

1170)

SCSL-04-15-1  
(26979 - 26995)

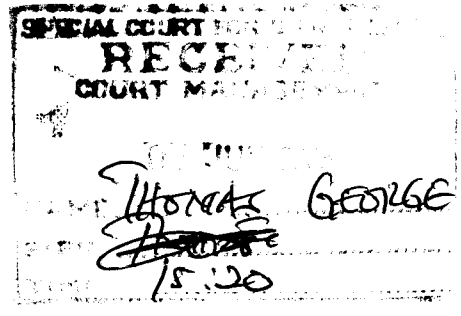
26979

SPECIAL COURT FOR SIERRA LEONE  
TRIAL CHAMBER I

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

Registrar: Mr. Herman Von Hebel

Date filed: 6<sup>th</sup> June 2008



THE PROSECUTOR

v.

ISSA HASSAN SESAY  
MORRIS KALLON  
AUGUSTINE GBAO

Case No. SCSL-04-15-T

---

PUBLIC

Defence Reply to Prosecution Response to  
Motion Requesting the Trial Chamber to Hear Evidence Concerning the  
Prosecution's Witness Management Unit and its Payments to Witnesses

---

Office of the Prosecutor

Mr. Peter Harrison  
Mr. Reginald Fynn

Defence Counsel for Issa Sesay

Mr. Wayne Jordash  
Ms. Sareta Ashraph

Defence Counsel for Morris Kallon

Mr. Charles Taku  
Mr. Orgetto Kennedy  
Ms. Tanoo Mylvanganam

Court-Appointed

Counsel for Augustine Gbao

Mr. John Cammegh  
Mr. Scott Martin

## I. INTRODUCTION

1. On the 30<sup>th</sup> May 2008 the Defence for the First Accused filed a “Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution’s Witness Management Unit and its Payments to Witnesses” (“Motion”).<sup>1</sup> On the 5<sup>th</sup> June 2008 the Prosecution filed its Response (“Response”).<sup>2</sup> Herewith the Defence files its Reply.
2. The Prosecution appears to be providing improper benefits and inducements (“payments”)<sup>3</sup> to its witnesses. This is a reasonable inference arising from the Response which fails to offer any, or any reasonable explanation for the payments the Prosecution has made. The Response offers no reasoned insight into the necessity of the payments but instead hides behind legal technicalities and bluster in order to avoid exposing the lack of proper basis for its payments to insider and ex-combatant witnesses. In the absence of any further explanation, right-thinking members of the public will conclude that the Prosecution has paid their witnesses and have done so in order to secure convictions.

## II. REPLY

### **The Prosecution’s “Discretion” Pursuant to Rule 39(ii)**

3. The Prosecution’s claim to an “unfettered discretion” to “[t]ake all measures deemed necessary for the purpose of the investigation”<sup>4</sup> exposes the lack of principle at the heart of the payments to witnesses. The notion that a Prosecution has an unfettered discretion to channel huge sums of money to witnesses is devoid of merit and *ultra vires* the Prosecution’s obligations under the Statute, the Rules, and the Practice Direction. At a minimum the Prosecution has a duty, pursuant to Article 17, to ensure that the exercise of any discretion is guided by the right of the Accused *inter alia* to a fair trial and the right to “obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.”<sup>5</sup> The Prosecution’s disregard for this duty lies at the heart of the Motion.

<sup>1</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-1161, “Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution’s Witness Management Unit and its Payments to Witnesses”, 30<sup>th</sup> May 2008.

<sup>2</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-1169, “Prosecution Response to Sesay Request to Hear Evidence Concerning the Prosecution’s Witness Management Unit”, 5<sup>th</sup> June 2008.

<sup>3</sup> “Payments” is used primarily to describe money but also includes other forms of benefit, including relocation packages; housing; educational programs; health care; top-up cards; meals; day trips; social activities; leisure activities; release from imprisonment; assistance with immigration issues, criminal charges or civil penalties; or any other form of assistance.

<sup>4</sup> Response, para. 13.

<sup>5</sup> Statute, Articles 17(2) and 174(e).

4. The Prosecution's discretion is further limited by Article 16(4) which is wilfully ignored in the Response. The Prosecution's attempt to interpret Rule 39(ii) without reference to Article 16(4) is wholly misconceived. The Rules of Procedure are subordinate to the Statute and must be interpreted to give effect to it. Rule 39(ii) and the rights and duties conferred upon the Prosecution therein are circumscribed by the statutory duties of the Registry, which "shall set up a Victims and Witnesses Unit" which shall "provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses".<sup>6</sup> Rule 39(ii) cannot be interpreted to provide the Prosecution with the same rights and duties as the WVS. To do so would render the statutory obligations of WVS nugatory. Rule 39(ii) makes it clear that the rights and duties conferred upon the Prosecution are thus exercisable only in relation to *potential* witnesses, thus ensuring that WVS maintains its exclusive statutory mandate vis-à-vis witnesses.
5. This is obvious and makes good law. No reasonable or fair criminal process hands either party to the proceedings the right to issue the same payments as the WVS. No reasonable – or honest – Prosecutor would lay claim to the same discretion. This explains why the Special Court saw fit to enact a Practice Direction aimed at regulating the rights and duties of the WVS, and not the Prosecution, to issue payments to witnesses. As previously noted by Mr. Farrison on behalf of the Prosecutor:

It is with reference to two particular points raised by Mr Jordash. One is in respect to medical expenses. If you look at the practice direction [on Allowances for Witnesses and Expert Witnesses] you will see under Article 12 there is a complete code that is established by the Court as to what type of medical expenses ought to be paid, and *the authority is, of course, given to the witnesses and victims services unit* to do that. You will also see in the same practice direction under Article 14 that has the heading "Other allowances", and if you look under subsection 3 you will see that again the practice direction is specific in stating that for all witnesses "appropriate clothing to enable witness to testify". That again is the authority given by the Court to the witness and victims services unit to ensure that every witness is in fact given appropriate clothing to testify".<sup>7</sup>

6. This previous statement of principle has been overlooked. The belated claim to an unfettered discretion must be viewed in light of these remarks. Right-thinking members of the Sierra Leonean public will conclude that the Prosecution has deliberately supplanted the rights and

<sup>6</sup> Statute, Article 16(4).

<sup>7</sup> RUF Trial, Transcript, 11<sup>th</sup> April 2005, p.22; emphasis added.

duties of the WVS in an attempt to conceal dubious mercantile investigation techniques – techniques designed to ensure convictions *at all costs*.

### **Smoke and Mirrors**

7. The Prosecutor’s claim that “[b]ringing forth witnesses who are willing to relive their ordeals in testimony before the Special Court is a challenging responsibility, which would be impossible to fulfil if witnesses had to suffer financially because of their decision to testify”<sup>8</sup> must be approached with a degree of circumspection. This claim would not be so offensive if the Prosecution were paying *victims* to ensure that they were able to testify but it is clear that all excessive, unwarranted, or impermissible payments relate to ex-combatants or insider witnesses. The Prosecution’s payments have enriched ex-combatants and insiders, including TF1-015, TF1-046, TF1-108, TF1-334, TF1-360, TF1-362, TF1-366, and TF1-371. The Prosecution appears to have turned testifying for the Prosecution into a potential livelihood and, in so doing, have turned persons – who right-thinking members of the public might conclude ought to be on trial themselves – into prosperous individuals.
8. The Prosecution is not assisting victims or those who are coming to relive their ordeals. This noble endeavour is correctly within the purview of the WVS. The curious anomaly at the heart of the Prosecution’s payment scheme is the unanswered question concerning why the welfare needs of insiders and ex-rebels are so much larger than those of victims. This disparity has never been explained.
9. Furthermore, the Defence had no budget and did not require one to “investigate”. The Defence was not attempting to purchase testimony. If a Defence witness “required” money for “wasted time”, school fees, meals, etc., the witness (civilian, ex-combatant, or insider) was referred to the WVS who could make an assessment of the necessity of the payment. Naturally if the Defence witness requested money to repair a generator, money for school uniforms, or as a “gesture” of good will, the Sesay Defence *and the* WVS would refuse to entertain the request. Right-thinking members of the Sierra Leone public would conclude that an honest prosecutor would do the same.
10. At the very least, right-thinking members of the public would expect that an honest prosecutor would approach the issue of payments to witnesses with candour and circumspection. At the very least, an honest prosecutor would wish to explain why its

---

<sup>8</sup> Response, para. 39.

witnesses in the RUF case – TF1-015, TF1-334, TF1-360, TF1-362, and TF1-366 – and several witnesses in the Taylor case not only dispute the reasons offered by the Prosecution concerning payments made, but themselves admit that the payments were not related to their legitimate expenses. This explanation ought to have been at the heart of the Response. The “explanations” proffered for the discrepancies and the unwarranted payments detailed in Paragraph 30 of the Motion are demonstrably inadequate.

**Lack of *Bona Fides* in the Prosecution’s “Explanations”**

11. TF1-334 testified in the RUF case in July 2006 and received payments following his testimony. The Prosecution claim that he was providing ongoing assistance to the AFRC Prosecutors for these payments but offers no other explanation.<sup>9</sup> The witness disputes that he was given payments for providing assistance.<sup>10</sup> No explanation has been proffered for this discrepancy. The Prosecution has refused to disclose these payments to the Defence. The Defence discovered them by reading the transcripts from the Taylor Trial.
12. TF1-015 testified in the RUF case on 27<sup>th</sup>-31<sup>st</sup> January 2005. He was given money as a “kind of gesture”.<sup>11</sup> No explanation has been proffered.
13. TF1-362 was given an unspecified amount of money in an envelope in the same month as she testified in the RUF case.<sup>12</sup> No explanation has been proffered by the Prosecution. The Prosecution refused to disclose these payments to the Defence. The Defence discovered them by reading the transcripts from the Taylor Trial.
14. TF1-141 testified in the RUF case. The Prosecution paid the witness a weekly allowance, support for his foster parents, and school fees up until September 2004 even though – as admitted by the Prosecution – the WVS had been working since March 2003.<sup>13</sup> No explanation has been proffered concerning how these payments could conceivably be “necessary” for an investigation or even, given the role of the WVS, necessary at all.
15. The Prosecution paid TF1-366 Le210,000 for 6 days of food in August 2004 and yet a Sierra Leone police constable is paid a monthly salary of Le109,444.<sup>14</sup> No explanation has been proffered to explain why an ex-rebel (in the case of TF1-366, with no education and no

<sup>9</sup> Response, para. 37.

<sup>10</sup> Taylor Trial, Transcript, 28<sup>th</sup> April 2008, p. 8898.

<sup>11</sup> Motion, para. 30.

<sup>12</sup> Motion, para. 30(vii).

<sup>13</sup> Response, para. 31.

<sup>14</sup> See Confidential Annex A of this Reply.

employment), should require twice the amount of this salary for a week's worth of food. Between 12<sup>th</sup> and 19<sup>th</sup> November 2004, TF1-366 received Le320,000 – three times the monthly salary of a Sierra Leone Police officer (Le93,763).<sup>15</sup> This was apparently for meals, drinks and family allowance. There can be little wonder that TF1-366 exclaimed that “today and tomorrow” he wanted to help the Prosecution.<sup>16</sup>

16. TF1-360 was given Le1,100,000 in one month (February 2006) for meals, transport, and information.<sup>17</sup> The Prosecution has not proffered a single explanation to justify why information provided by an ex-RUF rebel is ten times more valuable than the information provided in a month by a Sierra Leonean Police Constable or how this witness could properly be paid more than five times the average monthly salary of a civil servant in the Law Officers Department within the Ministry of Justice of Sierra Leone.<sup>18</sup>

17. Alfred Sesay testified on the 29<sup>th</sup> June 2006 and confirmed that he was employed by the Office of the Prosecutor since the 8<sup>th</sup> June 2003.<sup>19</sup> The Prosecution has proffered no explanation to justify why this witness – in addition to his salary – was paid Le15,000 for “time wasted” on the 22<sup>nd</sup> and 23<sup>rd</sup> October 2003.<sup>20</sup> This would appear to contradict the Prosecution's claim that time wasted equates to lost earnings.<sup>21</sup>

18. TF1-371 was paid \$300 dollars in just over one month for providing information.<sup>22</sup> No explanation has been proffered to justify this huge sum of money – nine times the amount earned by a hard working police constable and twice as much as the average salary of a Sierra Leonean civil servant.

19. TF1-139 testified in the RUF case that the Chief of Investigations assisted him with his relocation and immigration status in a new country.<sup>23</sup> The Prosecution has refused to disclose this Rule 68 material and moreover proffered no explanation concerning why the WVS was not involved in this relocation.

<sup>15</sup> See Confidential Annex B of this Reply.

<sup>16</sup> RUF Trial, Transcript, 10<sup>th</sup> November 2005, p. 79.

<sup>17</sup> Motion, para. 27.

<sup>18</sup> Confidential Annex C: Payroll of the Law Officers Department.

<sup>19</sup> RUF Exhibit 110.

<sup>20</sup> Motion, para. 20.

<sup>21</sup> Response, para. 27.

<sup>22</sup> Motion, para. 19.

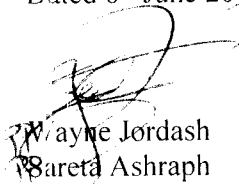
<sup>23</sup> Motion, para. 13.

### III. CONCLUSION

20. The Prosecution fails to appreciate the public concerns which have arisen from the payments of large sums of money to insiders and ex-combatants seemingly in exchange for, or resulting from, their role as Prosecution witnesses. The Response to the Motion, which offers no further information to justify or explain these substantial payments, will not diminish this concern. The admissions made in the Taylor Trial by Prosecution witnesses that previously testified in the RUF Trial (to the effect that they have been given money as rewards or as gestures) raise further concerns which need to be addressed and explained.

21. The WMU should provide this explanation and demonstrate the propriety of its payments. This evidence, along with the other evidence requested, will provide the judges with information which will assist the truth-finding process. Absent this explanation, any convictions which flow from the RUF trial will be indelibly stained by the public perception that the Prosecution undermined the rule of law by purchasing testimony from disreputable insiders and ex-combatants.

Dated 6<sup>th</sup> June 2008



Wayne Jordash  
Sareta Ashraph

26986

**LIST OF ANNEXES**

- Confidential Annex A: Pay Stub of a Sierra Leone Police Constable
- Confidential Annex B: Pay Stub of a Sierra Leone Police Officer
- Confidential Annex C: Payroll of the Law Officers Department (department within the Ministry of Justice)





SPECIAL COURT FOR SIERRA LEONE  
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE  
PHONE: +39 0831 257000 or +232 22 297000 or +39 083125 (+Ext)  
UN Intermission 178 7000 or 178 (+Ext)  
FAX: +232 22 297001 or UN Intermission: 178 7001

Court Management Section – Court Records

**CONFIDENTIAL DOCUMENT CERTIFICATE**

This certificate replaces the following confidential document which has been filed in the *Confidential* Case File.

Case Name: The Prosecutor – v- Sesay, Kallon & Gbao  
Case Number: SCSL-2004-15-T  
Document Index Number: 1170  
Document Date 6 June, 2008  
Filing Date 6 June, 2008 at 15:20  
Number of confidential pages: 9  
Page Number: **26987-26995**

Document Type: -

- Affidavit
- Indictment
- Reply**
- Order
- Other
- Decision
- Response
- Application

Document Title **Defence Reply To Prosecution Response To Motion Requesting The Trial Chamber To Hear Evidence Concerning The Prosecution's Witness Management Unit And Its Payment To Witnesses**

Name of Officer:

**Thomas George**

Signed:

A handwritten signature in black ink, appearing to read 'Thomas George', is written over a circular stamp or seal.