SCSL-04-15-T
(9630-9636)

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: **Mr. Robin Vincent**

Date filed: **3rd December 2004**

The Prosecutor

-v-

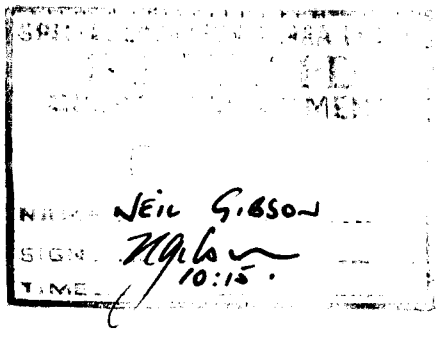
Issa Hassan Sesay

Case No: SCSL – 2004 – 15 – T

SESAY - DEFENCE RESPONSE TO PROSECUTION REQUEST FOR LEAVE TO CALL ADDITIONAL WITNESSES AND DISCLOSE ADDITIONAL WITNESS STATEMENTS PURSUANT TO RULES 66(A) and 73bis (E).

Office of the Prosecutor

Luc Cote
Lesley Taylor
Pete Harrison
Sharan Parmar



Defence

Wayne Jordash
Serry Kamal
Sareta Ashraph

1. The Prosecution seek to adjudicate this matter without attaching the statements of TFI – 366 and TFI – 368 to their motion dated 23rd November 2004. It is submitted that without this evidence the defence (and the Trial Chamber) are unable to properly litigate/adjudicate on the issues raised by the Prosecution motion. In effect the Defence and the Trial Chamber[1] are being asked to address these fundamentally important issues on the basis of the Prosecution summaries of these statements and their arguments as to the overall impact on the rights of the accused pursuant to Article 17 as well as their assessments as to the interests of justice as defined by the jurisprudence of the Special Court (see paras. 29 – 32 of the Trial Chamber's decision of 29th July 2004).

2. As noted by the Honourable Trial Chamber in its decision of the 29th July 2004[2] these considerations require a "close analysis of each witness... the probative value of the proposed testimony in relation to existing witnesses.... The ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty". It is difficult to conclude that the rigorous analysis implicit in these remarks can occur in the absence of the source material and based only upon a summary of the evidence - as provided by the Prosecution - and moreover submitted as part of their attempts to persuade the Trial Chamber to admit the evidence.

3. For example, the Trial Chamber inter alia needs to assess whether the present resources available to the Defence are adequate, pursuant to Article 17 of the Statute, to be able to properly investigate these additional witnesses whose evidence (it is said) provide "new....unique... distinct and direct evidence of the conduct of one or more of the RUF".[3] In this regard it is crucially important to note that the principal reason for the belated attempts to rely upon these witnesses is said to be the difficulties of locating these witnesses and yet the Prosecution have been investigating for in excess of two years with a large number of investigators. This logically must mean that the Defence will encounter considerable difficulties in investigating the veracity of their evidence especially given (a) its alleged importance to the case against the accused (b) the wide ranging nature of the evidence and (c) the reliance on one investigator who has access to a vehicle for a paltry 7 days a month[4].

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[1] The Defence assume that the Trial Chamber have not been provided with copies.
[2] See para. 30 quoting Bagosora, Decision on Prosecution Motion for Additional Witnesses pursuant to Rule 73 bis(E), 26 June 2003, para. 14.
[3] See para. 10 and 11.
[4] The Defence again are unable to make further submissions upon this point in the absence of the statements although it is instructive to note that TFI – 368 statement (disclosed pursuant to Rule 68) covers a period from 1991 to 2001 and includes evidence relating to (a)Command structures during the junta period (b) command structures in Bo (c) command structures in Kailahun (d) command structures in Kono (e) communications following the ejection of the junta from Freetown (f) commands pertaining to the attack on Freetown in 1999 (g) an attack on Kono in 1998 (h) an attack on Makeni in 1998/1999 (i) the alleged joint attack on Freetown in 1999 (j) Mr Sesay's alleged residence in Koidu in 1999 (k) mining in Tombudu in 2000 and the alleged command by Sesay (l) trips to Liberia allegedly by Sesay in 2000 and (m) the exchange of diamonds for weapons. Additionally the Prosecution note in para. 10 (i) the

4. Moreover the Trial Chamber noted in paragraph 32 of its 29th July Decision on the Prosecution's first application to call additional witnesses, that the Trial Chamber would approach the determination of this issue with "due regard for the doctrine of equality of arms". That this should be so is clear. It is a fundamental aspect of a fair trial that criminal proceedings, including the elements of proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the Prosecution and Defence. The right to an adversarial trial means, in a criminal case, that both Prosecution and Defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (Jasper v United Kingdom, 30 E.H.R.R. 441 at pp 441). Whilst it is accepted that this right may be restricted so as to safeguard an important public interest "only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6[5]" (Jasper (supra) at pp 442).

5. It is submitted that there is no public interest in not allowing the Defence and the Trial Chamber this evidence so as to properly and comprehensively consider this issue. The Defence anticipate that the Prosecution may seek to argue that Rule 66(A) (ii) does not permit them to disclose these statements in the absence of a showing of good cause. The Defence submit that such an interpretation of Rule 66 would be incompatible with Article 17 of the Statute and the accused's right to an equality of arms and ought therefore to be resisted. Disclosure, as defined by Rule 66(A) (ii) ought to be interpreted to mean "leave to call" and not simply "service" of the statement upon the Defence.

FURTHER SUBMISSIONS ON THE EQUALITY OF ARMS

6. In paragraph 13 of the Prosecution application the Prosecution note that the Accused's rights are protected since "they will have significant time to examine and prepare for these additional witnesses... especially true given the recent significant reduction of the number of witnesses". This might be true if the Defence resources had not been comprehensively stretched by this case and the attempts to prepare for in excess of 170 witnesses. The present reduced list still represents a task which is practically impossible given the resources allowed. The fact that the Prosecution allege that their intended witnesses will each give new, direct and unique evidence represents therefore 100's of new legal hours to fully "prepare"[6] these witnesses.

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unwillingness of TFI – 366 to testify until recently – a problem which it is submitted affects the Defence more than the Prosecution.

[5] of the European Convention of Human Rights.

[6] Preparation includes taking instructions; investigating; preparing for cross examination; cross referencing; seeking defence witnesses to rebut this new evidence.

FURTHER SUBMISSIONS[7]

TF1- 366

7. The Defence note that the arguments relied upon in relation to this witness (and TF1 – 367 and 368) in relation to troop movements and radio communications between the AFRC and the RUF are the same as the arguments used to seek the addition of the radio operators TF1-359, TF1 – 60, TF1-361 and TF1 – 363 (see para 8(i) – (iii) of the application dated 12th July 2004). Moreover the evidence of TFI – 366 is essentially the same – and relates to exactly the same counts - as that covered by these witnesses.

8. Moreover the evidence of shipments of arms which this witness will testify to is dealt with by witness TFI – 355. The evidence Mr Sesay's alleged role in diamond mining is dealt with by TF1 – 078, 071, 304, 077, 012, 132, 045, 151, 153, 033, 167 and 334. The evidence of this witness is therefore simply a replacement or corroboration of existing evidence. *In reality the Defence suspicion (not able to be confirmed in the absence of seeing the evidence) is that the present application reflects the view of the Prosecution that these latter witnesses will be more credible witnesses rather than new witnesses.*

TF1 - 367

9. The Defence reiterate para 7 above.

10. The Defence also note that the phrase "The witness will give evidence concerning the overall responsibility of the Accused Issa Sesay as a senior RUF commander in Kailahun District"[8] is too vague to provide any meaningful insight within the context of these complex issues. It could relate to any period in the indictment and could include a wide array of alleged behaviour. It is impossible, without more specificity, to properly assess this evidence within the criteria from Nahimana[9] and thereafter to protect the rights of the accused. In any event the Defence would highlight that the Prosecution already rely upon a significant swathe of evidence in relation to the accused Sesay within Kailahun including TF1 – 114, 330, 313, 208, 189, 168 and 210.

11. Moreover any attempt by the Prosecution to assert (as they do in relation to all three proposed witnesses) that evidence of Sesay coordinating and taking part in diamond transactions in Liberia is unique or new is demonstrably false. As the Trial Chamber will recall a great deal of the October 2004 session was taken up

[7] The Defence would wish to reserve their right to make further submissions in the event that the Trial Chamber agree with the Defence submission that the Defence should be able to see the evidence before making submissions upon it.
[8] See pp.5 last sentence of Prosecution application.
[9] See Prosecution application para 7.

with this evidence (Mr Bility and General Tarnue). The Defence would submit that the present application has the hall marks of an attempt by the Prosecution to corroborate evidence which was, in large part, both weak and incredible. It is the submission of the Defence that to allow the Prosecution's present application would be to allow them to shore up their evidence and to tailor their case according to the inroads made by the Defence during cross examination.

TF1 368

12. The Defence reiterate the submissions made above. The evidence of this intended witness is not new or unique. It can be found in TF1 – 78, 071, 304, 077, 012, 132, 045, 151, 153, 033, 167, 334 and is therefore a duplication.

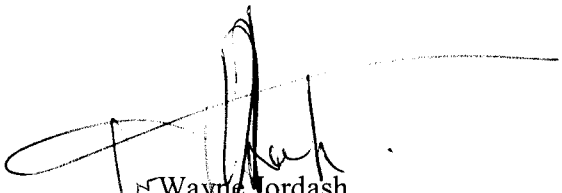
CONCLUSION

13. The Defence submit that no good cause exists to allow the witnesses to be added to the Prosecution witness list. In the first place the Prosecution should have subjected its evidence to proper analysis by serving them on the Defence. In the event that the Trial Chamber rules against their application the statements can be set aside without prejudice to the Prosecution or the Defence. In the second place their submissions provide inadequate information to conduct the careful balancing exercise necessary before the witnesses can be relied upon. Thirdly what information is supplied about the reasons for the late applications is inadequate and amounts to no more that an assertion that it took a while to locate the evidence.[10] Fourthly the Prosecution's attempt to categorise this evidence as new *(in terms of their not being other evidence dealing with this element of the accused's alleged responsibility)* is clearly inaccurate.

14. The Defence submit that the granting of this application, without more, would effectively lower the threshold of good cause pursuant to Rule 66. The test would simply be reduced to two simple questions: Do the Prosecution say that they have had difficulty finding this evidence? And do they say that it is unique by virtue of it coming from a new witness? This would represent a usurpation of the role of the Trial Chamber and moreover is likely to represent a huge advantage for the Prosecution, now and in the future, with the corresponding prejudice to the rights of the accused.

[10] An argument used before and which can be used again in relation to **any** new evidence recovered. In fact, if the Prosecution's arguments are accepted the longer the delay the stronger their application. That is the longer they have been investigating the more they can assert difficulties in investigating and locating the evidence and the more likely they are to satisfy the "good cause" threshold. This is not the purpose of Rule 66(A) which is designed to expedite the Prosecution and not encourage (or justify) delay.

Dated this 3rd December 2004



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BOOK OF AUTHORITIES

Bagosora, Decision on Prosecution Motion for Additional Witnesses pursuant to Rule 73 bis(E), 26 June 2003, para. 14.