved. So, these are the
circumstances
23 we are subjected to, and I feel very, very hamstrung about the
24 situation. So this can only be my submission in this regard.
25 PRESIDING JUDGE: And does the real solution lie here
with
26 the Court?
27 MR NMEHIELLE: I don't think so. I don't think the
28 solution lies with the Court, Your Honour, or with the
Chamber,
29 again, because it involves fiscal issues. But, I think, if it

1 does impact the fundamental rights of the accused in terms of
2 having their fair trial --

3 PRESIDING JUDGE: That's our jurisdictional premise for
4 intervening in these matters. Of course, when the kind of
5 dispute is right for that kind of intervention, we certainly
6 would not, in any way, sacrifice the authority which we have

to

7 do that to any kind of fiscal, political expediency. Go

ahead.

8 MR JORDASH: Well, simply, the time is past that point.

9 PRESIDING JUDGE: Right.

defence

10 MR JORDASH: One shouldn't be forced to go into a

11 case without being able to look at the expert evidence. The

12 expert evidence isn't just for Your Honours. Although,

13 obviously, that's the most important thing. But the expert

14 evidence is for us to be able to work out things we don't

operations

15 understand. And I don't understand the way guerilla

16 work; I don't understand the inherent flaws of guerilla

to

17 operations in terms of command and control, which, according

to

18 the experts, are varied and many. And I don't, really, want

19 go into a defence case without having that expertise, but I am

be

20 being forced to. So as soon as we get the time, a motion will

21 drafted.

22 PRESIDING JUDGE: Yes. Quite right. In other words,
23 formulate a proper motion for intervention, therefore, we can

do

24 these things [indiscernible]. We, sadly, would like to be

moved

25 by the parties, and if the issues are properly framed,

justifying

26 the intervention of this Court, I'm sure that we will be ready

to

27 do that.

28 MR JORDASH: Well, the problem is this arbitration.

That's

29 where you sent us back to the arbitration, which is no

solution,

1 given the time now that --

2 PRESIDING JUDGE: Well, if there can be some way where
the
3 inherent jurisdiction of this Chamber can be invoked to
override
4 some of the existing arrangements, I don't see why we
shouldn't
5 engage in some judicial creativity to see how we can, you
know,
6 move this process on, if it means that the process will be
7 stifled because of this fiscal constraint.

8 MR JORDASH: Well, what I hope, and I'll leave this
issue
9 there, is that when we file that motion, I hope that the
Office
10 of the Principal Defender doesn't oppose it on the basis that
we
11 should go through arbitration.

12 JUDGE BOUTET: But isn't it a bit premature at this
time,
13 given what the Principal Defender has stated: That the budget
14 may have been approved, from what I know, yesterday, or maybe
15 today, whatever, this week. But what is not clear to me is if
16 the budget is approved, whether that will provide sufficient
17 funding for that. It's not clear, from what I heard from the
18 Principal Defender. It was in his budget, but he's not -- you
19 appear, Mr Principal Defender, not to be sure as to whether or

20 not that was maintained as part of your budget; am I right?

21 MR NMEHIELLE: For experts.

22 JUDGE BOUTET: For experts.

23 MR NMEHIELLE: We were able to fight for the P5.

24 JUDGE BOUTET: So it is there?

25 MR NMEHIELLE: This part of the budget.

26 JUDGE BOUTET: Okay.

27 MR NMEHIELLE: When I spoke with the Management
Committee,

28 I got the impression that it would be maintained. Now, in
terms

29 of the length of time an expert is required to do a job, that
may

1 be a different matter entirely that needs to be worked out.
In
2 relation to not opposing this because it is not part of the
3 arbitration --
4 PRESIDING JUDGE: We could probably leave that.
5 MR NMEHIELLE: But I am just wanting to point out --
6 PRESIDING JUDGE: You have a right of reply, but I
didn't
7 think --
8 MR NMEHIELLE: No, it's not a reply. I'm agreeing with
him
9 in the sense that I really tried to persuade counsel, "Let's
not
10 go through arbitration. Let's see if we can find an amicable
way
11 of resolving this, because arbitration may likely lead to a
waste
12 of time," and I think he's been amenable to that, and I'm
hoping
13 that we will get this P5 thing sorted out as quickly as
possible.
14 We had a meeting yesterday, today being Wednesday, that
the
15 management team was meeting to agree on the budget, and that
it
16 had, in principle, been accepted. As soon as we get a
17 communication of that approval -- again, the difficulty with
the
18 Special Court is that a budget of 89 million may be there, but

raised
to
of

19 the post may be not in existence, and the money has to be
20 because of voluntary contributions, but I'm sure we'll be able
21 muddle through, having a P5 expert for eight weeks on behalf
22 the Defence teams.

perhaps

23 PRESIDING JUDGE: Well, on that note of compromise,
24 we should bring this proceeding to -- go ahead.

25 MR JORDASH: There is more, I'm afraid.

26 PRESIDING JUDGE: Okay. Well, let's hear some more.

27 MR JORDASH: I'm sorry to take the Court's time up, but
28 these issues may well take up more time in the future.

29 PRESIDING JUDGE: Very well.

1 MR JORDASH: The funding for the Defence is such that
there
2 is almost certainly going to be long delays in the next few
3 months. The funding for the Sesay Defence allows, in the
present
4 time, for myself, Ms Ashraph and Mr Kneitel to work, and that
is
5 it. I don't blame the Prosecution for this, but I would
invite
6 Your Honours to look at the Prosecution team, who will
7 effectively be working on opposing the Sesay Defence case and
the
8 Sesay Defence case alone.
9 Whilst they will have, and understandably so, the
ability
10 to be able to rotate counsel, an experienced counsel at that,
in
11 court, they will be able to have more than one counsel in
court.
12 We don't have such a luxury. So it will be me in court,
13 and Ms Ashraph and Mr Kneitel trying to deal with the deluge
of
14 witnesses coming into Freetown. In my view, wholly
inadequate,
15 but also completely a false economy because, if one of us is
ill,
16 we can't continue. If I'm ill, the case cannot continue
because
17 the jobs that each of us do are specific to each other.

the
18 Necessarily so because of the inadequate funding provided to
19 Defence.

course,
20 Now, putting aside the point of principle that, of
21 a Prosecution shouldn't be enabled to get four experienced
22 lawyers into court, backed up by case managers, backed up by
23 interns and so on, whereas the Defence have only one in court.
24 Putting that aside, it actually just doesn't work. It doesn't
25 work to have one person in court because if I'm ill for a
week,
26 two weeks, the cost to the Court is huge.

same
27 JUDGE BOUTET: Mr Jordash, you have my sympathy; the
28 applies to us. If one of us is ill, then you go nowhere. We
29 have no substitute. So your position is no different than
ours

than
is

1 when we're here. And we cannot sit at two judges for more
2 five days. That's it. After five days, if one of us is ill,
3 unable to attend, well, everything is suspended.

4 MR JORDASH: But the point is though you --

5 JUDGE BOUTET: The financial scenario you're describing
6 applies to the Bench as well.

7 MR JORDASH: Yes. The problem is that Your Honours can
8 manage with three judges.

9 PRESIDING JUDGE: Right.

10 MR JORDASH: I can't manage with three lawyers.

me,

11 PRESIDING JUDGE: The difficulty again, as I say, I keep
12 repeating this thing, is it's such an unusual experience for
13 speaking for myself, that called upon to play the role of an
14 adjudicator, I'm also asked to be a financial arbitrator in
15 terms
16 of fiscal matters in respect of the Court.

back

16 I mean, really, how much can we do as a Chamber, the
17 judges, to alleviate this difficult situation? Again, we go
18 to our formula; if it impacts upon the rights of the accused
19 persons. So in a way, effectively, what can we do? We would
20 like to advance the process but what can we, as judges, do?

Once

dictating

21 more, intervention by way of directives, orders, again
22 to administration and the fiscal managers, this is what you
23 should do because, otherwise, the rights of the accused
persons
24 will be prejudiced or violated and all that kind of thing.

25 MR JORDASH: I raise this; there is another issue.

26 PRESIDING JUDGE: Yes.

27 MR JORDASH: But I've raised this issue at this point to
28 inform Your Honours as to where we are. The arbitrator who is
29 considering the issue of funding for the Sesay cases concluded

1 that the Sesay case is exceptional.

2 PRESIDING JUDGE: Yes.

3 MR JORDASH: And we are in discussions with the Registry
4 and they will, in due course, I hope very quickly, decide what
5 that means in terms of additional funding. So it may be that
6 some of this is alleviated.

7 PRESIDING JUDGE: Yes.

think
no

8 MR JORDASH: But, if it's not, I raise it because I
9 it's right to raise it that if suddenly this seat is empty and
10 one --

11 PRESIDING JUDGE: Quite right.

what
and
in

12 MR JORDASH: -- can take my place, then Your Honours
13 understand exactly why. But we are at the point, depending
14 the Registry does now, depending if the Registry comes back
15 gives us a sensible offer of additional funding so that we can
16 hire additional counsel, then, aside from it being a bit late
17 the day, perhaps we can muddle through. But if the Registry
18 doesn't give us additional funding to that extent, then we
19 be seeking recourse to the Trial Chamber and saying to Your
20 Honours, is it fair, and two, is it sensible. That's my

point.

one
there
of
he
us.

21 PRESIDING JUDGE: Good. All right. Well, let me ask
22 question, and this would be for the Principal Defender. Is
23 provision in the statutory arrangements for such matters to go
24 directly to the President of the Court rather than come to the
25 Chamber? In other words, first to the President for some kind
26 resolution as a kind of, in a way, administrator or fiscal
27 manager of the Court, because the President plays two roles;
28 wears a political hat, as President of the Court, and then he
29 wears the hat of an adjudicator, rather than come direct to

the

1 MR NMEHIELLE: Unfortunately, there is no provision for
2 President to deal with such issues. What really happens is
3 such requests are made to the Registrar.

that

4 PRESIDING JUDGE: Yes.

right

5 MR NMEHIELLE: Now, of course, the President has the
6 to review a decision of the Registrar, and depending on what
7 issues are, more specifically in the detention rules when it
8 applies to that.

the

9 PRESIDING JUDGE: I see.

that

10 MR NMEHIELLE: Now, where the Registrar has made a
11 determination relating to say resources, it is usually such

rights,

12 if a team then determines that it impacts the fundamental

venture

13 they could come to the Chamber, but I think they can also

be

14 to ask the President to review but, again, the President will

15 quite reluctant to review financial decisions.

16 PRESIDING JUDGE: They prefer to pass the buck on to the
17 Chamber.

18 MR NMEHIELLE: Well, if they give -- of course, the team
19 will be the one to make out the link between that and the

20 fundamental rights of the accused. Your Honours, I want to
21 underscore the point that I have maintained the position that
if
22 the Defence could have half of the resources made available to
23 the Prosecution, and I'm sure that the Defence case will
operate
24 smoothly from my time here, because I do know that member
states
25 tend to somehow be affiliated with the causes of the
Prosecution,
26 as such, are willing and more generous sometimes specifically
to
27 ring-fence some resources for the Prosecution and, of course,
the
28 Defence have the most unpopular job, if you like, in this kind
of
29 mechanism relative to what the member states think and the

I 1 members of an administration think, and I have difficulty and
2 get frustrated about this from time to time.

3 PRESIDING JUDGE: All right. Thank you. Carry on,
4 Mr Jordash.

perhaps.
5 MR JORDASH: One final issue, and more fundamental
6 On present budget provided by the Registry, at the rate
7 suggested
8 at the beginning of this trial procedure four years ago now,
9 the
10 budget will run out for the Defence teams -- certainly my
11 team,
12 and I know the team for the third accused have similar
13 submissions to make -- it will run out in six weeks, which is
14 why
15 we've never arrived at this crisis point before because we've
16 always just sit for six weeks. So the budget will run out in
17 six
18 weeks' time.

19 Now, at that stage, my Bar Council does not require me
20 to
21 continue, because Bar Council does not require me to continue
22 working for no money. And so I raise that now so that the
23 Registry here -- the pressures which the team is under are
24 immense, and I can say this now that every member of the team
25 is
26 exhausted because of the lack of resources. We are working

we
six
my
to
suggested
for

20 seven-day weeks, and we have been doing for several weeks, and
21 haven't even started yet. And when that budget runs out in
22 weeks, in all conscience, and also according to the Rules of
23 Bar Council, I do not have to continue, nor would I recommend
24 my team that they should continue. But, obviously, we will
25 revisit that at six weeks and everyone will have to make their
26 own minds up. But, this is the budget which was provided four
27 years ago; these are the rates which were set. We've already,
28 certainly my team have taken a huge reduction in those
29 rates over the last few years and the time has come, we say,

1 that not to keep continuing. So in six weeks, when the money
2 runs out, I will be taking fresh advice from my Bar Council
and I
3 will be advising my team, Ms Ashraph, and Mr Kneitel to do the
4 same, and we will then have to come to a decision as to
whether
5 we simply say: We are not working for no money, and we are
not
6 continuing to spend our own money to continue to work in a
case
7 which we are hugely committed to but being exploited on.

8 PRESIDING JUDGE: Well, we need some intervention from
the
9 Principal Defender.

10 MR NMEHIELLE: I'm really sorry that I have to stand up
11 from time to time --

12 PRESIDING JUDGE: That's okay. This is very important.
13 After all, you are a stakeholder here.

14 MR NMEHIELLE: I don't know how counsel arrived at the
15 whole six weeks calculation, but I think I know where he is
going
16 in relation to the resources available. I have a difficulty
here
17 because we have a legal service contract that was done four
years
18 or thereabouts ago that established a rate of 25,000 maximum
19 ceiling for Defence teams including transportation, tickets
and

20 daily living allowance, as well as fees. When I came in as
21 Principal Defender, I took it up with the then Registrar,
Robin
22 Vincent, to indicate that that was inadequate from my
experience
23 and my estimation. But unfortunately, they said: They have a
24 contract. They signed a contract. But again, when Mr Cassese
25 came here, I raised the issue and made a recommendation
because
26 of the discussions I have had with counsel over the issue of
27 remuneration, and I put it to Justice Cassese that there was a
28 need, particularly in view of the fact that the RUF trial will
29 sit no longer vacating for six weeks, interchanging with the

CDF

legal

1 trial, that there was a need to demarcate between DLA and
2 fees; at least to be able to afford counsel adequate
3 remuneration. Of course, he bought the idea and made a
4 recommendation.

the

5 Of course, the Court told everyone that they would
6 implement the provisions of the Cassese report and, based on
7 Cassese report, I drew up a new budget. Of course I tried to
8 raise the figure from 25 to 30 at least, to have a 5,000
9 increment because I was shot down on the premise that there is
10 existing contract. That's very well and good. Let's leave it
11 25,000 for fees and then I made provision for separate DLA for
12 four members of a team in addition to the legal fees.

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13 Well, eventually, the Management Committee felt that the
14 Defence budget was too big, and felt that there was a need to
15 it down and give a mandate to the Acting Registrar to cut it
16 and, subsequently, the budget was cut down to -- it was more
17 less me not having any further input as to what should happen
18 the budget, and I was told that I could not have more than two
19 people in a team to have DLA, more so if it is composed of two

is
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20 internationals, and then not more than one person where there
21 one international in any particular team. Because I am
22 the RUF trial in making my recommendation. So all I can say
23 is that at least in the budget there is a separate provision
24 DLA which was reduced to two members, rather than four, based
25 my recommendation proposal separate from legal fees, I sealed
26 cap of 25,000 per month in relation -- in accordance with the
27 legal service contract. So, again, it comes down to who
28 determines what the Defence office needs.
29 I am a professional who should be able to determine, to

1 extent necessary, the resources that Defence should need, but
2 somebody else determines whether really, what I said, carries
3 weight. Lack of financial autonomy for the Defence office,
and
4 for the Defence generally, is at play here. And I can only
tell
5 counsel, and confirm, that unless DLA is provided in the
current
6 budget for two, maximum of two, separate from legal fees. So,
7 hopefully, you will be -- if that brings any cushioning to
your
8 circumstances -- you may well be in a position to redistribute
it
9 the way you want. At least that is all I can submit at this
10 point in time.

11 PRESIDING JUDGE: Yes. Anybody else want to contribute
to
12 this rather complicated debate?

13 MR O'SHEA: Your Honour, yes. Briefly and
constructively,
14 I hope. I would like to make two comments: First relates to
how
15 this impacts upon the fundamental rights of the accused and,
16 secondly, on what role this Court can take at this juncture.

17 PRESIDING JUDGE: Well, don't do the first because I
think
18 we know that.

19 JUDGE ITOE: We have a stand on this.

20 PRESIDING JUDGE: Don't do the first.

21 JUDGE ITOE: We have a stand on this.

22 PRESIDING JUDGE: Do the second; what should we do?

23 Because we too can argue we know exactly how it does impact.

But

24 tell us what role we have.

25 MR O'SHEA: Yes. Well, Your Honour, the position at the

26 moment --

27 PRESIDING JUDGE: What creatively can we do as judges?

28 MR O'SHEA: The position at the moment, as I understand

it,

29 what I anticipated, is that it is likely that this trial will

run

1 continuously as opposed to in sessions as we were doing during
2 the Prosecution case. If you, as the judges, can give a very
3 clear indication at this stage that that is the case, that
this
4 trial will be running continuously as opposed to in six week
5 sessions --

6 JUDGE ITOE: Mr O'Shea, it is known by everybody. Do we
7 need to -- don't you think it is known by everybody? The
Cassese
8 report knows that, and the Principal Defender, you know, has
put
9 across that case. That we will be running, you know, nonstop
10 excepting for judicial vacations on one case, this case alone,
11 because the CDF case is over.

12 MR O'SHEA: Well, that statement alone --

13 PRESIDING JUDGE: Except for Mondays.

14 JUDGE ITOE: Except for the Mondays that we've taken
away
15 from you.

16 MR O'SHEA: Yes.

17 JUDGE ITOE: And that Mr Jordash is not very happy
about.

18 MR O'SHEA: That statement alone is sufficient, Your
19 Honour. That statement that Your Honours just made is
20 sufficient. So that --

To

21 PRESIDING JUDGE: So what do you think we need to do?

22 publicize this in gold? Send it to the fiscal office and let
23 them know?

24 MR O'SHEA: A letter would do.

25 JUDGE BOUTET: Well, we've already said that in the
26 completion strategy.

27 MR O'SHEA: Yes.

28 JUDGE BOUTET: That is what we want to do. We want to
29 finish this trial.

SCSL - TRIAL CHAMBER I

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1 MR O'SHEA: We're in a position whereby our position now
2 different from the one it was during the Prosecution case and
3 this is the time when we need more resources. There is no
4 clearer way to explain how this is prejudicing the accused.

5 PRESIDING JUDGE: Well, I think, quite frankly, the case
6 has been very well articulated and, as I keep asking, it's
7 what constructive role can the judges play, but we have advice
8 now and, considering that the Registrar has this peculiar
9 province of administration and fiscal jurisdiction, and that
10 judges should only come in when we think that the rights of
11 accused persons are in jeopardy because of that, and we
12 certainly -- we are not yielding from that position.

13 MR O'SHEA: I should indicate to Your Honour that we
14 could enter into an issue of crisis at some stage. And, in a
15 sense, it's good for us to try and avert that. Of course --

16 PRESIDING JUDGE: Well, if you create the crisis it
17 be a way of, in fact, forcing the fiscal managers to respond.
18 But, of course, not with the support of the judges.

19 MR O'SHEA: Well, I would like to reiterate --

20 PRESIDING JUDGE: We don't --

21 MR O'SHEA: -- what Mr Jordash has alluded to. If our
22 living expenses and our hotel expenses are coming out of our
23 budget and we're going to be sitting eight, nine, or ten weeks
as
24 opposed to six, the reality is that if we cannot - and I say
this
25 for the benefit of the Registry's hearing - if we cannot
resolve
26 this matter diplomatically soon, and I mean within weeks, we
are
27 going to be in a situation where we, as counsel, will have to
say
28 to Your Honours: Your Honours, tomorrow we have to leave.
29 PRESIDING JUDGE: Yes. In other words, you resort to
what

1 usually would be the trade union --

2 MR O'SHEA: We do not have --

3 PRESIDING JUDGE: -- Trade union strategy.

4 MR O'SHEA: We do the not have the expenses to maintain
us here anymore.

5 PRESIDING JUDGE: Yes.

6 MR NMEHIELLE: Your Honour --

7 PRESIDING JUDGE: Well, you put us on notice.

8 MR NMEHIELLE: I think you have not come -- would not
come

9 to that position yet in terms of -- while I have every
interest

10 of counsel at heart in terms of this issue of separating DLA
from

11 legal fees, like I just indicated to the Court, there is a
12 provision. Whether that provision should have covered every
13 member of the team is a different thing entirely, but I had

14 made
15 a proposal for four per team. The Registry had cut it down to
16 two per team. Looking at the various configurations of the
17 teams, that's what they tried to look at. So I think there is
18 some -- there is some reprieve. The effect may not be applied
19 the same way on all the teams in the decision.

20 Let's assume that there is a provision for DLA. Mind
you,

and

have

So

we

21 DLA is only available to international counsel and not a local
22 counsel. So a team that has, say, two international counsel
23 one local counsel or two local counsel and two international
24 counsel. It means that the two international counsel will
25 their issues in terms of expenses covered up and protected.
26 again, I think we've now come to the point where we will say
27 will down tools.

28 Let's look at the arrangement that has been made and see
29 how it works for us and then articulate it in relation to the

1 resources available to the --

Defender.

2 PRESIDING JUDGE: Well, thank you, Mr Principal

certainly

3 I think we need to bring this issue to a close now, and

4 with just one short word from Mr Jordash.

Registry

5 MR JORDASH: Well, two things. One is that this is not

6 about the Registry providing extra DLA, it's about the

7 providing funds so that we get paid --

8 PRESIDING JUDGE: Yes.

that's

9 MR JORDASH: -- and we get expenses. I don't think

suddenly

10 too much to ask. If any other profession of this Court

11 had their budget, their funding, cut: From now on you're not

12 getting paid, it wouldn't happen. Why does it happen with the

13 Defence? That is something I just find difficult to believe.

14 JUDGE ITOE: It should not happen.

15 MR JORDASH: It shouldn't happen. Of course not.

16 PRESIDING JUDGE: It's mind-boggling.

17 JUDGE ITOE: It shouldn't happen.

18 PRESIDING JUDGE: It's mind-boggling.

19 JUDGE ITOE: The Prosecution is paid regularly. The

20 Defence must be paid regularly. That -- this we say very

21 clearly.

That's

22 MR JORDASH: Just what we agreed. No more no less.

23 all we are asking for.

24 PRESIDING JUDGE: It's mind-boggling. Do we think it
25 probably appropriate if we, by way just of a modest beginning,
26 send the transcript of this status conference to the Registry?

27 MR NMEHIELLE: Your Honour, I need a clarification.

28 PRESIDING JUDGE: Wouldn't you think it would be
29 appropriate to do that?

SCSL - TRIAL CHAMBER I

1 MR NMEHIELLE: They will have it anyway.

2 PRESIDING JUDGE: Yes; this particular debate.

3 MR NMEHIELLE: My problem is: I don't understand why
the
4 counsel for the Sesay team says: You're not going to get paid
5 anyway. You're not getting paid. Does it mean that somebody
has
6 said that you won't be paid?

7 PRESIDING JUDGE: No. He is probably hearing things on
the
8 grapevine.

9 MR JORDASH: No. No. When the budget allows - I'm not
10 indicating what hourly rates I've been given, it's not
something
11 for public consumption - but we were told three years ago,
four
12 years ago: This is what lead counsel gets; this is what
13 co-counsel gets. I've been getting co-counsel rate. My
learned

14 colleague Ms Ashraph has been getting legal assistant rate for
15 the last four years. Now, that has been difficult enough to
16 stomach given that we've carried a huge burden in this case.

17 What -- so Mr Nmehielle understands, is that we are no
18 longer prepared to go to that rate. I want to be paid at lead
19 counsel rate and I want my learned colleague to be paid at
20 co-counsel rate, and I want Mr Kneitel, who's been paid at a

agreed

21 derisory rate, to be paid at legal assistant rate, as we

22 four years ago.

funds

23 Now, if that happens, and from now it should happen, it

24 will happen, because we'll be billing at those rates, the

25 will run out in six weeks. And, at that point, the legal

26 services contract, which requires them to pay us for legal

27 services, would appear no longer to be operative.

day

28 PRESIDING JUDGE: I think we can spend the rest of the

say:

29 on this issue. It comes down to what the Americans usually

Court
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this

1 Money is the bottom line. I think one way to begin, if the
2 would have any weight in this, is to make sure that this part
3 the debate this morning reaches the Registrar's office with
4 kind of indication that the Court would like the Registrar,
5 Acting Registrar, to consider some of the implications of the
6 issue that have been raised here for the further progress of
7 trial, and to take appropriate action to avert any impending
8 crisis in respect of these proceedings.

summer

9 MR JORDASH: And could I just raise one further question
10 which is: Do Your Honours have an indication as to when
11 break will be?

and

12 PRESIDING JUDGE: Well, that's what we -- I think I said
13 this morning that it will be coming out as soon as possible,
14 I hope when I said as soon as possible, probably by the end of
15 the week as to when there will be summer break.

never

16 MR JORDASH: Thank you.
17 PRESIDING JUDGE: I'm sure that we all -- I mean, I
18 believe that -- yes, Prosecution, any contribution on this
19 debate?

20 MR HARRISON: We, or I myself don't know any of the
21 details.

22 PRESIDING JUDGE: Yes, fine,

23 MR HARRISON: It's [indiscernible] learned here in
Court.

24 PRESIDING JUDGE: It's rather complicated. I think I
25 sometimes have a familiar statement that finance sometimes --
26 certain things exhaust finances but I didn't realise that
27 discussing finances could be very exhaustive. I think we need
to

28 call this proceeding to bring it to a close, and I certainly

29 thank you all for your cooperation. We will commence the
trial

p.m.,

1 tomorrow at 9:30 a.m.

2 [Whereupon the hearing adjourned at 12.45

3 to be reconvened on Thursday, the 3rd of May

4 2007, at 9.30 a.m.]

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SCSL - TRIAL CHAMBER I