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SCSL-2004-15-T
(7243-7250)

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THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

**Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet**

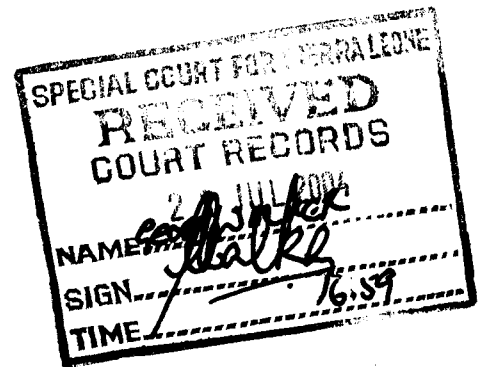
Registrar: Mr. Robin Vincent

Date filed: 22nd July 2004

The Prosecutor

-v-

**Issa Hassan Sesay
Morris Kallon
Augustin Bao**



Case No: SCSL – 2004 – 05 – T

**JOINT DEFENCE RESPONSE TO PROSECUTION REQUEST FOR LEAVE TO
CALL ADDITIONAL WITNESSES AND
DISCLOSE AN ADDITIONAL WITNESS STATEMENT**

Office of the Prosecutor
Luc Cote
Lesley Taylor

Defence Counsel for Issa Sesay
Wayne Jordash

Defence Counsel for Morris Kallon
Raymond Brown

Defence Counsel for Augustin Bao
Andreas O'Shea
John Cammegh

Procedural context

1. On 1 April 2004, the Trial Chamber issued its Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial. This Order required the production of a witness list, which the Prosecution accordingly filed on 26th April, containing 266 witnesses.
2. At a status conference, the prosecution indicated that its final decision on witnesses would be affected by the issue of judicial notice and that it expected to call approximately 170 “core witnesses”. Accordingly, on 7th July 2004, following its decision on judicial notice, the Trial Chamber ordered the prosecution to file a list with “core witnesses” and “back-up” witnesses. Pursuant to this Order the prosecution produced a list with 173 “core witnesses” and ... “back-up” witnesses.
3. On 5 July 2004, the trial started. The prosecution now seeks to add 6 witnesses to its witness list which do not appear either on its initial witness list or its modified witness list.

Legal framework

4. The Prosecutor is responsible for the investigation and prosecution of persons in terms of Article 15 of the Statute of the Special Court for Sierra Leone (hereinafter ‘the Statute’). However, the exercise of this power is subject to the supervisory jurisdiction of the Trial Chamber to protect the rights of the accused to a fair trial in terms of Article 17(2) of the Statute. In particular in the context of the presentation of evidence by the prosecution, the accused have the right under Article 17(4)(b) to the minimum guarantee of adequate time and facilities to prepare his or her defence and the right under 17(4)(c), being a minimum guarantee, to be tried without undue delay.
5. The close supervisory jurisdiction of the Trial Chamber over the exercise of discretion of the Prosecutor is clearly recognised in Rules 73*bis* (C), (D) and

(E), giving the power to the Trial Chamber to shorten the examination-in-chief of witnesses, order a reduction in the number of witnesses and act as ultimate arbiter of whether the addition of witnesses is in the interests of justice. Such supervisory control of prosecutorial discretion is recognised on a national level. In international criminal trials it has even greater importance due to the complexity of the trials and the potential indefinite scope of the evidence. It should be remembered that the instant case is concerned with events which, at least on the prosecution version of the conflict, potentially affected every region of Sierra Leone and every person in the country. A free reign to the prosecution in such circumstances has significant dangers attached to it for the rights of the accused and a fair and expeditious trial.

6. The power of the Trial Chamber to act as the ultimate arbiter of what is in the interests of justice for the purposes of a prosecution decision to add witnesses under Rule 73(E), is further developed by a more imposing power under Rule 66(A)(ii) to control the addition of witnesses where such attempt comes late in the proceedings, thereby affecting the right to adequate time and facilities and the consequent duty of disclosure. In order to give effect to Article 17(4)(b) the prosecution have strict disclosure obligations, which are contained in Rule 66 and 68. The relevant provisions for these purposes read as follows:

(A) Subject to the provisions of Rules 53, 69 and 75, the Prosecutor shall:

(i) Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial.

(ii) Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the prosecution.

7. This provision therefore contains a basic obligation to ensure that the Defence is appraised of the entirety of the Prosecution case 60 days before trial. While the Prosecution can escape the effect of this basic obligation through an order of the court, having shown good cause, it is submitted that in order to preserve the integrity of the proceedings and the rights of the accused as outlined above this must form the exception rather than the rule.

8. It is submitted that in order to satisfy the standard of good cause the prosecution must demonstrate circumstances which go beyond a mere desire to bolster the evidence. Otherwise the clearly intended limited nature of this procedure would be compromised.

9. It is submitted that in order not to make a mockery of the limited nature of the procedure, the circumstances should be such that both the prior disclosure of the evidence should have been beyond the control of the prosecution and the nature of the evidence must be such that its addition is necessary in the interests of justice.

10. Furthermore, it is submitted that in order for the Defence to respond adequately and for the Trial Chamber to be in a position to judge the issue of good cause, the prosecution is obliged to provide in its motion adequate evidence of the steps it has taken or been unable to take to secure and disclose the evidence at an earlier stage. In addition, it is submitted that the prosecution must further sufficiently indicate the factors which establish the necessity of adducing the evidence, including what paragraphs in the indictment the witnesses are to testify to and what other witnesses if any the prosecution intend to call in relation to the same indictments on the paragraph.

11. Accordingly, it is submitted that it is not sufficient for the prosecution to *describe* what the witnesses are going to testify to and give reasons for their need to call the witnesses. In order for the Trial Chamber to be satisfied as to good cause, the prosecution must further demonstrate that those reasons are well founded by:

(a) Reference to evidence of diligence, efforts and obstacles to earlier discovery, collection and disclosure of evidence;

(b) A clear comparative analysis with the witnesses already on their existing witness list to demonstrate the extent of their necessity;

(c) The absence or degree of prejudice to the accused rights to adequate time and facilities and trial without undue delay.

In the case of *Bagosora*, before the ICTR, it was stated:

These considerations [under Rule 73bisE) require close analysis of each witness, including:

... the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictment.

(*Bagosora et al*, Decision on Prosecution Motion for Addition of Witnesses pursuant to Rule 73bisE (TC), 26 June 2003, para 14).

The proposed additional witnesses

12. It is respectfully submitted that the defence is not in an adequate position to respond on a witness statement TF1-159, which it has not seen. In order to properly be heard on and assess the combined questions of the interests of justice and good cause it is submitted that the defence and the Trial Chamber must be in a position to examine the contents of the proposed witness statement independently. The proper course for the prosecution would have been to annex the proposed witness statement to their motion. It should not therefore be granted leave in relation to this witness.

13. In relation to all the proposed witnesses the prosecution fail to provide adequate detail or evidence to support their excuse as to why this witness could not have formed part of their original witness list of 266 witnesses or before 60 days prior to trial. In particular insufficient detail and evidence is provided as to the thorough nature and diligence of the prosecution investigations.

14. Moreover, it is submitted that the prosecution do not articulate in sufficient terms the paragraphs in the indictment to which each fresh witness relates. The prosecution refers to individual criminal responsibility without specifying which forms of liability it is relying upon, therefore removing the Trial Chamber's ability to properly assess the usefulness or necessity of this witness in proving the prosecution case in relation to the 173 other witnesses intended to be called as core witnesses or the 266 witnesses originally disclosed.

15. Furthermore, it is respectfully submitted that the prosecution fail to provide any or any adequate analysis of other witness statements dealing with the same areas it wishes to prove with this witness, or as to why those other witnesses cannot stand on their own or what this witness adds to that other evidence.

16. Further and or in the alternative, these witnesses to a large degree not only go to the same counts in the indictment as other evidence forming part of the original list but further cover the same ground as each other and therefore in so far as leave be granted to add these witnesses, leave should only be granted to add one of them. (See *Jelsic*, Decision of 27 December 1999 IT-95-10-T; *Musema*, Decision on the Prosecutor's request for Leave to Call Six New Witnesses)

Prejudice to the accused

17. It is submitted that the prosecution have failed to provide reasoning as to why the addition of these witnesses would not prejudice the rights of the accused.

18. It is respectfully submitted that the right of the accused to a fair and expeditious trial is prejudiced by any attempt to expand the number of witnesses in this trial beyond the 173 witnesses the prosecution has already indicated it intends to call. At the time of drafting this response we are more than half way through the first trial session, 17 days into the trial but have only completed the evidence of 7 short and not particularly contentious witnesses. This is not due to any unwarranted delays in the proceedings but is merely a reflection of the actual pace of the proceedings. If one works on a principle of an average of 1 witness every 2 days over any particular session (remembering that testimony is generally not taken three days of any 7 day week), 173 witnesses will require a trial of two years, having regard to the fact that the trial runs in sessions of alternate months. If one then takes into account the fact that there are a number of witnesses who are more contentious and wide-ranging in their testimony, some necessarily requiring one to two weeks of examination, together with holidays and the inevitable short delays from procedural issues, one realistically needs to add 6 months to such an estimate.

19. On the current plan therefore, it is submitted that a realistic estimate of the trial is 2.5 years. It is respectfully submitted that having regard to the nature of the crimes (generally based on specific attacks at specific locations at specific times, as opposed to genocide for example) and the fact that there are only three accused, this is an unnecessarily lengthy trial. Accordingly, it is submitted that in the current state of affairs regarding the number of witnesses in this trial, there cannot be good cause for the addition of witnesses, without special factors such as the need to respond to alibi or some other factor genuinely beyond the control of the prosecution.

20. It is therefore prayed that the prosecution motion be dismissed.

Andreas O'Shea, for Augustine Bao

Wayne Jordash, for Issa Sesay

Raymond Brown, For Morris Kallon

22nd July 2004

