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SCSL-04-15-T
(24097-24192)

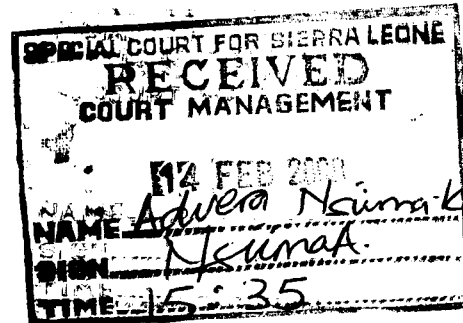
24097

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: 14th February 2008



THE PROSECUTOR

against

**ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO**

Case No. SCSL -2004-15-T

Public with Confidential Annex

**KALLON APPLICATION FOR LEAVE TO MAKE A MOTION IN EXCESS OF
THE PAGE LIMIT**

Office of the Prosecutor:

Peter Harrison
Reginald Fynn

Counsel for Issa Sesay:

Wayne Jordash
Sareta Ashraph
Mikael Eckman

Counsel for Morris Kallon:

Charles Taku
Kennedy Ogeto
Lansana Dumbuya
Tanoo Mylvaganam

**Court-Appointed Counsel for
Augustine Gbao:**

John Cammegh
Scott Martin

INTRODUCTION

1. In accordance with Art. 6(G) of the Practice Direction on Filing Documents before the Special Court for Sierra Leone (“the Practice Direction”), the Accused, Morris Kallon, hereby files an application for authorisation to make a motion in excess of the page limit set out in Art. 6(C) of the Practice Direction.
2. A draft version of the motion which is the subject of the application, (“the Motion”), has been appended hereto for the inspection of the Chamber. It is hoped that this will allow the Chamber to satisfy itself of the exceptional circumstances described hereunder which necessitate oversized filing.

THE APPLICATION

3. Art. 6(C) of the Practice Direction states:

“Preliminary motions, motions, responses to such motions and replies to such shall not exceed 10 pages or 3,000 words whichever is greater.”
[Underlining omitted]
4. Art 6(G) of the Practice Direction states, *inter alia*:

“A Party...seeking to file a document which exceeds the page limits set out in this article shall obtain authorisation in advance from a Judge or a Chamber and shall provide an explanation of the exceptional circumstances that necessitate the oversized filing.”
- (a) **The Volume and Scope of the Evidence Which the Motion Seeks to Exclude Constitute an “Exceptional Circumstance”**
 5. In making a determination as to whether the “exceptional circumstances” existed such as to justify oversized filing, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, (“ICTY”), in *Krstic* considered that:

“in particular, the need to address certain matters in depth and to do so with reference to the trial record, justify that...an extension of pages be granted.”¹
 6. The Motion presents cogent arguments which demonstrate that an accused is afforded the right to bring a motion to excluded evidence brought at this stage of

¹ *P v. Krstic*, IT-98-33-A, Order on Extension of Pages, 12 May 03.

the proceedings. In order to discharge the duties of diligence and competence which defence counsel owe their client, a motion of this sort must make detailed analysis of the applicable law and frequent reference to the trial record, such that necessitates a document greater than 10 pages in length. As such, in *Bagosora*, the accused, Ntabakuze filed a motion of 59 pages² with an addendum of 12 pages³ and supplementary notes of 4 pages,⁴ totalling 75 pages, in moving the Trial Chamber to partially exclude the evidence of 24 witnesses; the accused, Kabiligi, filed two written pleadings, of 22 pages⁵ and 15 pages⁶ in moving the Trial Chamber to exclude the evidence of eight witnesses; the accused Nsengiyumva, filed a 31 page motion to partially exclude the evidence of 16 witnesses,⁷ all of which were considered by the Trial Chamber in the determination of the matters before it. The issues before a Trial Chamber vary considerably from trial-to-trial and even case-to-case and, in some respects, comparing the length of submissions from other cases is not instructive but all that is abundantly clear is that issues of this nature cannot be adequately presented within ten pages.

7. It is submitted that the volume of evidence in the record which is outside the scope of the Indictment, the volume of defects from which the Indictment suffers and the extent of the vagueness with which allegations have been made by Prosecution witnesses in this case, far exceeds the scope of the aforementioned motions from the ICTR. It is submitted that a thorough prosecution has ensured that the range of allegations facing the RUF indictees is vastly more broad than the allegations brought at the ICTR, whose temporal jurisdiction is 1994 and

² *P v. Bagosora et al.*, ICTR-98-41-T, Ntabakuze Defence Motion for the Exclusion of Evidence of Allegations Falling Outside the Scope of the Indictment, 28 March 06.

³ *P v. Bagosora et al.*, ICTR-98-41-T, Addendum to 'Ntabakuze Defence Motion for the Exclusion of Evidence of Allegations Falling Outside the Scope of the Indictment' of 28 March 2006, 7 April 06.

⁴ *P v. Bagosora et al.*, ICTR-98-41-T, Supplementary Notes on Jurisprudence Related to the Pending 'Ntabakuze Defence Motion for the Exclusion of Evidence of Allegations Falling Outside the Scope of the Indictment', 1 May 06.

⁵ *P v. Bagosora et al.*, ICTR-98-41-T, Kabiligi Motion on the Prejudice Caused by the Testimony of Prosecution Witnesses on Facts not Included in the Amended Indictment, 5 April 06.

⁶ *P v. Bagosora et al.*, ICTR-98-41-T, Requete en Extreme Urgence Aux Fins De Rejet Des Temoinages Sur Des Faits Qui Ne Figurent Pas Dans L'Acte D'Accusation (Articles 20 Du Statut, 47 Et 73 Du Reglement De Procedure Et De Preuve, 19 Oct. 04.

⁷ *P v. Bagosora et al.*, ICTR-98-41-T, Anatole Nsengiyumva Motion for the Exclusion of Evidence of Allegations Outside the Scope of the Indictment, 9 May 04.

where the vast majority of alleged crimes occurred within a period of four months and where the indictees are typically responding to allegations relating to discrete areas of Rwanda. In every relevant respect, the state of the evidence in the record is beyond the control of the Defence. Therefore, the scope and size of a motion which seeks to exclude evidence of allegations of which the accused has not been put on notice, made with due regard to the duties of diligence owed by defence counsel to their client, is properly characterised as the responsibility of the Prosecution not the Defence.

8. As the Chamber will note the Motion purports to exclude the evidence, in part, of twenty-three Prosecution witnesses. The Motion cites 238 pages of testimony over thirty-four different days⁸ and the evidence contained therein purports to span all eighteen counts in the indictment.⁹ The Motion contains a brief description of the Impugned Evidence which is necessary for the purposes both of identifying precisely the evidence that the Defence seeks to exclude and of laying the foundation for the submissions which follow. Thereafter follow submissions relating each of the allegations in the Impugned Evidence to the applicable law, as analysed earlier in the Motion, and argument as to why each of the allegations is outside the scope of the indictment. As the Chamber will note different grounds for exclusion of evidence have been identified in the Motion¹⁰ and are referenced throughout the analysis of the Impugned Evidence.¹¹ In this regard, and all others, every effort has been made to avoid repetition and to maintain a concise approach to the Motion. In situations where the submissions pertaining to one allegation are identical to those pertaining to another, the Motion either references the submissions¹² or the evidence is categorised and dealt with *en bloc*¹³ to avoid

⁸ The following transcripts from 2006 are cited in the Motion: March 21, 22 and 29; May 21 and 27; June 20, 22, 29 and 30; and July 10, 20 and 21. The following transcripts from 2005 are also cited in the Motion: January 21, 24 and 27; April 6, 11, 12, 13, 18 and 28; June 21 and 22; July 5, 11, 12, 20 and 28; and November 7, 8, 9, 10, 21 and 30.

⁹ *P v. Sesay et al.*, SCSL-04-15-T, Corrected Amended Consolidated Indictment, (“the Indictment”).

¹⁰ See the Motion at para 19-41.

¹¹ See, eg the Motion, at para 42-280.

¹² See, eg, the Motion, at para 185, 196, and 233, referencing the arguments made in para 97.

¹³ See, eg, the Motion at para 125-147, which groups together all allegations in the Impugned Evidence relating to the use of child soldiers; see also the Motion at para 59-68, which groups together the evidence of TFI

repetition. However, given the diversity of the evidence and the way in which it has been pleaded it has been necessary to present individual submissions in respect of some of the allegations.¹⁴ Therefore it is submitted that the volume and scope of the evidence which the Motion seeks to exclude, (“the Impugned Evidence”), is such as to constitute an “exceptional circumstance” which necessitates “oversized filing.”

(b) The Scope and Fundamental Nature of the Legal Issues Raised in the Motion Constitute an “Exceptional Circumstance”

9. The basic premise of the Motion is that the case against the Accused is made up, in part, of allegations of crimes with which he had not been charged. As such, it raises issues of the most fundamental nature, pertaining, ultimately, to the statutory right of an accused to a fair trial¹⁵ In *Seselj*, under circumstances analogous to the present application, the Trial Chamber of the ICTY granted to the Accused an extended of the page limit, from ten pages to fifty pages, in respect of a motion alleging defects in the form of the indictment. In terms of the rights which that motion sought to uphold, the basic premise of the motion is the same. In so doing it considered as follows:

“bearing great importance on the principle of equity, equality and the rights of the defence, [the Trial Chamber] is of the firm belief that the matters raised by the Accused...namely challenges to the jurisdiction

366, TFI 360, TFI 263 and TFI 371 to the extent that they allege that Mr Kallon personally and physically perpetrated shootings in Kono District; the Motion at para 69-73, which groups together the evidence of TFI 045, TFI 367 and TFI 366 to the extent that they allege unlawful killings during the capture of Koidu in December 1998; the Motion at para 149-160, which groups together the evidence of TFI 045, TFI 367, TFI 366, TFI 114 and TFI 371 to the extent that they allege forced labour in Kailahun District; the Motion at para 163-179, which groups together the evidence of TFI 366, TFI 367, TFI 041, TFI 071, TFI 015, TFI 114, TFI 141 and TFI 263 to the extent that they allege forced labour in Koro District.

¹⁴ See, eg, the Motion, at para 46-49, which describes the allegation made by TFI 054 that Mr Kallon was part of a “five-man delegation” which killed the Paramount Chief in Gerihun; compare with the Motion at para 59-69, which described allegations by TFI 366, TFI 360, TFI 263 and TFI 371 that Mr Kallon personally and physically killed. “Ground 2”, relating to the defective pleading of allegations involving the personal and physical perpetration of an accused, is applicable to both categories of allegations. However, it is necessary to make individual in relation to aspects of both categories of allegations. In relation to the TFI 054 allegation, it is unclear what the Prosecution’s case is as to the alleged mode of participation. Therefore, it is necessary to make submissions in relation to all possible modes of participation. In relation to the allegations of TFI 366, TFI 360, TFI 263 and TFI 371 it is clear that Mr Kallon is implicated as the physical perpetrator. Furthermore, TFI 366 and TFI 360 allege the killing of RUF and AFRC personnel which is not criminal according to the Statute and individualised submissions must be made to that effect. It is submitted that the nature of the Prosecution evidence is such as to compel detailed submissions, which is evidenced herein.

¹⁵ Which is guaranteed by Art. 17(2) of the Statute of the Special Court for Sierra Leone.

and allegations of defects in the form of the indictment...could be classified as exceptional circumstances under Section 7 of the Practice Direction and justify exceeding the page limit foreseen in the Practice Direction.”¹⁶

10. Therefore, according to the Trial Chamber of the ICTY, issues of defective pleading represent exceptional circumstances justifying exceeding the page limit, without more.
11. Additionally, it is submitted that the sufficiency of charges is an exceptionally complex and thus much-litigated area of law by the standards of International Humanitarian law. A thoroughly reasoned motion which seeks to argue a lack of pre-trial notice must address the following issues, *inter alia*: the material facts which must be pleaded in an indictment in order to properly put an accused on notice of a charge; the level of detail with which such material facts must be pleaded; the difference between the pleading standards pertaining to allegations that an accused personally and physically committed an offence and allegations of command responsibility; the notion of ‘curing’ a defective indictment, or giving notice through disclosure instruments other than the indictment; and the circumstances under which a motion of this type is timely before the Chamber. Detailed submissions and legal arguments are necessary to assist the Chamber in its determination of each of the matters raised and it is hoped that this is demonstrated by the extent to which the Motion is dedicated to the analysis of the applicable law. Therefore, it is submitted that the scope and fundamental nature of the legal issues raised in the Motion constitutes an “exceptional circumstance” within the meaning of Article 6(G) of the Practice Direction.

CONCLUSION

12. The Practice Direction provides judicial limitation on the length of submissions

¹⁶ *P v. Seselj*, IT-03-67-PT, Decision on Certification to Appeal and to Extend the Deadline for Filing Certain Preliminary Motions, 18 Nov. 03; referring to the Practice Direction on the Length of Briefs and Motions of the ICTY, which in all relevant parts is substantially the same as the Practice Direction: at I (A) 4., it is stated that “[m]otions...before a Chamber shall not exceed 3,000”; and, at I (A) 7., that a “party must seek authorisation in advance from the Chamber to exceed the word limits in this Practice Directions and must provide an explanation of the exceptional circumstances that necessitate the oversized filing.”

made by the parties in furtherance of an expeditious trial. However, the goal of expediency must not override the necessity of fully addressing fundamental issues pertaining to the integrity of the Court's process.¹⁷ Thus, the provision to extend the page limit, set out in Article 6(G) of the Practice Direction, has equally been judicially promulgated to accommodate the resolution of matters of fundamental importance to the parties in a thorough and determinate manner. It is submitted that an extension of the page limit is justified in a case such as this where the issues involved are irretrievably complex and technical; the allegations that must be confronted are numerous and do not concern discrete moments in time, but cover a vast amount of time and space and aver indeterminate modes of participation and theories of culpability; and the issues concerned go to the fundamental right of an accused to a fair trial. It is submitted that "exceptional circumstances" necessitating "oversized filing" have been demonstrated in this application and the Motion annexed hereto, and that an extension of the page limit is therefore justified.

PRAYER

13. In light of the foregoing, the Kallon Defence respectfully prays that the Chamber:

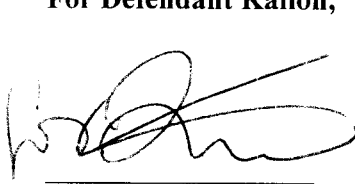
GRANT the Defence authorisation to file a motion for the exclusion of evidence in excess of 10 pages and

ORDER the Motion, annexed hereto, to be filed by Court Management Services.

¹⁷ *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Judgement, 23 Oct. 01, at para 100, ("the goal of expediency should never be allowed to over-ride the fundamental rights of the accused to a fair trial.").

DONE in Freetown on this. 14th day of February, 2008.

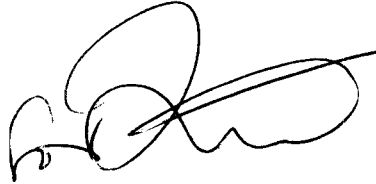
For Defendant Kallon,



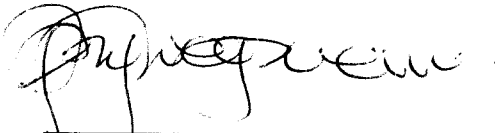
Chief Charles A. Taku



Kennedy Ogeto



Lansana Dumbuya



Tanoo Mylvaganam

LIST OF AUTHORITIES

(a) Statute and Practice Direction

(i) *Special Court for Sierra Leone*

1. The Statute of the Special Court for Sierra Leone.
2. The Practice Direction of Filing Documents Before the Special Court for Sierra Leone

(ii) *International Criminal Tribunal of the Former Yugoslavia*

3. The Practice Direction on the Length of Briefs and Motions, (available at <http://www.un.org/icty/legaldoc-e/index.htm>).

(b) Indictment

4. *P v. Sesay et al.*, SCSL-04-15-T-619, Corrected Amended Consolidated Indictment.

(c) Decisions

5. *P v. Krstic*, IT-98-33-A, Order on Extension of Pages, 12 May 03, (available at <http://www.un.org/icty/krstic/Appeal/order-e/030512.htm>).
6. *P v. Seselj*, IT-03-67-PT, Decision on Certification to Appeal and to Extend the Deadline for Filing Certain Preliminary Motions, 18 Nov. 03, (available at <http://www.un.org/icty/seselj/trialc/decision-e/031118-2.htm>).
7. *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Judgement, 23 Oct. 01, (available at <http://www.un.org/icty/kupreskic/appeal/judgement/kup-aj011023e.pdf>).

(d) Motions (copies of which are all appended hereto)

8. *P v. Bagosora et al.*, ICTR-98-41-T, Ntabakuze Defence Motion for the Exclusion of Evidence of Allegations Falling Outside the Scope of the Indictment, 28 March

- 06.
9. *P v. Bagosora et al.*, ICTR-98-41-T, Addendum 1 to 'Ntabakuze Defence Motion for the Exclusion of Evidence of Allegations Falling Outside the Scope of the Indictment' of 28 March 2006, 7 April 06.
 10. *P v. Bagosora et al.*, ICTR-98-41-T, Supplementary Notes on Jurisprudence Related to the Pending 'Ntabakuze Defence Motion for the Exclusion of Evidence of Allegations Falling Outside the Scope of the Indictment', 1 May 06.
 11. *P v. Bagosora et al.*, ICTR-98-41-T, Kabiligi Motion on the Prejudice Caused by the Testimony of Prosecution Witnesses on Facts not Included in the Amended Indictment, 5 April 06.
 12. *P v. Bagosora et al.*, ICTR-98-41-T, Requete en Extreme Urgence Aux Fins De Rejet Des Temoinages Sur Des Faits Qui Ne Figurent Pas Dans L'Acte D'Accusation (Articles 20 Du Statut, 47 Et 73 Du Reglement De Procedure Et De Preuve, 19 Oct. 04.
 13. *P v. Bagosora et al.*, ICTR-98-41-T, Anatole Nsengiyumva Motion for the Exclusion of Evidence of Allegations Outside the Scope of the Indictment, 9 May 04.



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: 985
Document Date 14th February, 2008
Filing Date: 14th February, 2008
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Document Type: - *Confidential Annex*
 Affidavit
 Indictment
 Correspondence
 Order
 Motion
 Application

Document Title: **Public with Confidential Annex, Kallon Application for Leave to make a Motion in Excess of the Page Limit**

Name of Officer:

Advera Nsiima K.

Signed *Nsiima*