

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

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

Registrar: Mr. Robin Vincent

Date filed: 23 February 2005

THE PROSECUTOR**Against****Issa Hassan Sesay****Morris Kallon****Augustine Gbao**

CASE NO. SCSL – 2004 – 15 – T

**PROSECUTION CONSOLIDATED REPLY TO DEFENCE RESPONSES TO
 FURTHER RENEWED WITNESS LIST FILED PURSUANT TO ORDER TO
 THE PROSECUTION CONCERNING RENEWED WITNESS LIST**

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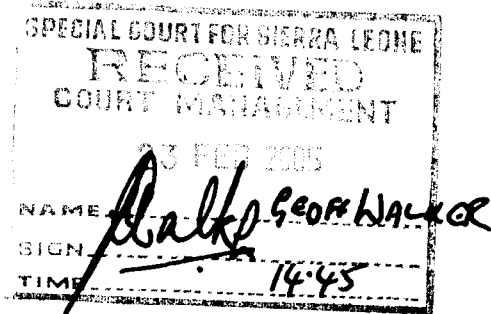
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The Defence Responses

1. The Prosecution hereby files a Consolidated Reply to the Defence Responses to its “Further Renewed Witness List [Filed] Pursuant to Order to the Prosecution Concerning Renewed Witness List”.¹ A Response was filed on behalf of the Accused Sesay on 18 February, and on behalf of each of the Accused Kallon and Gbao on 21 February 2005.
2. Broadly, the Respondents contend as follows:
 - i. That the Prosecution is required to seek leave to move a witness from its “back up” to its “core” witness list.

¹ Filed on 10 February 2005.

- ii. (On behalf of the Accused Gbao) That leave is required pursuant to the provisions of Rule 73 *bis* (E) of the Rules of Procedure and Evidence.²
- iii. That the Prosecution is required to show “good cause” in relation to each witness sought to be added, or substituted.
- iv. That the Prosecution is required to justify its position in relation to each witness and to provide reasons for the non-testimony of the witnesses envisaged to be replaced.³ Further, that the Prosecutions proposed/effected changes evince “marked inconsistency and caprice on the part of the Prosecution”, which will “obviously impact on the Defence in the preparation of its case”; that the Prosecution should not be allowed to “chop and change *ad libitum* their Witness List of “Core” witnesses or to shuffle through backwards or forwards from “Core” to “Backup” or *vice versa* by way of amendments as the trial progresses if and when they get it wrong and expect that they have an unbridled right to do so at the expense of the Defence”.⁴
- v. (On behalf of the Accused Sesay) That the changes in the Prosecution case in the event of a substitution of TF1-029 in place of TF1-085 are “significant both factually and legally”; and the changes in evidence in relation to the substitution of TF1-126 with TF1-122 “impacts considerably on the issues of command responsibility and the alleged joint criminal enterprise for the death of BS Massaquoi”.⁵
- vi. The Accused Kallon does not oppose the retention of TF1-210 in the core witness list having regard to the reasons advanced by the Prosecution, and does not, it appears, oppose the substitution of witness TF1-122 for TF1-126. The substitution of witness TF1-085 for TF1-029 is opposed because,

² “Bao Response to Prosecution Further Renewed Witness List Pursuant to Order to the Prosecution Concerning Renewed Witness List”, 21 February 2005 (“Bao Response”), para. 6.

³ Bao Response, para. 6.

⁴ “Kallon: Defence Response to “Further Renewed Witness List Pursuant to Order to the Prosecution Concerning Renewed Witness List”, 21 February 2005 (“Kallon Response”), paras. 15-16.

⁵ “Defence Response to “Further Renewed Witness List Pursuant to Order to the Prosecution Concerning Renewed Witness List” (10th February 2005)”, 18 February 2005 (“Sesay Response”), para. 7.

so it is submitted, the evidence of the two witnesses does not “relate to the same crime base area” and relates to “different incidents”.⁶

Reply

3. Pursuant to the Trial Chamber’s Order of 1 April 2004,⁷ the Prosecution filed on 26 April 2004 a witness list totalling 266 witnesses.⁸ The Order of 1 April 2004 provides that witnesses may only be *added* to the Prosecution witness list upon “good cause” being shown.⁹ On 7 July 2004, the Trial Chamber ordered the Prosecution, *inter alia*:

“(1) To produce a list of the “core” witnesses that the Prosecution is intending to call to testify at trial;

(2) To produce a list of the “back-up” witnesses that the Prosecution intends to call *only if it is later deemed necessary at trial*.

...”¹⁰ [Emphasis added.]

4. In giving its Order on 7 July 2004, the Trial Chamber clearly envisaged that Prosecution might “deem it necessary” to substitute, from time to time, certain witnesses appearing on its “core” list with witnesses appearing on its “back-up” list. The Order did not provide that the Prosecution should seek leave of the Chamber, or show good cause, in order to do so. If the Trial Chamber had intended that the movement of witnesses from one list to the other should involve anything more than a decision made, as deemed necessary, by the Prosecution, it would have said so.

⁶ Kallon Response, paras. 20-22.

⁷ “Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial”, 1 April 2004.

⁸ “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”. The total number of witnesses has since been reduced: “Updated Compliance Report Pursuant to Undertaking by Prosecution in Pre-Trial Conference Held 29 April 2004”, 11 May 2004.

⁹ See “Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements”, 11 February 2005; and the earlier “Decision on Prosecution Request for Leave to Call Additional Witnesses”, 29 July 2004.

¹⁰ “Order to Prosecution to Produce Witness List and Witness Summaries”, 7 July 2004.

5. The Prosecution's filing of its renewed list on 10 February did not involve the addition of new witnesses to the witness list. It involved a necessary movement of 3 witnesses from the "back-up" to the "core" list. There is no requirement therefore to seek leave, or to show good cause.
6. The Prosecution rejects the suggestion that its decision was made either arbitrarily or capriciously.¹¹ This is the first occasion upon which the Prosecution has asserted its right to add witnesses previously appearing on the "back-up" list onto the "core" witness list. Insofar as witnesses TF1-029 and TF1-122 are concerned, if leave is required, and the Prosecution submits that it is not, there are sufficient grounds for granting such leave advanced in the 10 February filing. Further, the Prosecution has provided an explanation for its failure to include TF1-210 on the "core" witness list in the first instance. That explanation is sufficient, it is submitted, to justify the grant of leave to add this witness to the "core" list.
7. The Prosecution volunteered the distinction of "core" witnesses in an effort to assist the Accused in the preparation of their cases.¹² Redacted statements for all those witnesses appearing on both the "core" and "back-up" lists have been disclosed by the Prosecution pursuant to its obligations under Rule 66(A) of the Rules. There is no question of the Defence being taken by surprise by the addition of witness TF1-210 to the "core" list or the addition of TF1-029 and TF1-122 in substitution of other witnesses, nor is there any question of the Prosecution "shifting the parameters" of its case.¹³ The Prosecution intends to call TF1-122 towards the end of the next 6 week trial session and does not intend to call TF1-029 until a later trial session. In any event, insofar as the substitution of witnesses TF1-029 and TF1-122 is concerned, their testimony addresses the same or similar issues to the testimony of the witnesses they replace: TF1-029 will testify, *inter alia*, to abductions and crimes of physical and sexual violence during and following the Freetown invasion, just as TF1-

¹¹ Kallon Response, para. 15: "inconsistency and caprice"; Bao Response, para. 5: "arbitrary movements between 'lists'".

¹² Status Conference on 23 June 2004; noted in the Trial Chamber's Decision of 7 July 2004.

¹³ Sesay Response, para. 10.

085's evidence relates to, *inter alia*, abductions and crimes of physical and sexual violence during and following the Freetown invasion; and TF1-122 will testify to events in Kenema District during the junta period, including the arrest and killing of B.S. Massaquoi, just as the evidence of TF1-126 deals with events in Kenema District during the junta period, including the arrest and killing of B.S. Massaquoi.

8. The authorities cited in the Responses filed on behalf of the Defendants Kallon and Sesay concern the issue of disclosure (of witness statements¹⁴; and of exhibits on the Prosecution "core" exhibit list in the *Krajisnik* proceedings¹⁵), the Trial Chamber's imposition of time limits for the presentation of the Prosecution case in the *Milosevic* proceedings,¹⁶ and appeals in national proceedings relating to applications by the Prosecution to amend an indictment to add new counts made on the 27th day of trial,¹⁷ and at the close of the Prosecution case,¹⁸ and thus have no bearing on the Prosecution filing or application for leave. As is clear from paragraph 7 above, disclosure is not an issue on this filing.
9. Finally, the Prosecution notes that the Trial Chamber has not made an order on a Pre-Trial Conference pursuant to Rule 73bis(D) of the Rules. On no occasion has the Trial Chamber ruled that the Prosecution is required to reduce the number of its witnesses on the grounds, in the wording of Rule 73bis(D), that an "excessive number of witnesses are being called to prove the same facts". No application for leave is therefore required, as is suggested on behalf of the Accused Bao, under Rule 73bis(E). The terms of Rule 73bis(E) necessarily relate back to the provisions of Rule 73bis(D). There is no question, in any event, of the Prosecution, in its 10 February filing, seeking to

¹⁴ State v. Scholtz [1997] 1 LRC 67, Namibia, Supreme Court, 6 February 1996; cited in the Sesay Response, para. 4.

¹⁵ Prosecutor v. Krajisnik and Plavsic, "Decision on Prosecution Motion for Clarification in Respect of Application of Rules 65 *ter*, 66(B) and 67(C)", 1 August 2001; cited in the Sesay Response, para. 4.

¹⁶ Prosecutor v. Milosevic, Case No. IT-02-54-AR73, App. Ch., "Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit", 16 May 2002; cited in the Kallon Response, para. 18.

¹⁷ R v. O'Connor [1997] Crim.L.R. 516.

¹⁸ R v. Luke Anthony Piggott and Jeffrey Simon Litwin [1999] 2 Cr. App. R. 320; cited in the Kallon Response, para. 16.


“reinstate” its list of witnesses or to vary its decision as to which witnesses are to be called within the meaning of Rule 73bis(E).

Conclusion

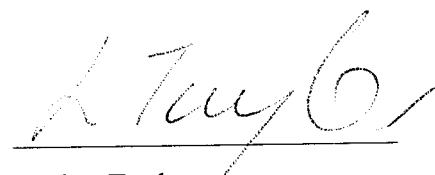
10. Accordingly, the Prosecution requests the Trial Chamber to dismiss the Defence Responses to the Prosecution Further Renewed Witness List.

Filed at Freetown

This 23rd day of February 2005



Luc Côte
Chief of Prosecutions



Lesley Taylor
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