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: **23 February 2006**

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 04 – 15 – T

DEFENCE MOTION REQUESTING THE EXCLUSION OF EVIDENCE (AS INDICATED IN ANNEX A) ARISING FROM THE ADDITIONAL INFORMATION PROVDED BY WITNESS TF1-168 (14th, 21st January and 4th February 2006), TF1-165 (6th/7th February 2006) AND TF1-041 (9th, 10th 13th February 2006)

Office of the Prosecutor

Desmond De Silva QC
Christopher Staker
James C Johnson

Defence

Wayne Jordash
Sareta Ashraph
Chantal Refahi

Public Document

Introduction

1. On various dates[1] pursuant to the Trial Chamber's Rule 66 order (which was supposed to oblige the Prosecution to serve the totality of their evidence on or before 26th April 2004) the Prosecution served a number of original and supplementary statements relating to witnesses TF1-168, TF1-165 and TF1-041. On various dates between February 2004 and February 2006 the Prosecution have actively re-interviewed these witnesses with the calculated aims of increasing the evidence against the Accused and moulding their case according to their ongoing assessment of the way in which their case has progressed.

2. The Defence submits that the supplemental evidence ought to be characterised as new[2] evidence. The Defence have received little or no prior notice of these alleged acts and moreover have no way of knowing the legal characterisation which the Prosecution allege should be given to these alleged acts. The Defence are unable to defend allegations, properly or comprehensively, without notice, with respect to each act, concerning what is the nature of the alleged criminal responsibility and how the Prosecution intends to make out its case. The Defence requests that the Trial Chamber exclude the evidence as new and/or as lacking the fundamental notice which would enable a fair trial pursuant to Article 17(4) of the Statute of Sierra Leone ("The Statute") - unless the Prosecution show good cause pursuant to Rule 66 (A) of the Rules of Procedure of Evidence.

The Law

3. Article 17(4) of the Statute states inter alia: "In the determination of any charge against the Accused pursuant to the Present Statute he or she shall be entitled to the following minimum guarantees, in full equality:

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[1] Please see Annex A: table of evidence and dates of disclosure.
[2] *Prosecutor v. Bagasora*, ICTR-98-41-T: Decision on the Admissibility of Evidence of Witness DP, 18 November 2003 ("the Bagasora Decision").

(a) To be informed promptly and in detail in language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence:

(c) To be tried without due delay.

4. The Defence refer the Trial Chamber to the applicable law section in its Motion (i) requesting the exclusion of evidence arising from the additional information provided by witness TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288 and (ii) in its Reply to the Prosecution Response to Defence Motion requesting exclusion of additional information of TF1-117. The Defence submit that the law referred to therein is trite law, the application of which would safeguard the rights of the Accused pursuant to Article 17(4).

5. Additionally the Defence submit the following principles are fundamental minimum guarantees in any criminal trial, without which a Trial is not fair:

(a) There is an absolute obligation on the Prosecution to set out with detailed particularisation, either in the Indictment[3] or the Pre-trial Brief;[4] the facts which form the basis of the case against the Accused;

(b) That disclosure of all the facts (or the evidentiary material) which forms the case against the Accused should be served promptly and in any event within a reasonable time and before the commencement of the trial;[5]

(c) The Prosecution is expected to know its case before it goes to trial;[6]

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[3] *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.
[4] *Prosecutor v. Krajisnik*, Case No. IT-0039 & 40, Decision Concerning Preliminary Motion on the Form of the Indictment, 1st August 2000, para. 13.
[5] *Prosecutor v. Nyiramusuhuko*, Case No. ICTR-97-29-T, Decision on Defence Motion for Disclosure of Evidence, 1st November 2000, para. 38.
[6] *Prosecutor v. Kupreskic*, Judgement, Case No. IT-95-16-A, 23rd October 2001, para. 114.

(d) Any new allegation of a material fact must be pleaded in the indictment if the Prosecution is to lead evidence about it at trial[7] and,

(e) At some point the Accused must be able to proceed with preparing his case in full knowledge of all the charges that have been or will be brought against him.[8]

6. As the United States Supreme Court noted in 1875,

"In criminal Cases...the accused has the constitutional right "to be informed of the nature and cause of the accusation". Amend. VI. In *United States v. Mills*, 7 Pet.142, this was construed to mean, that the indictment must set forth the offence "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in *United States v. Cook*, 17 Wall. 174, that "every ingredient of which the offence is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading, that where it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,-it must descend to particulars. 1 Arch.Cr.Pr. and PL., 291. The object of the indictment is, first to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intents; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances" and

[7] *Prosecutor v. Halilovic*, Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17th December 2004, para. 20.
[8] *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.

"Whether a particular crime be... (punishable or not)... is a question of law. The accused has, therefore the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment... whether one is so or not is a question of law, to be decide by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused" and

"Every offence consists of certain acts done or omitted under certain circumstances; and, in the indictment for the offence, it is not sufficient to charge the accused generally with having committed the offence, but all the circumstances constituting the offence must be set forth. Arch.Cr.Pl., ed., 43."[9]

Submissions on the Additional Statements

The additional statements are New in relation to the Original Statements

7. New allegations (those that do not appear in any form in the witness's original statements) are as follows: the RUF left their child combatants in the CARITAS program to be fed and that Sesay, Kallon and Gbao were responsible for the abduction of the UN peacekeepers (TF1-165), Peleto was Sesay's senior bodyguard, Sesay and all the big commanders would send their bodyguards to various places and have them report directly back to them, sometimes in secret, from Bumpe to Koidu there was a great deal of looting, that civilians at the camps set up around Bumpe were being used to mine and carry loads and wounded soldiers and that the 2 pile system was not being used in Kono (TF1-041) and Sesay was responsible for drowning 30 civilians, that Peleto was one of the senior bodyguards for Sesay was the Operations Man to Sesay who was sent on missions to arrest people and to take people's property and that Sesay had many armed SBU's between the ages of 10 and 16 (TF1 –168).

[9] *U.S. v. Cruikshank*, 92 U.S.542 (1875)

The Indictment and the Pre-trial Brief

8. The allegations are germane to the general allegations which are set out in pages 2-8 of the Amended Consolidated Indictment and also as set out in the charges as specified and particularised in Counts 1 – 18 thereof. This does not connote sufficient notice of the factual allegations, which are the subject of this Motion, since it is undeniably the case that any crime by any rebel during the time of the indictment is germane. The Defence have actively sought examples of crimes, which would not be germane but have been unable think of any.

9. Thus the Pre-trial Brief ought to have identified the factual allegations, which are the subject of this Motion, and the legal characterisation, which they are intended to support. As noted in the case of *Pelissier and Sassi v. France*[10] heard by the European Court of Human Rights, referring to Article 6 of the European Convention on Human Rights (ECHR),[11]

"The Court observes that the provisions of paragraph 3(a) of Article 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant". Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him (see the *Kamasinski v. Austria* judgement of 19th December 1989, Series A no. 168, pp. 36-37, s79). Article 6(3) of the Convention affords the defendant the right to be informed not only of the cause of the accusation that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should, as the Commission rightly stated, be detailed."[12]

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[10] 51 ECHR 1999 (Application No. 25444/94)

[11] Article 6 – Right to a fair trial. Article 6(3) inter alia states: Everyone charged with a criminal offence has the following minimum rights:

a. To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him:
b. To have adequate time and facilities for the preparation of his defence;

[12] Supra para. 51.

"The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential pre-requisite for ensuring the proceedings are fair".[13]

"(t)he Court considers that the subparagraphs (a) and (b) of Article 6(3) are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence."[14]

10. Neither the Indictment nor the Pre-trial Brief provides notice of the majority of the factual allegations and only tangentially provide generalised notice of the remaining allegations, now disclosed in the form of so-called proofing notes.

11. The first accused must inevitably face irredeemable prejudice in the light of this type of disclosure. As noted in the *Brdanin and Talic*[15] when considering the form of an Indictment (and not the more detailed disclosure which ought to be provided in a Pre-trial Brief),

"In a case based upon individual responsibility where the accused is alleged to have *personally* done the acts pleaded in the indictment, the material facts must be pleaded with precision – the information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the places and the approximate date of those acts and the means by which the offence was committed. Where the Prosecution is unable to specify any of these matters, it cannot be obliged to perform the impossible. Where the precise date cannot be specified, a *reasonable* range of dates may be sufficient. Where a precise identification of the victim or victims cannot be specified, a reference to their category or position as a group may be sufficient. Where the prosecution is unable to specify matters such as these, it

[13] Supra para. 52
[14] Supra. para.54.
[15] *Prosecutor v. Brdanin and Talic*, IT-99-36, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20th February 2001, para. 20-22.

must make clear in the indictment that it is unable to do so and that it has provided the best information it can".

12. In other words at the very least allegations such as that made by TF1-168, namely that the first accused was responsible for drowning 30 civilians should ordinarily be pleaded in an indictment. In the event that the indictment does not contain such particularity then the allegation should be included in the Prosecution's pre-trial Brief[16]

13. The Prosecution's abject failure to do either and further not disclosure the allegation (and hundreds more like it) could never be consistent with the evolving jurisprudence of the ad hoc tribunals and sets new and unenviable standards for unfairness.

Moulding of the Prosecution case

14. The present disclosure demonstrates starkly the manipulation of the process by the Prosecution who continue to take advantage of their non-disclosure and their misleading Pre-trial Brief to continuously mould the case against the Accused. On 15th November 2005, TF1- 366 gave evidence in which he asserted that;

    (a) All the big commanders would send their bodyguards to various places and have them report directly back to them;
    (b) Peleto was one of the senior bodyguards for Sesay and;
    (c) Peleto was the Operations man for Sesay sent on missions to take people's property (amongst other activities)[17].

15. The evidence TF1-366 gave was the very first time the Prosecution had disclosed these specific allegations. The Prosecution, aware of how unreliable TF1-366's evidence was, but cognisant of how important it is to their case to

[16] *Prosecutor v. Krajisnik*, Case No. IT-0039 & 40, Decision Concerning Preliminary Motion on the Form of the Indictment, 1st August 2000, para. 13.
[17] RUF Trial transcript dated 15th November 2005, p.69-70

establish a system of subordinates reporting to commanders, have deliberately sought out new evidence to support this unreliable witness on perhaps the most crucial aspects of his evidence. It is unfair, improper and makes a fair trial impossible.

16. As noted Trial Chamber II at the ICTY in the case of *Brdanin & Talic*,[18]

"This trial has become very complex. That is the inevitable consequence of the very general case, which the prosecution have pleaded. Unfortunately, however, the prosecution appears to have adopted a policy of avoiding a disclosure of as much of that case as possible until as late as possible. The Trial Chamber draws the inference that the prosecution has done so to enable it to mould its case in a substantial way during the trial, according to how its evidence actually turns out. The only other explanation for the recalcitrant attitude which the prosecution is exhibiting is that it still does not know what its case is. The Trial Chamber would be hesitant to draw such an inference. Both the Trial Chamber and the accused are entitled to know what the prosecution case is from the outset. The Trial Chamber acknowledges that the evidence may sometimes turn out differently to the expectations of the prosecution, and that it may be necessary in the interests of justice to permit the prosecution to change its case so as to adjust it to the evidence. But such changes must be made openly; if necessary by amendments to the indictment...they may not be made covertly, to the detriment of the interests of justice".[19]

"There has been, and there remain, enormous problems posed by the flood of paper which is still in the process of being disclosed by the prosecution in accordance with what it sees to be its obligations under the Rules. It appears that the prosecution is also either unwilling or unable to explain to the defence even in general terms the possible relevance of this material. It is obvious that any fair trial in the present case (with all of its complexities) within a

[18] *Prosecutor v. Brdanin and Talic*, IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26th June 2001, para. 11.
[19] Supra. para. 11.

reasonable period will require a strict insistence by the Trial Chamber that the prosecution case is made very clear to the accused (and to the Trial Chamber itself) from the outset, and that such case is not thereafter *unfairly* enlarged by the chance introduction of evidence which is not presently available, particularly if it were to be enlarged by the radical extent contemplated by the prosecution".[20] (Underlining added).

17. The Trial Chamber's comments in *Brdanin & Talic* could not be more apposite. It is startling to compare those comments – made some months before the start of the trial – and the conduct of the Prosecution in this case. The Prosecution continue to take advantage of their broad pleading and incomplete pre-trial briefs to unfairly enlarge their case; the enlargements are radical, there is no end in sight and no likely prospect of fairness. Neither the accused nor the Trial Chamber could possibly know what the factual and legal basis of the case against Sesay is for the simple reason that the Prosecution do not know. It is thus unclear to everyone, including the accused, how the additional evidence supports the Prosecution case, and how it will be legally categorised. It is trial by ambush and unprecedented. The case against Mr Sesay will be the one which is the one which is most expedient and the one which the Prosecution decide might stand up to scrutiny.

REQUEST

18. The Defence urge the Trial Chamber to exclude all supplementary evidence, if it could form the basis of a different factual basis for conviction on any of the counts and/or all new evidence. In particular the additional evidence the subject of this Motion should be excluded as "new" evidence.

Dated 23 February 2006

Wayne Jordash
Sareta Ashraph
Chantal Refahi

[20] Supra. para. 12.

Index of Authorities

Cases

Prosecutor v Bagasora, ICTR-98-41-T: "Decision on the Admissibility of Evidence of Witness DP", 18 November 2003 (available on ICTR website)

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 (available on ICTR website).

Prosecutor v Krajisnik, IT-0039 & 40, "Decision Concerning Preliminary Motion on the Form of the Indictment", 1st August 2000 (available on ICTY website).

Prosecutor v Nyiramusuhuko, ICTR-97-29-T, "Decision on Defence Motion for Disclosure of Evidence", 1st November 2000 (available on ICTR website).

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Prosecutor v Delic, 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 (available on ICTY website).

U.S. v. Cruikshank, 92 U.S.542 (1875) (http://justia.us/us/92/542/case.html)

Pelissier and Sassi v. France, 51 ECHR 1999 [Application No. 25444/94] (find attached to this motion).

Prosecutor v Brdanin and Talic, IT-99-36, "Decision on Objections by Momir Talic to the Form of the Amended Indictment", 20th February 2001 (available on ICTY website).

Prosecutor v Krajisnik, Case No. IT-0039 & 40, "Decision Concerning Preliminary Motion on the Form of the Indictment", 1st August 2000 (available on ICTY website).

Prosecutor v. Brdanin and Talic, IT-99-36, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26th June 2001 (available on ICTY website).

Annex A: Table of Evidence and Dates of Disclosure

Session Feb-April 2006 TFI No	**Date of Orig Statement and Supp Statements pre-26th April 04**	**Allegations against IS contained in Orig Statement and Supp Statements pre-26th April '04**	**Dates of Supp Statements post-26th April 2004**	**New Allegations against IS contained in Supp Statements post-26th April 04**
TFI 168	11th April 2003 [175 page interview transcript]	Witness makes no mention of Sesay being in charge of Kailahun in his original statement. Page 78: Witness states that Issa was across from him on the other side of the river along with other military leaders, witness mentions that at some point "they" opened fire but he makes no mention of civilians drowning. Witness makes no mention of Amara	14th, 21st Jan & 4th Feb 2006 [3 pages]	Paragraph 2: Witness alleges that at the time Bockarie went to Zogoda, around 1993, Sesay was in charge of Kailahun and CO Isaac was an advisor to Sesay in Kailahun. Witness alleges that Sankoh was the leader, under him was Mohamed Tarawallie, and under him Bockarie was in charge of Zagoda and Sesay in charge of Kailahun. Paragraph 3: Witness states that when he entered Sierra Leone from Guinea in March 1997, Sesay was on the Sierra Leone side of the river and was the 1st to fire his gun in the air and witness alleges that about 30 civilians drowned in the river due the panic from the gun shots. Paragraph 6: Witness states that

		Peleto in his original statement. Witness makes no mention of Sesay having SBU's in his original statement.		Amara Peleto was one of the senior bodyguards to Sesay and was an 'Operations Man' to Sesay. Witness alleges that Sesay sent him on missions to arrest people or to take people's possessions. Paragraph 7: Witness alleges that during his time in custody, Sesay had many armed SBU's with him, between the ages of 10 and 16.
TFI 041	16th Jan 2003 (A) 08th Feb 2004 (B)	(A) Sman and Issa Sesay were in charge in Kono (A) In Makeni when waiting to be disarmed Sesay was the overall commander. (B) Witness confirms previous statement and states he has no alterations or alterations (typo could mean additions) to make	16th-24th May 2005 (a) Heading describes these as 'notes' from 6 interviews conducted over the course of several days by Chris Santora and translator Mr Yarmeh. Notes from an interview conducted by Mr Yameh alone, on 19th May '05, are also described as incorporated into these 'interview	(b) Paragraph 2: Witness alleges that Sesay left Freetown prior to the ECOMOG intervention (as he was on patrol in Kono), with his bodyguards including one Amara Salia, aka Peleto, whom witness believes was Sesay's senior bodyguard. Witness alleges that Peleto was a front-line or operations commander at Guinea Highway in Kono, and later became the mining commander. Witness asserts that all the big commanders like Bockarie, Sesay, Morris Kallon, Sman, Komba Gbundema would send their

			notes'. 9,10th, 13th Feb 2006 (b) [2 pages]	bodyguards to various places and have them report directly back to them, sometimes reporting in secret. (b) Paragraph 3: Witness alleges that all of the commanders including Sesay, JPK and Mike Lamin were aware of Operation Pay Yourself in Makeni. (b) Paragraph 3: Witness states that from Bumpe to Koidu there was a great deal of looting and the witness heard that civilians were being captured and killed. Witness also states that after the ECOMOG attack on Koidu, when the order was given to burn Koidu, the witness himself saw houses burned in Koidu and states that in addition to mining, civilians were also used to carry loads and wounded soldiers to Kailahun. (b) Paragraph 4: Witness alleges that after being forced out of Koidu by ECOMOG a number of camps were set up around Koidu including one called Papanni Ground where

				around 100 civilians were forced to mine or prospect for diamonds. (b) Paragraph 5: Witness alleges that during his time in the Kono district civilians were forced to carry loads, including weapons captured near the Guinea border. Witness also alleges that the G5 unit forced over 400 people men and women, 10 to 45 years old, to go for military training at Camp Lion. Kallon ordered many of them to go. (b) Paragraph 5: Witness states that civilians forced to mine in Kono were told to use the 2 pile system, witness alleges however, that the 2 pile system was not used and the RUF took all the diamonds.
TFI 165	28th Feb 2003		21st June 2004 (a)	(b) Paragraph 6: Witness states that on 10th April 2000, he attended the usual weekly meeting with the RUF and raised concern about the RUF disruption of the CARITAS Children's Programme. Witness alleges that the RUF appeared to

				leave their child combatants in the CARITAS programme to be housed and fed, and then pulled them out for operations when they were needed.
			6th-7th Feb 2006 (b) [4 pages]	(b) Paragraph 7: Witness alleges that he met with Sesay on 14th April 2000 and did not get the necessary RUF consent required by CARITAS in order to freely move children to Freetown for identification by relatives. Witness states it appeared from this meeting that the RUF did not understand the purpose of the CARITAS programme. Witness also states that in this meeting Sesay complained that Sankoh's movement had been restricted and expressed concern about the disarmament process of the SLA. (b) Paragraph 15: Witness alleges that Sesay, Kallon, Gbao and other senior figures, were responsible for the abduction of the UN peacekeepers.