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SCSL-2004-15-T  
(7290-7297)

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**SPECIAL COURT FOR SIERRA LEONE**

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

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

Registrar: Mr. Robin Vincent

Date filed: 27 July 2004

**THE PROSECUTOR**

**Against**

**ISSA HASSAN SESAY**

**MORRIS KALLON**

**AUGUSTINE GBAO**

**Case No. SCSL – 2004 – 15 – T**

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**PROSECUTION REPLY TO JOINT DEFENCE RESPONSE TO PROSECUTION  
REQUEST FOR LEAVE TO CALL ADDITIONAL WITNESSES AND DISCLOSE AN  
ADDITIONAL WITNESS STATEMENT**

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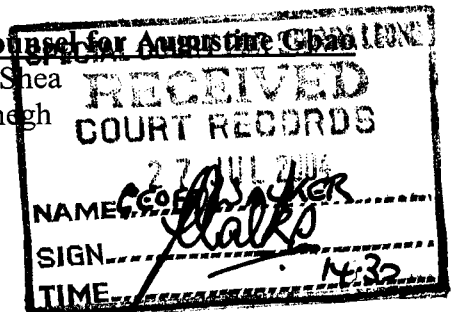
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**SPECIAL COURT FOR SIERRA LEONE**  
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The Prosecution files this reply to the Joint Defence Response to Prosecution Request for leave to call additional witnesses and disclose an additional witness statement.

**I. BACKGROUND**

1. On 1 April 2004, the Trial Chamber issued an Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial. On 26 April 2004, the Prosecution accordingly filed a list of the 266 witnesses it intends to call, which included a summary of each witness's expected testimony.
2. On 7 July 2004, the Trial Chamber issued an Order to Prosecution to Produce Witness List and Witness Summaries. Accordingly, on 12 July 2004, the Prosecution filed a modified list of the then 173 witnesses it intends to call, and the summaries of their expected testimonies.
3. On 12 July 2004, the Prosecution filed a Request for Leave to Call Additional Witnesses and Disclose an Additional Witness Statement (**'Motion'**).

4. On 22 July 2004, the Defence filed a Joint Defence Response to Prosecution Request for Leave to Call Additional Witnesses and Disclose an Additional Witness Statement (**‘Response’**). The Prosecution files this reply to the Defence Response.

## **II. DEFENCE SUBMISSIONS**

5. In the Response, the Defence argues for the dismissal of the Motion on the grounds that the Prosecution did not establish that there is good cause to call the additional witnesses. It bases its argument on the submissions that the Prosecution failed to: (a) annex the statement of its proposed additional witness TF1-359;<sup>1</sup> (b) provide a satisfactory explanation as to why its proposed additional witnesses were not included in its original Witness List; (c) specify to which form of liability the evidence provided by these witnesses pertains; (d) analyze the evidence provided by these witnesses to demonstrate its added value; and (e) establish that the rights of the Accused will not be prejudiced by the addition of these witnesses. In the alternative, the Defence argues that since all the proposed additional witnesses provide evidence relating to the same ground, only one of these witnesses should be called.

## **III. ARGUMENTS**

### ***No need to annex witness statement***

6. The Defence assertion that a decision with relation to proposed additional witness TF1-359 cannot be made without annexing the statement made by this witness is without merit. In accordance with the practice of the ICTY and ICTR, the Prosecution, in its Motion, provided summaries of the information to which each of the proposed additional witnesses will testify. Based on these summaries, the materiality of the information can be determined by the Chamber.
7. The Prosecution further submits that annexing the statement of the proposed additional witness TF1-359 would have amounted to its disclosure to the Defence. This would be in breach of Rule 66(A)(ii) of the Rules, according to which the Prosecution is obligated to “[c]ontinuously 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

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<sup>1</sup> Defence Response mistakenly refers to this witness as TF1-159, in paragraph 12 therein.

days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution.” Hence, since it is now “later than 60 days before the date for trial”, such disclosure can only be made pursuant to an order by the Chamber. While statements made by five of the six proposed additional witnesses were disclosed to the Defence, this was due to the fact that they contained exculpatory information, and therefore the Prosecution was obligated to disclose these statements pursuant to Rule 68 of the Rules.

8. It is additionally submitted, that in any event, failure to annex the statement of the proposed additional witness TF1-359, or indeed of any of the statements made by the proposed additional witnesses, does not in itself warrant the denial of the Prosecution Motion. In the event the Chamber deems it essential to review the statements, it may order the Prosecution to submit them to the Chamber.

***Satisfactory explanation for non-inclusion of witnesses to original list was provided***

9. The Prosecution submits that its Motion provides sufficient explanations as to why the proposed additional witnesses were not included in its original Witness List. The Prosecution reiterates its submissions in the Motion that difficulties in locating the names and locations of these particular witnesses account for their non-inclusion in the original Witness List. The Prosecution also reiterates its assertion that the difficulties in locating these witnesses were encountered despite the diligent efforts made by the Prosecution, in the course of its tenacious and on-going investigations.
10. The Prosecution further submits that in accordance with the jurisprudence of the ICTY and ICTR, the lateness of the request to add witnesses does not constitute a determining factor in deciding whether to grant the request.<sup>2</sup> Lateness has been found to be justified when the proposed additional witnesses had only recently become available or when they were identified as a result of an on-going investigation.<sup>3</sup>

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<sup>2</sup> *Prosecutor v. Bagasora et al*, ICTR-98-41-T, Decision on Prosecutor’s Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E), 21 May 2004 (*‘Bagasora, 21 May 2004’*), para. 11.

<sup>3</sup> *Prosecutor v. Nahimana et al*, ICTR-99-52-I, Decision on the Prosecutor’s Oral Motion for Leave to amend the list of selected witnesses, 26 June 2001 (*‘Nahimana, 26 June 2001’*), para. 20; *Bagasora*, 21 May 2004, para. 10; *Prosecutor v. Delalic et al*, ICTY-96-21-T, Decision on Confidential Motion to Seek Leave to Call Additional Witnesses, 4 September 1997 (*‘Delalic, 4 Sep. 1997’*), para. 10.

***No need to specify the form of liability to which the evidence pertains***

11. The Prosecution submits that the Indictment clearly states that all of the charges alleged therein are based both on the direct responsibility of the Accused under Article 6(1) (including under the theory of joint criminal enterprise) and on their command responsibility under Article 6(3). It is therefore submitted that there is no need to specify, in the Motion, the form of liability to which the Prosecution is intending to connect the evidence of the proposed additional witnesses. In any event, failure to specify the form of liability to which the evidence pertains does not constitute a ground to deny the Motion.

***Added value of statement was demonstrated***

12. The Prosecution submits that the materiality of the evidence provided by the proposed additional witnesses is established in its Motion. In accordance with the jurisprudence of the ICTY and ICTR, there is therefore no need to analyze their evidence at this point, nor is it necessary to compare their evidence to that provided by other witnesses.<sup>4</sup> The Prosecution reiterates its submissions in paragraph 8 of its Motion, and emphasizes that the summaries provided therein, of the evidence presented by the proposed additional witnesses, demonstrate the materiality of this evidence.
13. The Prosecution further submits that the statements of five out of the six proposed additional witnesses were disclosed to the Defence pursuant to Rule 68 of the Rules, allowing the Defence to make a substantive showing that the evidence provided by these witnesses is not material to the Prosecution's case. Failure to do so by the Defence in its Response indicates that the Defence argument is unsubstantiated.
14. It is emphasized by the Prosecution that according to the jurisprudence of the ICTY and ICTR, in determining whether there exists "good cause" for calling additional witnesses, the core consideration is the materiality of the evidence provided by these witnesses.<sup>5</sup>

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<sup>4</sup> *Bagasora*, 21 May 2004; *Delalic*, 4 Sep. 1997; *Nahimana*, 26 June 2001; *Prosecutor v Nahimana et al*, ICTR-99-52-I, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001.

<sup>5</sup> *Delalic*, 4 Sep. 1997, para. 7: "Where the testimony of a witness is important to the Prosecution or the Defence, the Trial Chamber will ensure that such witness is heard, subject, naturally, to the limits prescribed in the Statute of the International Tribunal and Rules".

***The rights of the Accused will not be prejudiced by the addition of witnesses***

15. The Prosecution reiterated its submissions in paragraph 10 of the Motion that the rights of the Accused are protected since they will have significant time to examine and prepare for the proposed additional six witnesses, especially in light of the Prosecution's intention to call these witnesses to testify in a relatively late stage of the trial.<sup>6</sup>
16. Furthermore, the Defence argument that adding the witnesses will delay the proceedings is purely hypothetical. The Prosecution expects that the evidence presented by the proposed additional witnesses may obviate the need for lengthy direct examinations of other witnesses, hence in fact shortening the duration of the trials.
17. It is also emphasised that it is still early in the proceedings, thus the timeliness of the request cannot justify denial of additional witnesses.<sup>7</sup> Furthermore, in accordance with the jurisprudence of the ICTY and ICTR, even if the request to add witnesses is made late into the proceedings, this alone cannot constitute a justification to deny the request.<sup>8</sup>

***All additional witnesses are necessary***

18. Regardless of whether or not the proposed additional witnesses provide evidence relating to the same ground, they must all be heard as their evidence relates to distinct and separate incidents which all must be proven to establish the peculiar elements of international crimes, such as the widespread or systematic nature of activities, or the existence of a nexus between the armed conflict and the crimes committed.<sup>9</sup> Furthermore, the evidence provided by these witnesses will, assuming leave is granted, establish an organized systemic coordination between the RUF and AFRC, necessary to prove the Prosecution's theory that the RUF and AFRC participated in a joint criminal enterprise. The cross examination of even the "short and not particularly contentious witnesses"<sup>10</sup> to

<sup>6</sup> *Prosecutor v Nyiramasuhko et al*, ICTR-97-29-T, Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses, 24 July 2001, para. 13, where the Trial Chamber notes that "this witness should not be called to testify at trial before several months so that the Defence should have sufficient time to examine this piece of evidence".

<sup>7</sup> *Bagasora*, 21 May 2004, para. 10.

<sup>8</sup> *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecutor's Request to Call Witness C-063, 18 February 2004.

<sup>9</sup> E.g. *Bagasora*, 21 May 2004, paras. 14-16 and 20-22, where the Trial Chamber allowed the prosecution to add two witnesses where the first, witness AAA's evidence related to "the intent of the accused" and where the evidence of witness AFJ related to "a direct order from the Accused, Ntabakuze, which led to killings of Tutsi".

<sup>10</sup> Defence Response, paragraph 18.

date shows that this area is one which the Chamber will be assisted by all available, probative evidence.

19. The Prosecution reasserts that the evidence provided by each of the proposed additional witnesses adds unique elements to the Prosecution's case against the Accused persons in this case, and is therefore not merely corroborative or cumulative. It reaffirms that each of the proposed additional Prosecution witnesses will offer direct evidence on the conduct on one or more of the RUF accused, and that the expected testimony is of significant value to the Prosecution in that the bulk of the evidence these witnesses will offer is direct evidence and not circumstantial or indirect.

#### IV. CONCLUSION

20. The Prosecutor submits that for the foregoing reasons, the Trial Chamber should dismiss the Defence Response and grant the Prosecution Motion, allowing the calling of the proposed additional witnesses.

Freetown, 27 July 2004

For the Prosecution.

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Luc Côté

  
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Lesley Taylor

**Prosecution Index of Authorities**

*Prosecutor v. Bagasora et al*, ICTR-98-41-T, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E), 21 May 2004 (Annexed to Prosecution Motion)

*Prosecutor v. Delalic et al*, ICTY-96-21-T, *Decision on Confidential Motion to Seek Leave to Call Additional Witnesses*, 4 September 1997 (Annexed to Prosecution Motion)

*Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecutor's Request to Call Witness C-063, 18 February 2004 (Annexed to Prosecution Motion)

*Prosecutor v Nahimana et al*, ICTR-99-52-I, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001 (Annexed to Prosecution Motion)

*Prosecutor v. Nahimana et al*, ICTR-99-52-I, Decision on the Prosecutor's Oral Motion for Leave to amend the list of selected witnesses, 26 June 2001 (Annexed to Prosecution Motion)

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