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SCSL-2004-15-T
(7176-7182)

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SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 15 July 2004

PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao
(Case No. SCSL-2004-15-T)

SESAY-DECISION ON DEFENCE MOTION

Office of the Prosecutor:
Luc Côté
Robert Petit

Defence Counsel for Issa Hassan Sesay:
Tim Clayson
Wayne Jordash

Defence Counsel for Morris Kallon:
Sheckou Toure
Raymond Brown

Defence Counsel for Augustine Gbao:
Girish Thanki
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THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson and Hon. Judge Pierre Boutet;

SEIZED of the Defence Motion, filed confidentially on 1 June 2004 on behalf of Issa Hassan Sesay ("Accused");

NOTING the Prosecution Response to the Defence Motion ("Response"), filed confidentially on 9 June 2004 by the Office of the Prosecution ("Prosecution") and the Defence Reply thereto, filed late on 14 June 2004 ("Reply");

NOTING the Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004 ("Order to File Disclosure Materials");

COGNISANT of the Prosecution Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004, filed on 26 April 2004;

NOTING the comments of both parties during the Pre-trial Conference of 29 April 2004 and the Status Conference of 23 June 2004;

NOTING the Order to Prosecution to Produce Witness List and Witness Summaries of 7 July 2004, and the Materials Filed Pursuant to the Order to Prosecution to Produce Witness List and Witness Summaries of 7 July 2004, filed by the Prosecution on 12 July 2004;

NOTING the provisions of Rule 66 and 73 of the Rules of Procedure and Evidence ("Rules");

NOW CONSIDERS the matter on the basis of the written submissions of the Parties;

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I. SUBMISSIONS OF THE PARTIES

A) *The Defence Motion*

1. The Defence submits that it had made it clear at the Status Conference held on 29 April 2004,¹ that it would be ready for trial on 5 July 2004, conditional upon the substance of the material disclosed by the Prosecution on 26 April 2004. It further asserts that it has done its utmost to assess the new disclosure by the Prosecution but the sheer volume of the material make it impossible for the Defence to ascertain its significance within the overall Defence strategy and within the Prosecution's strategy before the commencement of trial on 5 July 2004. Consequently, the sheer volume of this material makes it unlikely that it can be analysed and instructions obtained in relation to it by 5 July 2004.²
2. The Defence submits that of the more than three hundred and fifty eight (358) witness statements received from the Prosecution, it has not been informed of how many will testify at trial.³ Subsequently, the Defence requests that the Trial Chamber order the Prosecution to inform the Defence which Prosecution witnesses will be relied upon at trial as 'core' witnesses and which witnesses may be called as 'back up' in the event the core witnesses fail to appear at trial.⁴ It particularly draws attention to three witnesses whose final statements were taken between 2002 and 2003. The Defence was presented with one page of each witness summary before, and with hundreds of pages of these witnesses on 26 April 2004.⁵
3. On another occasion, the Defence was served with the statements of what appears to be 'core' witnesses for the Prosecution. However, as the Defence was served without their TFI pseudonyms, it submits that they are in a predicament in ascertaining whether they have received any papers in respect of these witnesses, prior to 26 April 2004. The Defence further reiterates that it will make all "reasonable endeavours to be ready" for the date the

¹ Worthy of note is that a Pre-Trial Conference pursuant to Rule 73bis of the Rules was held on 29 April 2004, and not a Status Conference pursuant to Rule 65bis of the Rules. A first Status Conference for this case was held on 2 March 2003 while a second Status Conference was held on 23 June 2004.

² Motion, paras 5-7.

³ The total figure of 358 witnesses due to testify for the Prosecution is incorrect as stated because it confuses the actual number of the Prosecution witnesses with the pseudonym number for a Prosecution witness, identified as witness TF1 358.

⁴ Motion, para. 8.

⁵ *Id.*, para. 3.

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trial begins but asked the Prosecution to give due notice of the evidence it seeks to call in the first session in order for the Defence to be able to prioritise its remaining work.⁶

4. Defence submits that unredacted statements of witnesses appearing at trial that were supposed to have been served by 24 May 2004, or forty two (42) days before trial, are yet to be served to the Defence.⁷ It further avers that by serving over four thousand (4000) pages, many of which could have been served many months before 26 April 2004, the Prosecution have developed a strategy which is tantamount to 'a trial by ambush'.⁸
5. The Defence would like to bring the following to the Trial Chamber's notice:
 - (i) The sheer volume of the material disclosed by the Prosecution on 26 April 2004 makes it unlikely that it can be analysed and instructions obtained in relation to it by 5 July 2004.
 - (ii) Reserves its right in relation to whether it will be in a position to deal with this evidence in the first session of the trial in July 2004.⁹

B) The Prosecution response

6. The Prosecution submits that the Defence failed to seek any relief in its motion but simply provides notice to the parties of potential action it may undertake before the Chamber. It further asserts that pre-trial pleadings ought to include fact, argument and relief sought, and are obviously not intended to be employed as a conduit for communicating intentions between parties. The Prosecution submits that should the Defence eventually seek a postponement of the commencement of the trial or any other trial related relief, the Prosecution will address any relevant issues concerning Rule 66, including the said allegations brought by the Defence, once they are raised in an appropriate pleading and brought in accordance with the letter and spirit of the Rules.¹⁰

⁶ *Id.*, paras 4 and 8.

⁷ *Id.*, para. 9

⁸ *Id.*, para. 11.

⁹ *Id.*, para. 7.

¹⁰ Response, paras 4-6.

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C) *The Defence Reply*

7. The Defence submits that there is no provision in the Rules of Procedure and Evidence that sets out a prescribed form for a pre-trial motion.¹¹ It reiterates that it will make all reasonable endeavours to be ready for trial on 5 July 2004, and it is for this reason that it has not asked the Trial Chamber to make a specific order at this juncture.¹² It regrets the fact that the Prosecution has chosen not to address the points in issue raised by the Defence motion, especially why four thousand (4000) pages of witness statements and interviews, most of which had been served before 26th April 2004, were disclosed so close to the trial.¹³

II. PROCEDURAL ISSUES

8. Both the Motion and the Response thereto were filed confidentially due to the sensitivity of the contents of some of the attachments and, accordingly, have not been disclosed to the public.
9. This Chamber would like to reiterate that as a matter of general principle, all documents filed before the Special Court should be public, unless a cogent reason is offered to the contrary.¹⁴ In reviewing this matter and in rendering this Decision on the Motion, the Chamber however concludes now that there is no reason why such a decision should not be made public.
10. The Chamber will dispose of the confidential submissions pertaining to the Motion in accordance with Rule 54 and Rule 81(B) of the Rules.¹⁵

¹¹ Reply, para. 2.

¹² *Id.*, para. 3.

¹³ *Id.*, para 4.

¹⁴ See also *Prosecutor v. Morris Kallon*, SCSC-03-07-PT, Decision on the Motion by Morris Kallon for Bail, 23 February 2004, paras 19-20.

¹⁵ Rule 54 of the Rule provides for the following:

“At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.”

Rule 81(B) of the Rules, on the records of proceedings, provides that:

“The Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering the non disclosure no longer exist.”

III. DELIBERATIONS

11. The Chamber has taken notice of the fact that the Defence did not raise any of these disclosure issues at the most recent Status Conference held on 23 June 2004.
12. The Chamber further opines that from the day of its Order to the Prosecution to File Disclosure Materials, the Defence had sufficient time to analyse the material disclosed by the Prosecution before 5 July 2004, when the trial commenced and still has the opportunity to challenge it during cross examination.¹⁶
13. Although the Rules do not provide for a specific form in which a party might bring a motion before the Trial Chamber, Rule 73(A) of the Rules however, clearly provides that motions at this stage of the process are to be entertained for the purpose of seeking a ruling or relief. This provision does not provide for a declaration. The Chamber has noted that the Defence failed to seek any ruling or relief in its Motion but simply provides notice to the parties of potential actions it may undertake before the Trial Chamber.
14. Furthermore, the Chamber wishes to underline that the 42 day period for the full disclosure of witness statements in an unredacted form, pursuant to the provisions of Rule 69(C) of the Rules and the established jurisprudence of the Special Court on the system of "rolling disclosure", applies to the date of testimony at trial of each witness rather than the date of commencement of the trial.¹⁷
15. The Chamber, however, observes that it has issued an Order to the Prosecution,¹⁸ requiring the Prosecution to produce, *inter alia*, a list of the "core" and "back up" witnesses that the Prosecution intends to call to testify at trial. The Prosecution has complied with the Order by filing its Modified Witness List.¹⁹

¹⁶ Decision on Defence Motion for Disclosure Pursuant to Rule 66 and 68 of the Rules, 9 July 2004, para. 44.

¹⁷ Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004, Order p.; see also para. 23; Ruling on Oral Application for Respect of Disclosure Obligations, 9 July 2004, para. 3. In addition, see *Prosecutor v. Issa Hassan Sesay*, SCSL-2003-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003; *Prosecutor v. Morris Kallon*, SCSL-2003-07-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003; *Prosecutor v. Augustine Gbao*, SCSL-2003-09-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 10 October 2003, para. 55.

¹⁸ Order to Prosecution to Produce Witness List and Witness Summaries, 7 July 2004.

¹⁹ Materials filed pursuant to "Order to Prosecution to Produce Witness List and Witness Summaries", 12 July 2004, Annex A; The modified Witness list reduced the current number of the Prosecution Witnesses to 173 witnesses.

FOR ALL THE ABOVE REASONS

THE CHAMBER notes the submissions of the Parties and DENIES the Motion as no particular ruling or relief is sought.

Done at Freetown this 15th day of July 2004

Pierre Boutet

Hon. Judge Pierre Boutet

Benjamin Mutanga

Hon. Judge Benjamin Mutanga

Bankole Thompson

Hon. Judge Bankole Thompson

Itoe
Presiding Judge,
Trial Chamber

