

503)

SCSL-04-15-T
(18233-18240)

18238

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Hon. Justice Pierre Boutet, Presiding
Hon. Justice Benjamin Itoe,
Hon. Justice Bankole Thompson

Registrar: Mr. Lovemore Green Munlo

Date filed: 1st March 2006

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL - 04 - 15 - T

PUBLIC

DEFENCE REPLY TO PROSECUTION RESPONSE REQUESTING THE
EXCLUSION OF EVIDENCE ARISING FROM THE ADDITIONAL
INFORMATION PROVIDED BY WITNESS TF1-168, TF1-165 and TF1-041

Office of the Prosecutor

Desmond De Silva QC
James C Johnson
Peter Harrison
Urs Wiedemann

Defence

Wayne Jordash
Sareta Ashraph
Chantal Refahi

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
= 2 MAR 2006	
NAME	Geoff Walker
SIGN	<i>[Signature]</i>
TIME	10.30

Reply

1. The Defence files this Reply to the Prosecution's Response to the "Defence Motion Requesting the Exclusion of Evidence (As Indicated in Annex A) Arising from the Additional Information Provided by Witness TF1-168, TF1-165, and TF1-041.

2. As noted by the Prosecution, the Motion is the seventh in a series of similar oral and written motions in relation to which this Trial Chamber has rendered six decisions so far. It is thus the seventh motion in which the Prosecution have failed to address the following defence submissions:
 - (a) Why, at the ICTR, ICTY, European Court of Human Rights¹ and all known domestic cases, is there an absolute obligation on the Prosecution to set out with detailed particularisation, either in the indictment² or the Pre-trial Brief;³ the *facts* which form the basis of the case against the Accused? What reasons exist at the Special Court to depart from this universal minimum guarantee?

 - (b) Why are Accused at the ICTR, the ICTY, the European Court of Human Rights and all known national jurisdictions, guaranteed prompt (and in any event within a reasonable time and before the commencement of the trial)⁴ disclosure of all the facts (or the evidentiary material) which forms the case against the Accused but the Accused at the Special Court are not?

¹ De Salvador Torres v. Spain, E.H.R.R. 601 at para. 32 & 33 & Sadak and others v. Turkey (No.1) (29900/96, 29901/96, 29902/96 and 29903/96) (12th March 2003) at para.48-50 & Pelissier and Sassi v. France (25444/94) (25th March 1999) & Sipavicius v. Lithuania (49093/99) (21st February 2002) at para. 28 and 29. Kapasinski v. Austria (judgment of 19th December 1989, Series A no. 168, pp.36-37, para. 79 & Dallos v. Hungary (29082/95) (1st March 2001), para. 47 & Prosecutor v. Kupresik, Appeal Chamber, IT-95-16, 23rd October 2001, para. 103. These and all other ECHR decisions presuppose disclosure of both the acts with which an accused is charged and on which his indictment is based, and of the legal characterisation of the acts in question. The information should be "full" and "detailed" in order to ensure the proceedings are fair.

² Prosecutor v. Bizimungu et al, Case No. ICTR-99-50-T, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAB, GKC, GKD and GFA, 23rd January 2004, para. 14.

³ Prosecutor v. Krajisnik, Case No. IT-0039 & 40, Decision Concerning Preliminary Motion on the Form of the Indictment, 1st August 2000, para. 13.

⁴ Prosecutor v. Nyiramuhuko, Case No. ICTR-97-29-T, Decision on Defence Motion for Disclosure of Evidence, 1st November 2000, para. 38.

- (c) Why are the Prosecution at the ICTR, the ICTY, the European Court of Human Rights and all known national jurisdictions, expected to know the case before it goes to trial⁵ and what reason exists for the Accused at the Special Court to be denied this fundamental protection?
- (d) Why are the Prosecution at the ICTR, the ICTY, the European Court of Human Rights and all known national jurisdictions, expected to give the Defence notice of any new allegation of a material fact? Is there any reason whatsoever at the Special Court which would or could justify a departure from this requirement which indicates that where, “the prosecution seeks to lead evidence of an incident which supports the general offence charged, but **the particular incident** had not been pleaded in the Indictment in relation to that offence, the admissibility of the evidence depends upon the sufficiency of the notice which the accused has been given **that such evidence** is to be led in relation **to that offence**. Until such notice is given, an accused will be entitled to proceed upon the basis that the **details pleaded are the only case which he has to meet in relation to the offence or offences charged**. **Notice that such evidence will be led in relation to a particular offence is not sufficiently given by the mere service of witness statements by the prosecution pursuant to the disclosure requirements imposed by Rule 66(A)**. This necessarily follows from the obligation imposed upon the prosecution pursuant to identify in its Pre-trial Brief, in relation to each count, a summary of the evidence which it intends to elicit regarding the commission of the alleged crime and the form of responsibility incurred by the Accused. **If the prosecution intends to elicit evidence in relation to a particular count additional to that summarised in its Pre-**

⁵ Prosecutor v. Kupreskic, Judgement, Case No. IT-95-16-A, 23rd October 2001, para. 114.

trial Brief, specific notice must be given to the Accused of that particular intention.”⁶

- (e) Why are Accused at the ICTR, the ICTY, the European Court of Human Rights and all known domestic jurisdictions, given the right to proceed with preparing their case in full knowledge of all the charges that have been or will be brought against him and what is the reason that the Accused at the Special Court are not afforded this facility?⁷
- (f) Why are the Prosecution at Special Court moulding the evidence as it unfolds to continuously ambush the Defence whereas this practice was expressly forbidden by this Trial Chamber in the case of *Sesay*⁸ and is absolutely prohibited at the ICTR, the ICTY, the European Court of Human Rights and all known domestic jurisdictions?⁹
3. The Prosecution’s Response thus displays a characteristic failure to deal with any of the salient issues. The fact that they refuse to address the issues demonstrates the impoverishment of their argument and the disregard of their role as Ministers of Justice. A fair Prosecution would not allow legitimate Defence complaints to be simply ignored. At a minimum a fair trial would provide answers as to why fundamental fair trial rights recognised in all other jurisdictions should not be enjoyed by the Accused in this case.
4. Paragraph 20 (k) of the Prosecution Response demonstrates how far the Prosecution’s approach is from any recognised notion of fairness. The Prosecution note, “Although the Prosecution reading of the additional

⁶ Prosecutor v. Brdanin and Talic, IT-99-36 Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26th June 2001, Para. 62. Emphasis added.

⁷ Prosecutor v. Delic, Case No. IT-04-83-PT, Decision on Defence Motion alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, 13th December 2005, para. 63.

⁸ Prosecutor v. Sesay, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment; 13th October 2003, para. 33.


⁹ Prosecutor v. Kupreskic, Appeal Judgement, Case No. IT-95-16-A, 23rd October 2001, para. 82.

information of TF1-168 *did not in the mind* of the Prosecution lead to the result that Sesay was criminally culpable for the drowning of 30 civilians... paras. 43-50 of the Supplemental Pre-Trial Brief gives notice of the intention to prove that Sesay is culpable for unlawful killings in Kailahun District” (Emphasis added). In other words it is suggested, that the fact that the Accused has notice that it is alleged he is responsible for “unlawful killings in Kailahun,” ought to be sufficient to allow the Accused to guess what is in the Prosecution mind in relation to *every* single specific factual allegation of unlawful killing contained in the evidence disclosed throughout the Prosecution case. If it needed to be observed, the notion of an Accused being forced to guess what is in the mind of the Prosecution in relation to allegations of war crimes or crimes against humanity, is yet to find its way into any jurisprudence or international human rights legislation. A fair trial would not expect the Defence to guess what is in the Prosecution’s mind. A fair trial would oblige the Prosecution to disclose what is in its collective mind. A fair trial would not allow the Prosecution to keep its case in its mind to be changed to suit the challenge to it.

5. The Defence specifically and respectfully request that the Trial Chamber rule on the following question; Is it the view of the Trial Chamber that the consequence of the ruling that all evidence is admissible if it “singly or cumulatively, relate(s) to separate and constituting different episodic events, or as it were building blocks constituting an integral part of, and connected with the same *res gestae* forming the factual substratum of the charges in the indictment”¹⁰ is that all evidence which is relevant to the indictment and pre-trial Brief is admissible notwithstanding what factual allegations it contains and when it is disclosed? The Defence have no desire to continue to waste the collective time or energies of all parties by objecting to evidence if the answer to this question is in the affirmative. In those circumstances the Defence will simply reserve its position and in due course seek recourse with the Appeal Chamber.

¹⁰ See for example *Prosecutor v Sesay et al*, SCSL-04-15-T-496, Decision on Defence Motion for the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288, 27th February 2006, para. 11.

Dated 1st March 2006



WJ Wayne Jordash

SA Sareta Ashraph

Chantal Refahi

BOOK OF AUTHORITIES

1. *De Salvador Torres v. Spain*, E.H.R.R. 601 (attached to the Defence Motion)
2. *Sadak and others v. Turkey* (No.1) (29900/96, 29901/96, 29902/96 and 29903/96) (12th March 2003) (attached the Defence Motion)
3. *Pelissier and Sassi v. France* (25444/94) (25th March 1999) (attached to the Defence Motion)
4. *Sipavicius v. Lithuania* (49093/99)(21st February 2002) (attached to the Defence Motion)
5. *Kapasinski v. Austria* (judgment of 19th December 1989, Series A no. 168 (attached to the Defence Motion)
6. *Dallos v. Hungary* (29082/95)(1st March 2001) (attached to the Defence Motion)
7. *Prosecutor v. Kupresik*, Appeal Chamber, IT-95-16, 23rd October 2001 (readily available on ICTY website)
8. *Prosecutor v. Bizimungu et al*, Case No. ICTR-99-50-T, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAB, GKC, GKD and GFA, 23rd January 2004 (readily available on ICTY website)
9. *Prosecutor v. Krajisnik*, Case No. IT-0039 & 40, Decision Concerning Preliminary Motion on the Form of the Indictment, 1st August 2000 (readily available on ICTY website)
10. *Prosecutor v. Nyiramusuhuko*, Case No. ICTR-97-29-T, Decision on Defence Motion for Disclosure of Evidence, 1st November 2000 (readily available on ICTR website)
11. *Prosecutor v. Brdanin and Talic*, IT-99-36 Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26th June 2001 (readily available on ICTY website)
12. *Prosecutor v. Delic*, Case No. IT-04-83-PT, Decision on Defence Motion alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, 13th December 2005 (readily available on ICTY website)

13. *Prosecutor v. Sesay*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment; 13th October 2003 (readily available on SCSL website)
14. *Prosecutor v. Kupreskic*, Appeal Judgement, Case No. IT-95-16-A, 23rd October 2001 (readily available on ICTY website)
15. *Prosecutor v Sesay et al*, SCSL-04-15-T-496, Decision on Defence Motion for the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288, 27th February 2006 (readily available on SCSL website)