



SPECIAL COURT FOR SIERRA LEONE

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 THE TRIAL CHAMBER

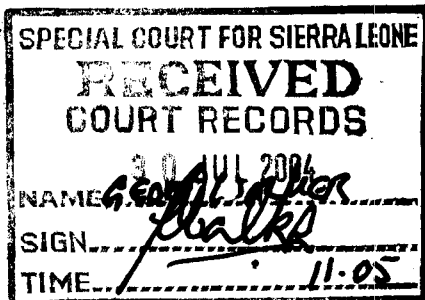
Before: Hon. Judge Benjamin Mutanga Itoe, Presiding Judge
Hon. Judge Bankole Thompson
Hon. Judge Pierre Boutet

Registrar: Robin Vincent

Date: 29 July 2004

PROSECUTOR Against Issa Hassan Sesay
Morris Kallon
Augustine Gbao
(Case No. SCSL-2004-15-T)

 DECISION ON PROSECUTION REQUEST FOR LEAVE TO CALL
ADDITIONAL WITNESSES

Office of the Prosecutor:Luc Côté
Lesley TaylorDefence Counsel for Issa Hassan Sesay:Tim Clayson
Wayne JordashDefence Counsel for Morris Kallon:Shekou Touray
Raymond BrownDefence Counsel for Augustine Gbao:Girish Thanki
Andreas O'Shea

THE TRIAL CHAMBER (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”) composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson, and Hon. Judge Pierre Boutet;

SEIZED of the “Prosecution Request for Leave to Call Additional Witnesses and Disclose an Additional Witness Statement”, filed on 12 July 2004 (“Motion”);

NOTING the “Joint Defence Response to Prosecution Request for Leave to Call Additional Witnesses and Disclose an Additional Witness Statement”, filed on 22 July 2004 (“Response”), and the “Prosecution Reply to Joint Defence Response to Prosecution Request for Leave to Call Additional Witnesses and Disclose an Additional Witness Statement”, filed on 27 July 2004 (“Reply”);

NOTING the Trial Chamber’s Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial, delivered on 1 April 2004, wherein the Trial Chamber ordered the Prosecution to file by 26 April 2004 a witness list for all the witnesses that the Prosecution intended to call at trial with the name or the pseudonym of each witness, and that, should the Prosecution seek to add any witnesses to this list after 26 April 2004, it should be permitted to do so only upon good cause being shown;

NOTING that the Prosecution filed a Witness List on 26 April 2004, as part of its filing of “Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004” (“Witness List”);

NOTING the Trial Chamber’s Order to Prosecution to Produce Witness List and Witness Summaries, filed on 7 July 2004;

NOTING that the Prosecution filed a modified witness list on 12 July 2004, as part of its “Materials Filed Pursuant to ‘Order to Prosecution to Produce Witness List and Witness Summaries” (“Modified Witness List”);

HEREBY ISSUES THE FOLLOWING RULING:



I. SUBMISSIONS OF THE PARTIES

A. Prosecution Motion

1. The Prosecution seeks to vary the Modified Witness List by adding six witnesses to it, namely, witness TF1-359, witness TF1-360, witness TF1-361, witness TF1-363, witness TF1-314 and witness TF1-362. The Prosecution submits that the content of the expected testimonies from these witnesses meets the “good cause” standard for the addition of witnesses, as required by the Trial Chamber in its Decision of 1 April 2004. It is submitted that the anticipated testimony for each witness is not merely corroborative or cumulative, but is direct, and will provide distinctive evidence on the individual criminal responsibility of one or more of the Accused at unique times and locations.¹

2. The Prosecution asserts that the statements of five of these witnesses were recently taken by investigators of the Office of the Prosecutor and have been disclosed as soon as practicable after their statements were available² and the Prosecution had formed the intent to call them at trial. The Prosecution further argues that the Accused’s rights are protected as the hearing of evidence during the trial has just commenced and the Accused will have significant time to examine and prepare for these additional witnesses, given that the Prosecution does not plan to call these witnesses to testify until a much later stage of the trial.

3. The Prosecution seeks permission from the Trial Chamber to disclose the statement of witness TF1-359.³

4. Regarding the testimonies of the six additional witnesses the Prosecution submits as follows:⁴

Witness TF1-359

5. The Prosecution asserts that the witness, a radio operator, will provide unique direct evidence of collaboration and coordination between senior AFRC/RUF commanders in Sierra Leone and communications from RUF Accused Issa Sesay and Morris Kallon, including orders

¹ Motion, paras 9&13.

² These statements contain exculpatory evidence and were therefore disclosed pursuant to Rule 68.

³ *Id.*, para. 14.

immediately prior to and following the 1999 attack on Freetown to burn and “spare no living soul”, as well as direct evidence on the individual criminal responsibility of the RUF Accused Issa Sesay and Morris Kallon. The paragraphs of the Amended Consolidated Indictment that the witness will testify to include paragraphs 34, 36, 37, 38 and 39.

6. The Prosecution submits that investigations into locating radio operators were on-going since June 2003. Investigations into locating this particular witness have been on-going since October 2003, but the witness could only very recently be discovered. Thus, the statement by this witness was only obtained on 26 June 2004 due to these general difficulties encountered by investigators in locating and identifying radio operators.

Witness TF1-360

7. The Prosecution asserts that witness TF1-360, a radio-operator for a senior RUF commander in the North of Sierra Leone, will provide detailed direct evidence on the military organisation of the RUF and on the individual criminal responsibility of the RUF Accused Issa Sesay and Morris Kallon, including killings ordered by Morris Kallon during the early 1998 attack on Koidu, Issa Sesay’s role in the late 1998 Kono offensive and on the command authority for both Issa Sesay and Morris Kallon for attacks immediately following the Freetown invasion in 1999. The paragraphs of the Amended Consolidated Indictment that the witness will testify to include paragraphs 34, 36, 37, 38 and 39.

8. The Prosecution submits that statements were obtained from this witness on 12 and 25 June 2004. Investigators were only recently able to identify the witness’s location with the help of another radio-operator.

Witness TF1-361

9. The Prosecution asserts that witness TF1-361, a former radio operator abducted and trained by the RUF since the early 1990s and assigned to a senior RUF commander, will provide direct evidence on the individual criminal responsibility of all three Accused, including command positions and areas of responsibility. The witness will provide eye-witness evidence of RUF Accused Issa Sesay executing men in Makeni. The witness will also give direct and unique testimony demonstrating the collaboration between AFRC/RUF groups. The paragraphs of the

⁴ *Id.*, para. 8.

Amended Consolidated Indictment that the witness will testify to include paragraphs 34, 36, 37, 38 and 39.

10. The Prosecution submits that a statement was obtained from this witness on 11 June 2004. Investigators were only recently able to identify and obtain access to the witness' location, due to the fact that they only knew the "jungle name" of this witness. The actual identity of this witness was only established with the help of two other radio operators.

Witness TF1-363

11. The Prosecution asserts that witness TF1-363, another radio-operator, will testify on the military structure of the RUF and of RUF operations. The witness will also provide direct evidence on the individual criminal responsibility of all three RUF Accused, including the presence of Morris Kallon at camps holding abducted girls and women in the area known as Superman Ground, and the command responsibility of Augustine Gbao; as well as indirect evidence of command responsibility of Issa Sesay during military operations in Koidu and Makeni during late 1998. It is submitted that the witness will also provide unique direct evidence of coordination between senior AFRC/RUF commanders for military operations, including the planned combined attack on Kabala. The paragraphs of the Amended Consolidated Indictment that the witness will testify to include paragraphs 34, 36, 37, 38 and 39.

12. The Prosecution submits that a statement was obtained from this witness on 2 June 2004. Investigators were only able to locate this witness through another radio operator in May 2004.

Witness TF1-314

13. The Prosecution submits that the testimony of witness TF1-314 will be of great significance as she is the only female former child soldier amongst the proposed witnesses and will testify to the widespread use of Small Girls Units by the RUF. The Prosecution asserts that this witness was held as a rebel wife at Buedu Camp in Kailahun District and will provide direct evidence of many other abducted girls and women who were forcibly married to RUF combatants in the area. The witness will also provide direct and indirect evidence to the individual criminal responsibility of Morris Kallon and Augustine Gbao during the abduction of United Nations peacekeepers in Makeni, Bombali District. The paragraphs of the Amended Consolidated Indictment that the witness will testify to include paragraphs 6, 7, 8, 9, 12, 13, 15 and 18.

14. The Prosecution submits that a statement was obtained from this witness on 29 October 2003. Investigations into locating this witness after that date were not successful. Only very recently was this witness again located and her willingness to testify confirmed.

Witness TF1-362

15. The Prosecution considers the testimony of witness TF1-362 to be significant as the witness was a principal military trainer for hundreds of abducted civilians at several military camps for the RUF. The testimony of this witness is unique as the witness will provide direct evidence of organised training for forcible recruits, including children, in addition to eye witness evidence of the individual criminal responsibility of RUF Accused Issa Sesay in relation to the abductions of United Nations peacekeepers in Kono District. The paragraphs of the Amended Consolidated Indictment that the witness will testify to include paragraphs 34, 35, 36, 37, 38 and 39.

16. The Prosecution submits that a first statement was obtained from this witness on 25 May 2004 and a further statement was obtained between 27 and 30 May 2004. This witness, although investigations into locating him had been undertaken since July 2003, was only recently located with the assistance of another Prosecution witness.

B Defence Response

17. The Defence submits that in order to satisfy the standard of good cause of Rule 66(A)(ii) of the Rules the Prosecution must demonstrate circumstances which go beyond the mere desire to bolster the evidence. Moreover it submits that the Prosecution is obliged to provide adequate evidence of the steps it has taken to secure and disclose the evidence at an earlier stage.⁵

18. The Defence asserts that the Prosecution has to demonstrate that the reasons for the motion are well founded by reference to evidence of diligence, efforts and obstacles to earlier discovery, collection and disclosure of evidence; a clear comparative analysis with the witnesses already on their existing witness list to demonstrate the extent of their necessity; and the absence

⁵ Response, paras 7&10.

or degree of prejudice to the accused rights to adequate time and facilities and trial without undue delay.⁶ It is submitted that the Prosecution fails to address these issues.⁷

19. The Defence submits that in relation to witness TF1-359 no leave should be granted as the witness statement of this witness has not yet been disclosed to the Defence, therefore making it impossible for the Defence and the Trial Chamber to examine the contents of this statement and assess the combined questions of the interests of justice and good cause. The Defence submits that the correct procedure would have been to annex the proposed witness statement to the Motion.⁸

20. It is further submitted that these witnesses 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.⁹

21. Counsel for the Defence submit 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. Pursuant to the current plan and speed of witnesses, the Defence submits that with these 173 witnesses the trial will already last for two and a half years.¹⁰

C. Prosecution Reply

22. Regarding the issue of annexing the statement of the proposed additional witness TF1-359 to the Motion, the Prosecution submits that it would be contrary to Rule 66(A)(ii) of the Rules, according to which the Prosecution has to show good cause in order to disclose this statement as it is later than 60 days before the date for trial. The Prosecution submits that in case the Trial Chamber deemed it necessary to review the statements, it may order the Prosecution to submit them to the Chamber.¹¹

⁶ *Id.*, para. 11.

⁷ *Id.*, paras 13-15.

⁸ *Id.*, para. 12.

⁹ *Id.*, para. 16.

¹⁰ *Id.*, para. 18.

¹¹ Reply, paras 7-8.

23. The Prosecution reiterates that sufficient explanation for the non-inclusion of the witnesses in question to the original list was provided. Moreover it is submitted that lateness of the request to add witnesses does not constitute a determining factor in deciding whether to grant this request.¹² The Prosecution also submits that the added value of the statements was demonstrated in the Motion, therefore no further analysis of the evidence has to be provided at the moment.¹³

24. The Prosecution resubmits that the rights of the Accused will not be prejudiced by the addition of witnesses, since the Defence will have sufficient time for examination and preparation for the proposed additional six witnesses. As the evidence of these witnesses may obviate the need for lengthy direct examinations of other witnesses, the duration of the trials could in fact be shortened.¹⁴

25. Moreover, the Prosecution submits that all additional witnesses are necessary, as their evidence relates to distinct and separate incidents which must all be proven to establish the peculiar elements of international crimes. Furthermore, the Prosecution states that the evidence would establish an organized systemic coordination between RUF and AFRC.¹⁵

26. Finally, the Prosecution reasserts that the evidence provided by each of the proposed additional witnesses adds unique elements to the Prosecution's case against the accused persons in this case, and is therefore not merely corroborative or cumulative.¹⁶ Each of the witnesses would offer direct evidence on the conduct of one or more of the RUF Accused, and the expected testimony would be of significant value to the Prosecution in that the bulk of the evidence these witnesses will offer is direct evidence and not circumstantial or indirect.

II. THE APPLICABLE LAW

27. The law governing the request of the Prosecution to vary the witness list and add additional witnesses, is Rule 73bis(E) of the Rules, which reads as follows:

¹² *Id.*, paras 9-10.

¹³ *Id.*, para. 12.

¹⁴ *Id.*, paras 15-16.

¹⁵ *Id.*, para. 18.

¹⁶ *Id.*, para. 19.

(E) After the commencement of the Trial, the Prosecutor may, if he considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.

28. Rule 73bis(E) becomes applicable after the commencement of the trial. Where it is in the interests of justice it serves as an instrument to vary the list of witnesses disclosed prior to trial pursuant to Rule 67 of the Rules. With respect to the disclosure of witness statements after the commencement of trial, Rule 66(A)(ii) of the Rules stipulates that where copies have not been submitted within 60 days before the date for trial, or as otherwise ordered by the Judge or Trial Chamber, the Prosecution must show good cause to disclose the witness statements of additional witnesses.

29. Rule 73bis(E) is similar in formulation to the corresponding Rule of the International Criminal Tribunal for Rwanda ("ICTR"). The Chamber notes that when interpreting this Rule, together with Rule 66(A)(ii), and the circumstances that give rise to a showing of "good cause" and the "interests of justice", Trial Chambers of the ICTR have taken into account a number of factors.¹⁷ For instance the Trial Chamber of the ICTR in the *Nahimana* case,¹⁸ observed that:

In assessing the "interests of justice" and "good cause" Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence. The Prosecution's duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay.

30. The Trial Chamber further notes that additional factors, taken into account by Trial Chambers of the ICTR when considering the circumstances giving rise to "good cause" and the "interests of justice", include the sufficiency and time of disclosure of the witness information to the Defence and the probative value of the proposed testimony. The Trial Chamber of the ICTR

¹⁷ *Prosecutor v. Nahimana*, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para. 20; *Prosecutor v. Nahimana*, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para. 5; *Prosecutor v. Bagosora*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E), para. 8.

¹⁸ *Prosecutor v. Nahimana*, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para. 20.

in the *Bagosora* case,¹⁹ expanding on the factors identified in the *Nahimana* decision mentioned above, stated that:

These considerations [under Rule 73bis(E)] require a close analysis of each witness, including the sufficiency and time of disclosure of witness information to the Defence; the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; the ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty or other factors; and the justification offered by the Prosecution for the addition of the witness.

31. This Trial Chamber acknowledges the importance of its role to ensure a fair and expeditious trial when weighing the abovementioned factors consistent with Rule 26bis of the Rules and the rights of accused persons to adequate time and facilities for the preparation of their defence, as set forth in Article 17(4)(b) of the Statute. Consistent with our recent Decision on Prosecution Request for Leave to Call Additional Witnesses in the CDF case,²⁰ we reassert the principle of law that the Prosecution should not be allowed to surprise the Defence with additional witnesses and should fulfil in good faith its disclosure obligations.

32. Taking our judicial cue from reasoning of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the *Delalic* case,²¹ wherein it stated that it will "[u]tilise all its powers to facilitate the truth finding process in the impartial adjudication of the matter between the parties", this Chamber will approach the determination of this issue with due regard for the doctrine of "equality of arms".

III. THE MERITS OF THE APPLICATION

33. The Trial Chamber considers that the proposed evidence of witnesses TF1-359, TF1-360, TF1-361, TF1-363 and TF1-362 appears to be relevant and could have probative value with respect to the allegations in paragraphs 34, 36, 37, 38 and 39 of the Amended Consolidated Indictment.²²

¹⁹ *Prosecutor v. Bagosora*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E), 26 June 2003, para. 14.

²⁰ *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*; SCSL-04-14-T, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 2004.

²¹ *Prosecutor v. Delalic*, Decision on Confidential Motion to Seek Leave to Call Additional Witnesses, 4 September 1997, para. 7.

²² The relevance of the proposed testimony of witness TF1-362 for paragraph 35 of the Amended Consolidated Indictment, as submitted by the Prosecution, however, cannot be acknowledged at this stage.

The proposed evidence of Witness TF1-314 appears to have relevant and probative value with respect to the allegations in paragraphs 6, 7, 8, 9, 12, 13, 15 and 18 of the Amended Consolidated Indictment.

34. The Chamber also notes that the proposed evidence of all witnesses purports to be mainly direct evidence of the individual criminal responsibility of the three Accused, as well as of the military organisation of the RUF, the collaboration between AFRC and RUF forces, and the forcible recruitment of children. This evidence is distinguishable from corroborative or cumulative evidence and appears not to be a repetition of evidence of other witnesses on the Modified Witness List. Therefore, it appears that the proposed testimonies are relevant in relation to existing witnesses. With regards to the Defence submission that the proposed witnesses cover the same ground as each other and therefore only one additional witness should be allowed, we agree with the Prosecution position that each of the proposed witnesses testifies to distinct and separate incidents in different parts of the country.

35. Furthermore, it is the Chamber's considered opinion that the submissions of the Prosecution sufficiently demonstrate the efforts of the Prosecution and the obstacles it faced in locating the additional witnesses and securing their cooperation, causing the non-inclusion of those witnesses in the Witness List of 26 April 2004 and the Modified Witness List of 12 July 2004.

36. The Chamber has weighed the timing of the application and the non-disclosure of the statement of TF1-359 and the disclosure of the five other witness statements under the Prosecution's disclosure obligations under Rule 68 of the Rules only on 1 July 2004 (TF1-360, TF1-361, TF1-363, TF1-362) and on 7 February 2004 (TF1-314) against the materiality of the evidence. Given that the trial of the accused persons commenced on 5 July 2004, and the representation by the Prosecution that it would not be calling these witnesses until a much later stage in the trial, the Trial Chamber does not consider that the Defence would suffer any prejudice to its case. In particular, the Chamber finds that there is no element of surprise resulting in detriment to the Defence. On the contrary, it is our opinion that the Defence will have adequate time and resources to investigate and prepare for the cross-examination of these witnesses. We, therefore, hold that good cause has been shown and that it is in the interests of justice to add these witnesses to the Modified Witness List.






37. Predicated upon this holding that it is in the interests of justice to include witness TF1-359 in the Modified Witness List, we further hold that good cause exists for the disclosure of the statement of this witness pursuant to Rule 66(A)(ii) of the Rules.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion with respect to witnesses TF1-359, TF1-360, TF1-361, TF1-363, TF1-314 and TF1-362 on the condition that these witnesses will not be called by the Prosecution before 1 January 2005 and

ORDERS the disclosure of the statement of witness TF1-359 to be made by or before 6 August 2004.

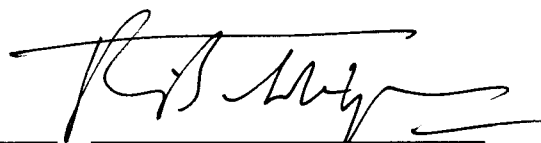
Done in Freetown, Sierra Leone, this 29th day of July 2004



Hon. Judge Pierre Boutet



Hon. Judge Benjamin Mutanga Itoe
Presiding Judge,
Trial Chamber



Hon. Judge Bankole Thompson



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