SCSL-2004-15-T

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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: 8 December 2004

THE PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL – 2004 – 15 – T

CONSOLIDATED PROSECUTION REPLY TO THE SESAY, KALLON, and GBAO DEFENCE RESPONSES TO THE PROSECUTION REQUEST FOR LEAVE TO CALL ADDITIONAL WITNESSES AND DISCLOSE ADDITIONAL WITNESS STATEMENTS, PURSUANT TO RULES 66(A)(ii) and 73*bis*(E)

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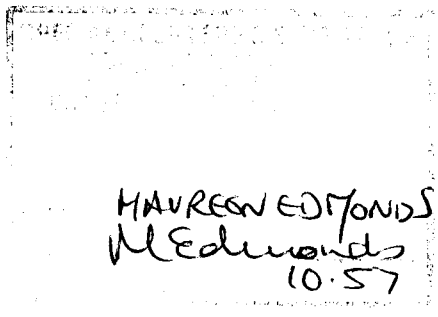

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I. INTRODUCTION

1. The Defence Responses contain objections to the Prosecution Request For Leave To Call Additional Witnesses And Disclose Additional Witness Statements, Pursuant to Rules 66(A)(ii) and 73bis(E) filed on 23 November, 2004 (the "Motion") shared by two or more of the Accused, and objections raised by particular Accused.

2. The common objections to the Motion that are raised by two or more Accused will be replied to first.

II. COMMON OBJECTIONS

a) Non-Disclosure of the Statements of the Proposed Witnesses

3. The Accused say that the Prosecution must disclose the statements of the proposed Additional Witnesses with its Motion so that the Defence and the Court can review the statements. This objection applies only to witnesses TF1-366 and TF1-368, as the statement of witness TF1-367 was disclosed on 9 November 2004, under Rule 68.

4. The Accused made this same argument, unsuccessfully, in a prior application. In its 29 July 2004 decision this Court summarized the Accused's objection:

> 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.[1]

5. This Court summarized the Prosecution Reply in the same decision:

> 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.

6. In the 29 July 2004 decision this Court held:

> 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 is in the interests of justice to add these witnesses to the Modified Witness List.
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> 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.

7. The Prosecution wishes to make clear that if this Court holds the view that the Court should review the statements of the proposed Additional Witnesses prior to rendering a decision on the Motion, the Prosecution will submit them to the Chamber.

8. However, the drafters of Rule 66(A)(ii) may have intended that the statements of proposed additional witnesses should not be disclosed until after good cause has been shown on the policy ground that persons, who by order of the Court

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[1] *Prosecutor v. Sesay, Kallon and Gbao*, 29 July 2004

cannot be added to the witness list and cannot testify, should be protected from any improper act directed toward as a result of the information in their statement.

b) Equality of Arms

9. Each of the Accused assert that the doctrine of 'equality of arms' would be undermined if the Motion is granted.

10. This Court commented on the doctrine of 'equality of arms' in the context of a request by the Prosecution to add witnesses in its 29 July 2004 decision.[2]

11. The Accused have been notified that the Prosecution has reduced its witness list by over 70 witnesses. There are far fewer Prosecution witnesses for which the Accused need prepare. The Accused are also aware that the earliest the proposed Additional Witnesses could testify would be during the March 2005 trial session. Four months is a very substantial period of time to prepare for a witness. In the event the Court is concerned that four months may not be adequate time for the Accused to prepare then the appropriate remedy is to indicate by way of direction to the Prosecution that the proposed Additional Witnesses should not be called until after a date given.

12. The power to "facilitate the truth finding process" referred to in *Delalic*,[3] *supra*, includes the power to permit relevant testimony to be heard. The defence is entitled to adequate time to prepare for such testimony, but the truth finding process can only be facilitated if relevant evidence is heard.

13. In any criminal proceeding it is common for investigations to continue. In certain investigations evidence that is obtained after charges have been laid or the trial commenced may be exculpatory and lead to a charge being stayed or assist the accused in their defence. It is essential to "facilitate the truth finding process" that investigations

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[2] *Prosecutor v. Sesay, Kallon and Gbao*, 29 July 2004, where this Court held:

> 32. Taking our judicial cue from reasoning of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the *Delalic* case, 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".

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

continue, for the sake of an accused as much as for the prosecution. It is particularly true for large investigations. So long as an accused is not unfairly surprised by the evidence, which test may include *mala fides* on the part of the prosecution, the additional witness who can give such evidence should be permitted to testify.

14. This Court has repeatedly referred to the conditions that continue to exist in Sierra Leone that may cause citizens to feel concern should they testify. The Motion makes clear that the investigatory efforts that have been made with respect to the proposed Additional Witnesses were entirely reasonable and appropriate.

15. The Prosecution wishes to caution the Court with regard to the phrasing of a particular suggestion in the Response of the Accused Sesay, which states:

> 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 ....

16. Such an assessment should not be part of the Court's consideration of the merits of the Motion. Issues of how an accused uses the resources made available to him are properly left to the accused, and questions of the amount that should be made available to an accused in the context of the Special Court For Sierra Leone should be addressed to the entity with jurisdiction over such allocation, the Registry. The Court's overriding concern is trial fairness, not equal distribution of money. The fact that the Accused Sesay gives no information at all to indicate how he allocates resources, or those available to the Defence, which may include resources other than those provided through the Office of the Principal Defender, may raise other concerns for the Court.

c) Cumulative and Corroborative Evidence

17. Although it appears to be raised by each Accused, the Response of the Accused Gbao seems to most clearly express the objection that the Motion should be dismissed because the evidence of the proposed Additional Witnesses would be "cumulative or corroborative evidence" (see paras. 18-21 and 24).

18. Each of the Accused misstates, inadvertently, the Prosecution advice of how the evidence of the proposed Additional Witnesses corresponds to the paragraphs of

the Amended Consolidated Indictment. The Prosecution stated that the key paragraphs "to which the witness will testify include, but is not limited to, paragraphs 34, 36, 37, 38, and 39". The Accused state the proposed Additional Witnesses will testify "in support of paragraphs 34, 36, 37, 38 and 39 of the Indictment" (para. 1, Gbao Response). Those paragraphs are broad, and significant components of the Amended Consolidated Indictment, but the Prosecution never restricted the relevance of the proposed Additional Witnesses' evidence to those paragraphs.

19. The Prosecution does not believe that this Court has held that a witness who gives corroborative evidence can never be added as a witness. Where the issue is significant it remains open to the Prosecution to show "good cause" to add a witness who might corroborate contested testimony on an important and material allegation. The Gbao Response (at para. 18) refers to a limited abstract from para. 34 of this Chamber's decision of 29 July 2004. The paragraph, reproduced in full, states:

> 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.

20. The Prosecution recognizes that this is a Reply, which traditionally has a limited and specific scope, therefore, we simply urge the Chamber to consider the submissions made in the Motion that demonstrate the unique and direct nature of the evidence of the proposed Additional Witnesses, whose testimony "...would not be a repetition of evidence of other witnesses...." The proposed Additional Witnesses are insiders who can give specific, unique and direct evidence against all three Accused.

21. At para. 22 of the Gbao Response and paras. 7 to 12 of the Sesay Response representations are made with respect to other witnesses who address issues that must be proved by the Prosecution. The Prosecution is constrained by its obligation not to disclose the identity of these witnesses from providing further specific details of

the witnesses' testimony. We rely on the representations made in the Motion and at this point confine our submission to the following:

a) TF1-366 will provide evidence of individual criminal responsibility of the Accused Sesay and the Accused Gbao in regard to the murder of alleged Kamajors in Kailahun District;

b) TF1-367 will provide evidence of individual criminal responsibility of the Accused Kallon in relation to crimes in Bo, and the Accused Gbao in relation to killings in Kailahun; and

c) TF1-368 will provide evidence of individual criminal responsibility of the Accused Sesay in regard to forced labour and diamond mining, and the authenticity of a log book of diamond production.

III. OBJECTIONS BY THE ACCUSED KALLON

22. The Accused Kallon asserts at para. 24 of his Response that 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". The three proposed Additional Witnesses would, if the Motion is granted, be "core" witnesses. This complaint is without merit. We suspect that it was abundantly clear to the Accused Kallon that the purpose of the Motion is to have the proposed Additional Witnesses testify at the trial. As a result, they would be on the "core" witness list.

23. The Prosecution categorically denies the statement at para. 25 of the Kallon Response, which alleges that:

> 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 [*sic*], 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.

24. The "core" witness list that was filed by the Prosecution listed 102 witnesses. The purpose of the "back-up" list is to have witnesses available in case a "core" witness does not testify. As a result of the Court's Order To Prosecution

Concerning Renewed Witness List, dated 3 December 2004, the number of "core" witnesses is 98.

25. We are taken aback that counsel would suggest that there was any attempt to lead them up the garden path. The Prosecution further denies having any "oblique motive". The Prosecution made a significant reduction in the list. That is what the Prosecution said it would do and what it has done.

26. The Accused Kallon raises what can only be described as a novel proposition at para. 30 of the Kallon Response. He says that requests to add witnesses must be made with assurances to the Defence that the proposed additional witnesses have not already been approached by the Defence. This startlingly unique claim flies in the face of the law and common sense. If witnesses want to talk to both parties they can. Investigators rarely tell the opposing party who they are interviewing, and if a witness does not want his name known to an opposing party that is his right, although the solicitor may have a separate obligation to disclose the witness' evidence. We do not know what concern or practice the Accused Kallon seeks to redress.

IV. OBJECTIONS BY THE ACCUSED GBAO

27. The Accused Gbao argues that the Prosecution breached Rule 66(D). We believe that there is a typographical error in the Gbao Response as the Rules do not contain a Rule 66(D). The Rule being referred to is obviously Rule 67(D). The Accused Gbao suggests that where the Prosecution fails to promptly disclose "evidence under Rule 66(D) [*sic*] it would generally not be in the interests of justice to permit the calling of the witness" (para. 5 of the Gbao Response).

28. The Rules say something quite different though.[4] Rule 67 must be read in the context of the obligations imposed on the Prosecution by Rule 66. Rule 66 states that

[4] **Rule 66: Disclosure of materials by the Prosecutor (amended 29 May 2004)**
(A) Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:

i. Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial.
ii. Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial

the Prosecution shall produce the statements of the witnesses that the Prosecution **"intends to call"**, and has an ongoing obligation to continuously disclose the statements of the witnesses it **"intends to call"**. The Prosecution is not obliged to produce every statement in its possession.

29. The requirement imposed on the Prosecution and the Defence by Rule 67(D) is that if either party discovers additional evidence or information of witnesses the party "intends to call", the opposing party shall be promptly notified. Of course, the Prosecution obligation goes one step further because it is obliged to disclose Rule 68 evidence regardless of whether it intends to call the person as a witness.

30. The fact that a witness is asked to give a statement, or even several statements, does not mean the Prosecution intends to call the person as a witness. That decision is only made after a thorough review of the person's evidence, normally a review carried out by a number of prosecutors independent of each other, and a comparative analysis of that evidence with other evidence the Prosecution intends to call. The Prosecution formed the intention to call the three proposed Additional Witnesses shortly before the Motion was filed on 23 November 2004.

31. The Prosecution has complied with its obligation under Rule 67(D), and has promptly notified the Defence and the Chamber of the existence of the evidence of proposed Additional Witnesses.

32. The Accused Gbao says there would be an element of surprise if the proposed Additional Witnesses were allowed to testify (para. 2, Gbao Response). He does so without referring in any way to how the so-called element of surprise would

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> Chamber either before or after the commencement of the trial, upon good clause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence within a prescribed time.
>
> ...
>
> **Rule 67: Reciprocal Disclosure of Evidence** (*amended 7 March 2003*)
> Subject to the provisions of Rules 53 and 69:
>
> ...
>
> (D) If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.

cause prejudice to the accused. At its strongest the assertion is speculative. It should be rejected by this Court.

33. The Accused Gbao takes the position that the Prosecution has wrongly delayed disclosing the statements of the proposed Additional Witnesses, and it appears that by inference the Accused Gbao also takes the point that the Prosecution has wrongly delayed bringing this Motion (paras. 6, 7, 9 and 14 of the Gbao Response). The Prosecution reiterates that all statements under go extensive review by more than one prosecutor. The review includes an assessment of the information contained in the statement, whether the witness is prepared to testify, a comparison of the witness' evidence with other witnesses, and an evaluation of whether the Prosecution can show "good cause" that the witness should be added to the Prosecution witness list.

34. The dates on which the witness statements were taken were: TF1-366 – 5 February 2004 and 30 August 2004; TF1-367 – 20 August 2004 (disclosed on 9 November 2004); and TF1-368 – 4 September 2004.

35. These are the dates on which the witness was interviewed. Generally, there is a delay of about 5 to 20 days from the date the interview takes place to the date when the typed statement is finalized and delivered to a prosecutor. Once it is delivered to a prosecutor the review and assessment process begin. The Prosecution continues to review a number of incoming statements. Only those which provide new and direct evidence of culpability are considered for "good cause" motions. The Prosecution has not intentionally delayed the disclosure of the statements. It has acted appropriately.

36. The Prosecution categorically denies that it "has not fulfilled its disclosure obligations in good faith by concealing these statements from the defence for so long ..." (para. 3, Gbao Response). The Prosecutor has a duty to the Court to review the evidence, and only if the evidence meets certain criteria to bring on a "good cause" motion. That review is done with care and diligence. In addition, the Prosecutor also has an obligation to citizens who come forward in good faith, although sometimes tentatively, to speak to the Prosecutor not to disclose their evidence until they have agreed to testify, with the caveat that Rule 68 evidence must be disclosed.

CONCLUSION

37. The Prosecution says that "good cause" has been shown that the proposed Additional Witnesses have direct and unique evidence on significant issues pled in the Amended Consolidated Indictment and asks that they be added to the Prosecution's list of core witnesses.

All of which is respectfully submitted,

Filed in Freetown, 8 December 2004

Luc Côté

Pete Harrison