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SCSL-2003-05-PT-029-1P
(838-843)

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SPECIAL COURT FOR SIERRA LEONE

Before: Judge Bankole Thompson
Designated Judge

Registrar: Robin Vincent

Date filed: 7 May 2003

THE PROSECUTOR

v.

ISSA HASSAN SESAY

Case No. SCSL-2003-05-PT

**DEFENCE OBJECTION TO EVIDENCE FILED AS REPLY EVIDENCE IN THE
PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR
WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE**

Office of the Prosecutor

Luc Côté, Chief of Prosecutions
Brenda J. Hollis, Senior Trial Counsel

Counsel for Mr. Sesay

Mr. William Hartzog

RECEIVED
Signature: Bankole Thompson
DATE: 7-5-03 TIME: 10:55am

1. Counsel for Issa Hassan Sesay files this motion to object to the admission of the materials referred to in paragraph 15 of the Prosecution Reply to Response of the Defence Office to Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure. The accused respectfully submits that the materials are not properly the subject of reply submissions and ought to have been included in the original Prosecution motion if they were to be considered in relation to that motion by this Court.

I. THE FACTS

2. On 7 April 2003 the Office of the Prosecutor filed the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure (hereinafter "the motion").

3. On 23 April 2003 the Defence Office filed a response on behalf of Mr. Sesay without prejudice to the right of counsel eventually assigned to him to deal with any protective measures as that counsel saw fit (hereinafter "the response").

4. On 30 April 2003 the Defence Office received the Prosecution Reply to Response of Defence Office to "Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure" (hereinafter "the reply"). The reply was filed 29 April 2003.

5. On 1 May 2003 Mr. William Hartzog was provisionally appointed as counsel to Issa Hassan Sesay.

6. Paragraph 15 of the reply refers to the Declaration of Allan Quee, Director of Post-Conflict Reintegration Initiative for Development and Empowerment (PRIDE) dated 25 April 2003, the Declaration of Saleem Vahidy, Chief of Witness and Victims Unit for the Special Court dated 28 April 2003, the letter of President Kabbah to the President of the UN Security Council dated 14 March 2003 and the Declaration of Keith

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Biddle, Inspector General of Sierra Leone Police dated 29 April 2003. These materials are attached to the reply. The reply states the materials were submitted "to further assist the Court in response to Defence Counsel's submission" concerning the conditions which must be met for protective measures to be granted for Prosecution witnesses.

7. According to Allan Quee's declaration PRIDE has spoken with ex-combatants in various areas. At least some of these ex-combatants have expressed fear of reprisal or intimidation should they be known to be witnesses for the Prosecution in any of the cases currently before the Special Court. The declaration also indicates that PRIDE has existed since April 2001 and has been speaking with ex-combatants "since the indictments in early April".

8. Saleem Vahidy's declaration indicates that he has been Chief of the Special Court's Witness and Victim Unit since 6 January 2003. He declares that the civil war in Sierra Leone has damaged the administration of justice to the point where its ability to protect citizens of the country is "less than what it should be", that witness protection in Sierra Leone is more difficult than in Rwanda, and that it is not possible for his Unit to offer "complete protective measures" for each potential witness.

9. President Kabbah's letter to the President of the UN Security Counsel indicates that ex-combatants from the various factions of the civil war continue to present a threat to internal security.

10. Keith Biddle's declaration indicates that he does not believe the Sierra Leone Police currently have the capacity to guarantee the safety of potential witnesses before the Special Court.

II. THE LAW

11. While the parameters of reply submissions and evidence are not addressed by the Court's Statute or Rules of Procedure and Evidence, the

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accused submits that considerations of fundamental fairness require reply evidence be restricted so that a responding party is not deprived of the opportunity to address evidence forming part of a moving party's case.

12. On this point the accused relies on the judgment of the Appeals Chamber of the ICTY in *Delalic et al.*, "Celibici Camp" (available from www.un.org/icty). In that judgment (at paragraphs 269-293) the Appeals Chamber outlined the principles governing the admissibility of both rebuttal and fresh evidence. The paramount concerns in such a context are 1) whether the party seeking to adduce such evidence could have submitted it earlier through the exercise of due diligence; and 2) whether the admission of such evidence would operate unfairly to the opposing party. The Defence Office submits these principles apply equally to reply evidence in written submissions. In the context of the present motion, consideration 1) requires a consideration of whether the moving party had access to the evidence in question and whether its relevance was reasonably foreseeable from the outset of proceedings. Consideration 2) is closely related to the 1) and requires a consideration of whether the opposing party has a meaningful chance to address the evidence and the issues it raises

13. In *Delalic* the Appeals Chamber (at paragraph 273) agreed that the applicable standard in the case of rebuttal evidence was that such evidence "must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated". Thus the ICTY adopted the rule familiar in many common law jurisdictions¹ that a moving party must, at the outset of its case, adduce evidence necessary to prove that case AND to address any points which it reasonably foresees the opposing party making.

¹ Including Sierra Leone whose courts follow the formulation of the rule in Archbold, *Pleading, Evidence and Practice in Criminal Cases*, 33rd Edition at p.192, para.347.

14. In the present case, the security situation in Sierra Leone and the grounds for fears expressed by potential witnesses were clearly material issues from the outset of the motion for protective measures. The accused submits that the reply materials merely readdress the two factual issues which formed the basis of the Prosecution's original motion. The Prosecution's reply acknowledges that fact in paragraph 15 where the Prosecution states that these materials are being submitted "to *further* assist the Court" [emphasis added]. The materials do not address an issue raised by the Defence Office's response which the Prosecution could not reasonably have anticipated. Rather, they seek to add more detail to matters already set out in the Statement of Morie Lengor and the Declaration of Alan White attached to the Prosecution's original motion. The Prosecution had access to the evidence submitted in reply before it filed its motion as all the declarants were available at that time as was President Kabbah's letter. The principle in *Delalic* demanded the Prosecution file the material with the original motion. Submitting this material at this late stage acts unfairly to the accused because he has had no opportunity to address it in his response.

15. The procedure on written motions seeks, among other things, to impose finality to the submissions which can be made to the Court. It is thus incumbent on all parties to ensure the evidence they offer in support of their position is submitted in a way which operates fairly for the opposing party and respects the need for finality with respect to submissions. If the rebuttal evidence rules outlined above are not respected such action risks making motions an endless process where reply evidence or submissions lead to counter-reply and counter-counter-reply. The accused files this objection because he views the Prosecution's submission of this further material at this late stage of proceedings as a serious matter which would set a poor precedent for future proceedings if not addressed. Keeping in mind the need for finality in these proceedings and the principles outlined in *Delalic et al.*, the accused respectfully submits the Court ought not to consider

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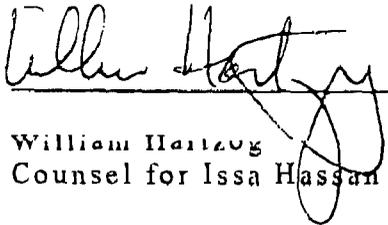
paragraph 15 and the materials to which it refers in coming to a decision on the protective measures motion.

III. PRAYER

16. That the Court rule inadmissible the Declaration of Allan Ques, dated 25 April 2003, the Declaration of Saleem Vahidy, dated 28 April 2003, the letter of President Kabbah to the President of the UN Security Council dated 14 March 2003 and the Declaration of Keith Biddle dated 29 April 2003 and proceed to a determination of the Prosecution motion on the basis of the admissible material submitted

17. In the alternative, the accused requests that the Court permit him to file a response to the Prosecutor's reply addressing the evidence outlined above and the issues to which it is addressed.

DATED this 6th day of May, 2003



William Hertzog
Counsel for Issa Hassan Sesay