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SCSL-04-15-T
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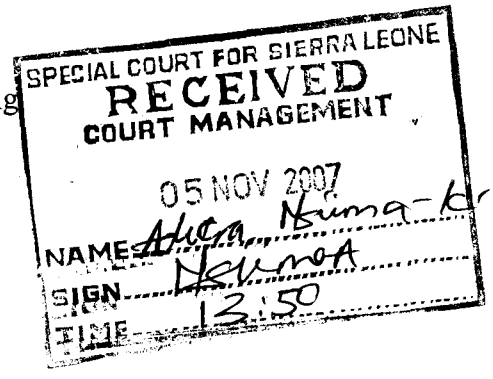
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

APPEALS CHAMBER



Before:	Justice George Gelaga King, Presiding Justice Emmanuel Ayoola Justice Raja Fernando Justice Renate Winter
Registrar:	Herman von Hebel
Date filed:	5 November 2007

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

Case No. SCSL-04-15-T

PUBLIC
PROSECUTION REPLY TO GBAO-RESPONSE TO PROSECUTION NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE OBJECTION TO THE ADMISSIBILITY OF PORTIONS OF THE EVIDENCE OF WITNESS TF1-371

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I. INTRODUCTION

1. On 22 October 2007, the Prosecution filed its "Public Prosecution Notice of Appeal and Submissions Regarding the Objections to the Admission of Portions of the Evidence of Witness TF1-371"**("Prosecution Appeal")**.[1] On 29 October 2007, the Defence for the Third Accused filed a Response **("Defence Response")**.[2] The Prosecution files the present Reply to the Defence Response.

II. ARGUMENT

2. The Indictment charges the three Accused pursuant to Articles 6(1) and 6(3) of the Statute, which includes allegations that the Third Accused was a member of a joint criminal enterprise and that he held a position of superior responsibility.[3] The Indictment further alleges various crimes in Kono District, including extermination, murder and violence to life, health and physical or mental well-being of persons, in particular murder.[4] The Prosecution opening statement made extensive reference to the Third Accused and to alleged crimes in Kono District.[5] Evidence was led from early on in the trial of the assignments and positions held by the Third Accused in the RUF.[6]

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[1] *Prosecutor v Sesay, Kallon, Gbao,* SCSL-04-15-T-845, "Public Prosecution Notice of Appeal and Submissions Regarding the Objections to the Admission of Portions of the Evidence of Witness TF1-371 With Confidential Appendices," 22 October 2007.

[2] *Prosecutor v Sesay, Kallon, Gbao,* SCSL-04-15-T-858, "Public Gbao-Response to Prosecution Notice of Appeal and Submissions Regarding the Objection to the Admissibility of Portions of the Evidence of Witness TF1-371 With Confidential Appendices", 29 October 2007, and SCSL-04-15-T-860, "Corrigendum to Gbao-Response to Prosecution Notice of Appeal and Submissions Regarding the Objection to the Admissibility of Portions of Evidence of Witness TF1-371," 30 October 2007.

[3] *Prosecutor v Sesay, Kallon, Gbao,* SCSL-04-15-T-619, "Corrected Amended Consolidated Indictment," 2 August 2007.

[4] These are crimes under Article 2.b., Article 2.a., and Article 3.a. of the *Statute of the Special Court for Sierra Leone.*

[5] In reply to paragraph 10 and 11 of the Defence Response see the Transcript of 5 July 2004, Prosecution opening statement, for the following references: Gbao's role as the head of the Internal Defence Unit, p. 46 lines 22-23; as Overall Security Commander of AFRC/RUF, p. 22, line 9; in charge of all RUF Security Units, p. 24, lines 34-37; as the Overall Security Commander in the AFRC/RUF forces Gbao was subordinate only to the leaders of the RUF and the AFRC, p. 25, lines 3-5, p. 45, lines 4-5, p. 46, lines 22-23; Gbao responsible for the crimes committed by the RUF and AFRC in pursuit of that common plan and knew these crimes were being committed or the crimes were a natural and foreseeable consequence of the common plan, p. 50 lines 7-10, p. 42, lines 3-4, p. 22, lines 5-9, p. 25, lines 21-25, p. 50, lines 8-12; Gbao's position of superior responsibility and failing to exercise effective control over subordinates, p. 25, lines 32-37, p. 29, lines 23-25; unlawful killings in Kono District, p. 28, lines 15-16, p. 40, lines 11-12, p. 46, lines 8-9.

[6] See the evidence of TF1-071 who testified on 18, 19, 21, 24-27 January 2005.

3. The Defence Response advises that it wishes to "stress the fact" that in TF1-371's statement of 8 May 2006 the Third Accused is referred to as the Chief of the IO (Intelligence Office), while TF1-371's proofing notes of 10 July 2006 and his Court testimony make no mention of the IDU (Internal Defence Unit), and the Defence Response further states that in the redacted disclosure of 11 April 2006 there were no legible references to the Third Accused.[7] These comments are mistaken. There is no statement of 10 July 2006, however, the proofing note of 12 July 2006, states that the Third Accused was the Overall Security Commander in charge of the IDU, G5 and MP (Military Police), and that the IO was part of the IDU. In addition, the statement dated 17, 18 and 19 February 2006 advised that the Third Accused oversaw the IO, IDU and MP. While testifying TF1-371 told the Trial Chamber that the IDU was the umbrella department for the IO, and that the Intelligence Officers worked within the IDU.[8] The redacted statements disclosed on 11 April 2006, included several pages of direct and legible references to the Third Accused.[9]
4. Paragraph 18 of the Defence Response asserts that the Indictment, Pre-Trial and Supplemental Pre-Trial Briefs, and the Prosecution opening statement are "characterized by vagueness," that it is "impossible for an Accused to gain a clear understanding of the charges against him," and that the charges do not give "any particulars of crimes." The Defence Response further refers to Rule 47(c), which stipulates what is required in an indictment. This assertion is an attack on the Indictment, it was not an argument advanced before the Trial Chamber during the submissions on the objection, and such an attack on an indictment must be raised at the pre-trial stage, not when the Prosecution's case is closed.[10] This assertion cannot be countenanced at this late stage in the trial.
5. In two passages the Defence Response refers to the Prosecution moulding its

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[7] Defence Response para. 15.
[8] RUF Transcript 24 July 2006, p. 35, 17-27.
[9] The redacted disclosure is not forwarded to Court Management, however, the Prosecution reference numbers to the 8 pages with direct and legible references to the Third Accused are: 00016480-00016482, 00016484-00016486, and 00016488-00016489.
[10] Rule 72(B)(ii) states: "Preliminary motions by the accused are ... (ii) Objections based on defects in the form of the indictment." Pursuant to Rule 72(D) preliminary motions shall be disposed of before trial.

case,[11] without giving any further guidance on what is meant by the comment. The Prosecution denies any improper conduct and without further information on the content of the assertion, the Prosecution is unable to make further submissions. However, the context provided by paragraph 21 of the Defence Response makes clear a misunderstanding on the part of the Third Accused. Paragraph 21 says that "The inclusion of new evidence at the very end of the trial is a clear example of the Prosecution moulding its case as the trial goes along." The Prosecution applied to the Trial Chamber to add TF1-371 as a witness, and the Trial Chamber determined that good cause had been shown and ordered that TF1-371 be added to the Prosecution witness list and that TF1-371 be called as the last witness in the Prosecution case.[12] There can be nothing improper on the part of the Prosecution in applying to the Trial Chamber for relief, and the relief later being granted.

6. The assertion at paragraph 26 of the Defence Response, that the Prosecution recognized that joint criminal enterprise is the mode of liability that applies to the Kono District crimes, is misleading. It is one of the modes of liability, but a reading of the transcript does not lead to the conclusion that the Prosecution suggested it was the only mode of liability, it is clear that the Prosecution also relies upon superior responsibility as a mode of liability against all Accused, as well as other forms of Article 6(1) liability.[13]

7. Prosecution evidence has demonstrated the role and function of the Third Accused in the RUF, and his participation in a joint criminal enterprise.[14] This evidence was heard from early on in the trial. Defence counsel apparently decided to pursue the theory that the Third Accused was not liable for crimes under Article 6(3) and that no joint criminal enterprise existed, or that the Third Accused was not part of that joint criminal enterprise. However, it was always known to the Third Accused that he could be found guilty for crimes in Kono

[11] See paragraphs 21 and 34 of the Defence Response.
[12] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-537, "Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for protective Measures," 6 April 2006.
[13] RUF transcript 21 July 2006, p. 26.
[14] See the evidence of TF1-071, transcripts of 18, 19, 21, 24-27 January 2005; TF1-361, transcripts of 11-15, 18, 19 July 2005; TF1-360, transcripts of 19-22, 25, 26 July 2005; TF1-036, transcripts of 27-29 July and 1, 3 August 2005.

District. In not cross-examining witnesses as to events in Kono District there was always the prospect that if the Trial Chamber found that the Third Accused was a member of a joint criminal enterprise and shared the intent to commit the crime or the crime was the natural and foreseeable consequence of the joint criminal enterprise, then the Third Accused would be convicted for the crimes in Kono District. It was also known that the Third Accused could be convicted as a person who held superior responsibility.

8. Paragraph 38 of the Defence Response states that "Defence counsel wishes to argue that the presentation of new evidence at the very end of the trial is disingenuous." The Defence goes on to cite *Delalić*, that "there should be a point where accusation ends and answering the allegations begins."[15] There is nothing disingenuous in applying to the Trial Chamber to add a witness to the Prosecution witness list and telling the Trial Chamber in that motion of the content of the proposed testimony. The Trial Chamber granted the motion, imposed a condition that the Prosecution had to call the witness as its last witness so that the defence had ample time to prepare, and the Third Accused never sought leave to appeal that decision.[16] In *Delalić,* the Prosecution sought to call rebuttal evidence and the motion was rejected, then after the close of the case for both parties, the Prosecution's application to reopen its case was also rejected. That situation is not comparable to the present case. Here a motion was granted to add a witness to the Prosecution witness list, and although the witness could have testified earlier, it was by order of the Trial Chamber that the witness was to be the last witness called in the Prosecution case.
9. The Defence Response refers to Rules 90 of the International Criminal Tribunal for Rawanda and the International Criminal Tribunal for the former Yugoslavia to advise that it is a rule of international law that cross-examination should be limited to the subject matter of the evidence-in-chief.[17] That comment is of marginal relevance as the drafters of the Rules of Evidence and Procedure of the

[15] *Prosecutor v Delalic et al, ICTY-IT-96-21*, "Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case," ("**Celebici Decision**") 19 August 1998, para. 20.
[16] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-537, "Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for protective Measures," 6 April 2006.
[17] Defence Response, para. 41.

Special Court for Sierra Leone chose not to so circumscribe the tendering of evidence, and the Rules are silent on the scope of cross-examination. The comment is also not complete as Rule 90(H)(i) of the ICTY Rules permits cross-examination on the subject matter of the evidence-in-chief, and matters affecting credibility, and evidence relevant to the case of the cross-examining party.[18]

10. In response to paragraph 52 of the Defence Response, the Prosecution makes clear, both in its application for leave to appeal[19] and in this appeal[20] that it is within the Trial Chamber's discretion to admit or reject evidence, but the Prosecution submits that the Trial Chamber erred in its application of that discretion.[21]

11. The exclusion of relevant and probative evidence was not the only means available to safeguard the rights of the Third Accused. A brief adjournment could have been considered. In allowing TF1-371 to be added as a Prosecution witness, knowing that he would testify to Third Accused's knowledge of unlawful killings in Kono, the Trial Chamber held:

> "(i) that the evidence of the Proposed Witness appears to be material and relevant to the various crimes alleged in the Amended Consolidated Indictment; (ii) that by reason of (i), the facts as contained in the statements of the Proposed Witness may contribute to serving the overall interest of justice; **(iii) that granting leave to the proposed Witness will not unfairly prejudice the right of the Accused to a fair and expeditious trial as governed by Article 17 of the Statute and Rule 26bis of the Rules;** (iv) that the evidence in question could not reasonably have been discovered or made available earlier notwithstanding the exercise of due diligence on the part of the Prosecution."[22] [emphasis added]

12. The Defence Response argues that the Defence had shown good cause for the recall of witnesses.[23] While the Defence pointed out a possible remedy of recall

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[18] Rule 90(H)(i) of the Rules of Procedure and Evidence of the ICTY, as amended 12 July 2007.
[19] *Prosecutor v Sesay, Kallon, Gbao,* SCSL-04-15-T-636, "Public Prosecution Application for Leave to Appeal Majority Decision on Oral Objection Taken by Counsel for the Third Accused to the admissibility of Portions of the Evidence of Witness TF1-371," 21 August 2006, para. 13.
[20] Prosecution Appeal , para.24.
[21] Prosecution Appeal, paras.22-23.
[22] *Prosecutor v Sesay, Kallon, Gbao,* SCSL-04-15-T-579, "Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures", 15 June 2006.
[23] Defence Response, paras. 58-60.

of witnesses during its submissions on the objection, no application was made to recall any witness. On even the most liberal reading of the transcript of proceedings before the Trial Chamber one could not conclude that a finding had been made that the Third Accused is entitled to recall any witness. Had any such application been made, the Prosecution would have responded based on the particular witness, what questioning took place of the witness when he or she first appeared, and the reasons being advanced for the recall. The Trial Chamber would only then be in a position to determine the merits of such an application.

13. It is also claimed that since 24 July 2006, the date of the decision under appeal, the Defence has been working on the understanding that the evidence was excluded,[24] and has cross-examined witnesses of the First Accused based on that decision. The Defence Response says the Third Accused has thereby been denied further opportunities to cross-examine witnesses.[25] The Defence has had notice of the Prosecution intention to appeal since 21 August 2006. Whether the Third Accused has a legitimate interest in recalling any of the First Accused's witnesses, to date only 12 have testified and almost all of them have testified of events in Kailahun District, is a matter for the Trial Chamber to determine once an application has been made.

14. Paragraph 80 of the Defence Response refers to a decision of the Trial Chamber on 3 August 2005[26] where the Trial Chamber expunged from the transcript a portion of the cross-examination of witness TF1-036 carried out by counsel for the Third Accused. Counsel for the Third Accused during his cross-examination proceeded to ask questions on behalf of the First Accused and was criticized for doing so.[27] Both counsel for the First and Third Accused apologized to the Trial Chamber.[28] The Prosecution sought to persuade the Trial Chamber not to expunge evidence from the transcripts, and suggested allowing written submissions on the point.[29] The Trial Chamber did not agree. This was not a

[24] Defence Response, paras. 68-69
[25] Defence Response, paras. 66 and 68.
[26] Paragraph 80 of the Defence Response mistakenly refers to 8 August 2005.
[27] RUF Transcript 3 August 2005, pp. 95-96.
[28] RUF Transcript 3 August 2005, pp. 95-96.
[29] RUF Transcript 3 August 2005, p. 97.

question of the rights of an Accused being violated, the Trial Chamber was concerned with the conduct of Defence counsel.

III. RELIEF SOUGHT BY THE THIRD ACCUSED

15. The Prosecution opposes the relief sought by the Defence.[30] Such requests for relief should be left to the discretion of the Trial Chamber, in the event an application is made to the Trial Chamber. Absent a fully argued motion it is impossible to assess the merits of the applications referred to in the Defence Response. There is no need for a substantial delay in the proceedings should the Prosecution appeal be granted. At present the First Accused still has 135 witnesses on his core witness list, only 12 have testified, and the Second Accused has 88 witnesses on his core witness list. If TF1-371 is recalled he could be interposed at a time convenient to the parties.
16. A request to recall witnesses who testified about events in Kono District should be determined by the Trial Chamber upon arguments by both parties and upon demonstrating good cause. The same applies to recalling one or more of the 12 Sesay Defence witnesses who have testified to date, and to the issue of whether any adjournment should be given to Defence counsel to prepare. This is particularly so given that the Defence had three months to prepare before TF1-371 testified in July 2006. The Trial Chamber is also best suited to determine whether the Defence has shown good cause to add witnesses to their witness list.

IV. CONCLUSION

17. The Prosecution appeal should be allowed.

Filed at Freetown, on 5 November 2007

For the Prosecution,

P. H. Harrison

Pete Harrison

[30] Defence Response, paras. 84-88.

INDEX OF AUTHORITIES

A. ORDERS, DECISIONS AND JUDGEMENTS

1. *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-537, "Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for protective Measures," 6 April 2006.

2. *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-579, "Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures," 15 June 2006.

3. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-636, "Prosecution Application for Leave to Appeal Majority Decision on Oral Objection Taken by Counsel for the Third Accused to the Admissibility of Portions of the Evidence of Witness TF1-371," 21 August 2006.

4. *Prosecutor v Sesay, Kallon, Gbao,* SCSL-04-15-T-619, "Corrected Amended Consolidated Indictment," 2 August 2007.

5. *Prosecutor v Sesay, Kallon, Gbao,* SCSL-04-15-T-845, "Public Prosecution Notice of Appeal and Submissions Regarding the Objections to the Admission of Portions of the Evidence of Witness TF1-371," 22 October 2007.

6. *Prosecutor v Sesay, Kallon, Gbao,* SCSL-04-15-T-858, "Public Gbao-Response to Prosecution Notice of Appeal and Submissions Regarding the Objection to the Admissibility of Portions of the Evidence of Witness TF1-371 With Confidential Appendices", 29 October 2007.

7. *Prosecutor v Sesay, Kallon, Gbao* SCSL-04-15-T-860, "Corrigendum to Gbao-Response to Prosecution Notice of Appeal and Submissions Regarding the Objection to the Admissibility of Portions of Evidence of Witness TF1-371," 30 October 2007.

8. *Prosecutor v Delalic et al, ICTY-IT-96-21*, "Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case," ("Celebici Decision") 19 August 1998. http://www.un.org/icty/celebici/trialc2/decision-e/80819MS2.htm

B. RULES OF PROCEDURE AND EVIDENCE AND PRACTICE DIRECTIONS

1. Rules of Procedure and Evidence of the Special Court, 47 and 72, as amended.

2. *Statute of the Special Court for Sierra Leone*, Articles 2, 3 and 6.

3. Rules of Procedure and Evidence of the ICTY, 90(H)(i), as amended 12 July 2007.

http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev40e.pdf

C. OTHER DOCUMENTS

1. RUF Transcript 5 July 2004.
2. RUF Transcript 24 July 2006.
3. RUF Transcript 18, 19, 21, 24-27 January 2005.
4. RUF Transcript 11-15, 18, 19 July 2005.
5. RUF Transcript 19-22, 25, 26 July 2005.
6. RUF Transcript 27-29 July and 1, 3 August 2005.
7. RUF transcript 21 July 2006.