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# SPECIAL COURT FOR SIERRA LEONE

# IN THE TRIAL CHAMBER

Before:

Judge Benjamin Mutanga Itoe, Presiding Judge

Judge Bankole Thompson

Judge Pierre Boutet

Registrar:

Mr. Robin Vincent

Date Filed:

3 December 2004

THE PROSECUTOR

**Against** 

ISSA HASSAN SESAY MORRIS KALLON AUGUSTINE GBAO

Case No. SCSL - 2004 -15- XT

KALLON – DEFENCE RESPONSE AND COUNTER MOTION TO PROSECUTION REQUEST FOR LEAVE TO CALL ADDITIONAL WITNESS AND DISCLOSE ADDITIONAL WITNESS STATEMENTS PURSUANT TO RULES 66 (A) (ii) AND 73 bis (E).

Office of the Prosecutor:

Luc Cote Lesley Taylor Pete Harrison Sharan Palmer Defence Counsel for Issa Sesay

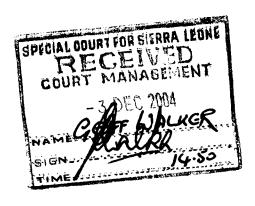
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Andreas O'Shea John Cammegh



#### INTRODUCTION

1. The Defence for Kallon files this Response in Opposition and Counter Motion to the Prosecution "Request for Leave to Call Additional Witnesses and Disclose Additional Witnesses Statements Pursuant to Rules 66 (A) (ii) and 73 bis (E)" filed on the 23 November 2004 (the "Request")

## PROCEDURAL BACKGROUND

- 2. By Order of the Trail Chamber made on 1 April 2004 pursuant to Art. 17 of the Statute of the Special Court and Rules 54, 66, 67, 68, 73 bis and 92 bis of the Rules (Original Order)<sup>1</sup>, the Prosecution was to file by 26 April 2004, a Witness list for all the witnesses 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 shall be permitted to do so only upon good cause being shown.
- 3. Further, the Prosecution was to file by 3 May 2004, a Chart indicating for each paragraph in the Indictment the testimonial evidence and primary documentary evidence upon which the Prosecution would rely to establish the allegations contained therein.
- 4. In compliance with the Original Order, the Prosecution filed on 26 April 2004, under Cover Sheet I as part of its filing of materials ordered to be filed, a witness list containing the pseudonyms of each witness the Prosecution intended to call at trial, numbering 266 witness in all (the "Witness List")<sup>2</sup>
- 5. On 4 May 2004, the Prosecution further filed a Chart indicating documentary and testimonial evidence relevant to each paragraph of the Consolidated Indictment (the "Chart")<sup>3</sup>

<sup>1</sup> Prosecutor v. Sesay et all SCSL – 04-15 PT, Order to the Prosecution to file Disclosure Materials and Other Materials in Preparation for the Commencement of Trial

<sup>&</sup>lt;sup>2</sup> Prosecutor v. Sesay et al SCSL – 04-15 PT, 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 <sup>3</sup> Prosecutor v. Sesay et al SCSL – 04-15 PT, Prosecution Chart Indicating Documentary and Testimonial Evidence by Paragraph of Consolidated Indictment Pursuant to Trial Chamber Order Dated 1 April 2004

6. Under the rubric "Description of Submissions Attached" in the Chart, the Prosecution stated *inter alia* as follows:

"[...]"

- 7. This chart attempts to provide comprehensive guidance to all relevant evidence for each paragraph of the Indictment. Prosecution notes that because of the general or encompassing nature of certain paragraphs, the prosecution will be relying on the bulk of the evidence presented at trial to support these paragraphs. This includes paragraphs in the Indictment connected to General Allegations or allegations that the AFRC/RUF conducted attacks throughout the country of Sierra Leone, where evidence from all witnesses is relevant. The Prosecution also notes that a significant number of witnesses and documentary evidence are relevant to the paragraphs alleging responsibility under Articles 6.1 including joint criminal enterprise, and 6.3 of the Statute. In order to understand the relevance of certain evidence underlying criminal responsibility the evidence cannot be viewed in isolation, but rather has to be analyzed in conjunction with the evidence supporting the paragraphs related to the Counts in the Indictment.
- 8. The witness List submitted by the Prosecution on 26 April 2004 pursuant to the Trial Chamber's Order, contained names of all witnesses that could provide relevant information on particular incidents alleged in the Indictment. As the Prosecution stated in the Pre-Trial Conference, some of these witnesses listed may not be willing or available to come to Freetown to provide evidence viva voce. For this reason, the prosecution provided as comprehensive as possible of a witness list for the Trail Chamber.
- 9. As stated in the Pre-Trial Conference the Prosecution intends to file the final list following a decision on the pending motion for Judicial Notice and the issuance of Notice of Hearing setting a trial date in this matter."

7. Pursuant to its undertaking in the Pre-Trial Conference held 29 April 2004 (RUF), the Prosecution on 11 May 2004 filed an Updated Compliance Report<sup>4</sup> in which it stated *inter alia* as follows:

"[…]"

- 3. In accordance with its undertaking in the Pre-Trial Conference, the Prosecution began, on 30 April 2004, to prepare its Updated Compliance Report. During the course of preparing its report, the Prosecution discovered that there still remain seven witnesses whose pseudonyms appear on the witness list and witness summaries table, but whose Statements have not been disclosed (only the summaries of these Statements were disclosed).
- 4. Upon examination, the Prosecution discovered that the pseudonyms of six of these witnesses were erroneously placed on this list, as four of these six witnesses have expressed during the Prosecution's confirmation process, their decision at this time not to testify before the Court, and the other two were among the potential witnesses that the Prosecution had previously decided not to call. The pseudonyms of these four witnesses who have decided not to testify are as follows: TF 106, TF 146, TF 189 and TF 274. The pseudonym of the two witnesses who the Prosecution had previously decided not to call are TF 103 and TF 276. The Prosecution hereby requests all parties to regards these six witnesses as deleted from the list. Accordingly, the number of witnesses the Prosecution intends to call at trial is 260.
- 8. At the Status Conference (RUF) held on 23 June 2004, the Prosecution indicated that it intended to call approximately 170 "Core" witnesses at trial depending on the outcome of its "Motion for Judicial Notice and Admission of Evidence " filed on 2 April 2004,

 $<sup>^4</sup>$  Prosecutor v. Sesay et al SCSL -04-15 PT Updated Compliance Report filed Pursuant to Undertaking by the Prosecution in Pre- Trial Conference held 29 April 2004

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- 9. On 24 June 2004, the Trial Chamber issued its "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence".
- 10. Considering that it was in the interest of Justice for the Prosecution to disclose to the Defence and the Court a Modified Witness List identifying clearly which witnesses were "Core" witnesses and which witnesses were meant to be used as "backup" witnesses if some "Core" witnesses were not available to testify, the Trial Chamber on 7 July 2004 ordered the Prosecution to produce a list of the "Core" witnesses it was intending to call to testify at trial and a list of the "backup" witnesses it intended to call only if it is later deemed necessary at trial (the "Second Order")<sup>5</sup>
- During the first session of the RUF trial in July, the Prosecution on 12 July 2004, filed a Modified Witness List<sup>6</sup> of 173 witness the Prosecution intended to rely upon as its "Core" witness to call to testify at trial, submitting that the composition of the list had been impacted by the admissions made by Defence Counsel for the three RUF accused<sup>7</sup> and noting that it had filed on the 12 July 2004 the "Prosecution Request for Leave to call Additional Witnesses and Disclose an Additional Witness Statement" where in it was seeking leave to add six witnesses to the Modified Witness List for reasons constituting good cause and that it was submitting the list pending consideration by the Trial Chamber of that Motion<sup>8</sup>
- 12. It is to the noted that witness TF 274, one of the six witnesses the Prosecution had requested all parties to regard as deleted from the Witness List as afore mentioned, contrary to that commitment and assurance given, appeared on the Modified List of "Core" witnesses and further, that the Prosecution failed to submit a list of "backup" witness as ordered.

<sup>&</sup>lt;sup>5</sup> Prosecutor v. Sesay et al SCSL-04-15PT Order to Prosecution to Produce Witness List and Witness Summaries

<sup>&</sup>lt;sup>6</sup> Prosecutor v. Sesay et al SCSL -04-15PT Materials filed Pursuant to "Order to Prosecution to Produce" witness List and Witness Summaries" - Annex A

See Para 6 op.cit

<sup>&</sup>lt;sup>8</sup> See Para 9 op.cit.

- 13. By decision of the Trial Chamber made on 29 July 2004, towards the end of the July session trial of RUF accused, the Prosecution's request for leave to call Additional Witnesses statement was granted notwithstanding a joint opposition response by the RUF Defence team, thereby bringing the total number of "Core" witnesses to 179.
- 14. After the conclusion of the October session of trial of RUF accused, the Prosecution on 23 November 2004 filed a Renewed Witness List<sup>10</sup> of 102 witnesses that the Prosecution intended to have testify (Core witnesses) and of 170 witnesses in the backup List it does not intend to call to testify currently, reserving the right to substitute backup witnesses for core witnesses should it become necessary to do so. The factors which motivated the Prosecution in doing so were clearly adumbrated as follows: that

"[…]"

- 5. At Status Conferences the Court has encouraged the Prosecution to attempt to reduce the number of Prosecution witnesses and the Prosecution has repeatedly stated that it is in the process of reviewing its witnesses and that the Prosecution also wishes to reduce the number of its planned witnesses.
- 6. All parties are aware of the limited mandate of this Court and of the importance of proceeding in an efficient manner while at the same time ensuring that the interest of justice prevail.
- 7. Taking into account the "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence of 24 June 2004", the right of the accused to be tried without undue delay, and the interest of justice being served by a speedy trial....
- 8. This is a very significant reduction in Prosecution witnesses. The Prosecution has expended a considerable amount of time and resources in reviewing evidence in its on going efforts to assist the

 $<sup>^{9}</sup>$  Prosecutor v. Sesay et al SCSL - 2004-15PT. Decision on Prosecution Request for Leave to Call Additional Witnesses.

<sup>&</sup>lt;sup>10</sup> Prosecutor v. Sesay et al SCSL – 2004-15PT, Prosecution Renewed Witness List.

Court and the Defence in ensuring that this trial proceeds in an efficient and fair manner.

- 15. By the Renewed Witness List the total number of both Core and back up Prosecution witnesses now Sums up to 272, thereby exceeding the previous total of 260 as per paragraph 7 herein together with the 6 (six) Additional witnesses approved by the Court as per paragraph 13 by six (6) other witnesses.
- 16. It is worthy of note that all 6(six) witness the Prosecution had requested should be deleted from the witness list again appear on the Renewed witness List as Core witnesses to wit: TF 274 and TF 189 and as back ups to wit: TF 103, TF 106, TF 146 and TF 276.<sup>11</sup>
- 17. It is further to be noted that two witnesses, TF1 013 and TF 1 302 who were on the October Session's witness list filed by the Prosecution on 16 September 2004<sup>12</sup> but were said to be withdrawn for good as intimated to the Court and the Defence by the Prosecution in open Court also appear as backups in the Renewed witness List. 13
- 18. The foregoing notwithstanding, the Prosecution is in its current application filed on the same date as the Renewed Witness List seeking the leave of the Court to add 3 more witnesses to wit: TF 366, TF 367 and TF 368 to the Renewed Witness List

## **PROSECUTION SUBMISSIONS**

19. The Prosecution in substance submits that the instant application satisfies the tests adumbrated in the *Nahimina Decision* of the ICTR and the Trial Chamber's Decision of 29 July 2004, granting leave to call Additional Witnesses, and that the content of the expected testimonies of the proposed additional witnesses meets the standard required for "good cause" and that their addition to the Reduced Witness List is in the "interest of justice".

<sup>&</sup>lt;sup>11</sup> See Index I. Renewed Witness List (Core witness) op cit Nos. 94 and 101 and Index 2: Back up List

<sup>&</sup>lt;sup>12</sup> Prosecutor v. Sesay et al Proposed Order of Appearance of Prosecution Witnesses – Second Session of Trial October 2004.

<sup>13</sup> ibid

- 20. It further submits that the Accused rights are adequately protected since the proposed witnesses will not be called to testify until at least the March 2005 Session and that the Defence will have significant time to examine and prepare for them.
- 21. Problems in locating some of the witnesses and initial reluctance to testify on the part of one are said to have been experienced by the Prosecution in its investigative efforts.
- 22. On the Substance of their expected testimony, the Prosecution assures that the key paragraph of the Amended Consolidated Indictment all three proposed witnesses will testify include, but will not be limited to paragraphs 34, 36, 37, 38 and 39.

#### **ARGUMENTS**

## Breach of Rule 73 bis E

23. The Defence submits that the inclusion of witnesses TF 103, TF 106, TF 146, TF 189, TF 274, TF 276 and also witnesses TF 013 and TF 302 on the Renewed Witness List offends against Rule 73 bis E on the grounds that the Prosecution failed to obtained the leave of the Trail Chamber to reinstate them on the List or to vary its decision on them as intimated to the Defence and the Court.

# **Good Cause**

- 24. The Prosecution's Request is incompetent in that it fails to indicate clearly or at all whether the proposed three witnesses are to be added as Core witnesses or as backups and leaves the Court to speculate on such material aspects. It is submitted that considerations of a showing of good cause could well depend on the distinction.
- 25. The Defence submits that equally inherent in the concept of "good cause" is the underlying principle of good faith. The Prosecution's Request viewed against the Procedural Background herein outlined more particularly, its avowed assurances and commitments as expressed in Paragraph 6, 7 and 14 herein, out rightly lacks bona files, the Defence it would appear has been led up the garden path as the

facts disclose all the way an oblique motive to increase rather than actually reduce the witness list.

- 26. Further, a close scrutiny of the Prosecution's Chart filed on 4 May 2004 will confirm that at least 40 of its current core witnesses and 30 of it backups are already slated to testify in respect of the same key paragraph 34, 36, 37, 38 and 39 of the Amended Consolidated Indictment as the three proposed witnesses to be added are also expected to do. It is submitted that the evidence of the three proposed witness will therefore be merely corroborative or cumulative and will bear no further impact on the Prosecution's case.
- 27. The Defence accordingly submits that there has been no showing of good cause by the Prosecution both on the merits and in principle to have its request granted.

## **Interest of Justice**

- 28. It is to be observed that this is the second request for leave to call additional witnesses after the commencement of the RUF Trail; the first during the cause of the July session proceedings and the instant one after the October session proceedings. The Defence therefore views the Prosecution's indulgence in making applications to add new witnesses as an ongoing strategy to repair its case to the prejudice of the Defence as the Prosecution evidence is tested in Court.
- 29. The Defence submits that the right of the Accused to a fair and expeditious trial as enshrined in the Statute and the Rules stands to be seriously threatened and prejudiced if such indulgence were to be encouraged without restraint.
- 30. Further the request for leave to add witnesses is coming at a stage when the Defence is also conducting investigations and identifying witnesses to testify on its behalf. It is submitted therefore that to avoid the Defence being prejudiced by the loss of evidence of potential value to its case and in line with the principles of equality of arms, that Requests to add witnesses must be backed up with assurances or statements that such proposed witnesses have not also been approached by the Defence; more so as their identities at this point are known only to the Prosecution and not to the Defence. The failure on the part of the Prosecution in this case to give such assurances to buttress its request, it is

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submitted makes the request potentially prejudicial to the Defence and not in the interest of justice to grant it.

# **Conclusion**

- 31. The Defence therefore prays the Court as follows:
  - (1) An Order that witnesses TF 103, TF 106, TF 146, TF 189, TF274, TF 276, and also TF 013 and TF 302 improperly reinstated on the Renewed Witness List without the leave of the Court be deleted from the List.
  - (2) That the Prosecution's Request be dismissed on grounds that it is incompetent, not in the interest of justice as it is to prejudicial to the Defence, lacking in bona files and devoid of good cause.

Shekou Touray

3 December 2004 Melron Nicol-Wilson