SCSL-04-16-T
(19100 - 19109)

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SCSL

SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER II

Before:	Justice Richard Lussick, Presiding Judge Justice Teresa Doherty Justice Julia Sebutinde
Registrar:	Lovemore G. Munlo, SC
Date:	28 September 2006

PROSECUTOR	**Against**	**Alex Tamba Brima** **Brima Bazzy Kamara** **Santigie Borbor Kanu** (Case No.SCSL-04-16-T)

DECISION ON CONFIDENTIAL PROSECUTION MOTION TO REOPEN THE PROSECUTION CASE TO PRESENT AN ADDITIONAL PROSECUTION WITNESS

Office of the Prosecutor:
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28 SEP 2006

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Richard Lussick, Presiding Judge, Justice Teresa Doherty and Justice Julia Sebutinde;

SEISED of the Confidential, With Ex Parte Under Seal Annex, Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, filed on 25 July 2006 ("Motion");

NOTING the Confidential Joint Defence Response to Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, With Ex Parte Under Seal Annex, filed on 4 August 2006 ("Response");

NOTING the Confidential Reply to Joint Defence Response to Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, filed on 21 August 2006 ("Reply");

NOTING the provisions of Article 17(4) of the Statute of the Special Court for Sierra Leone ("Statute") and of Rules 26bis and 85 of the Rules of Procedure and Evidence ("Rules");

HEREBY DECIDES AS FOLLOWS based solely on the written submissions of the parties pursuant to Rule 73(A).

I. BACKGROUND

1. The Prosecution moves the Trial Chamber for leave to reopen the Prosecution case to present an additional Prosecution witness. Accompanying the Motion is an *Ex Parte* Under Seal Annex ("Annex") containing a declaration setting out the details of attempts by the Prosecution to secure the evidence of the proposed witness.

2. The Prosecution submits that the evidence of this proposed witness would be direct evidence of certain significant issues in the case. We will not set out details of such issues here since this is a public decision and the identity of the proposed witness could be compromised. He is a protected witness who has already testified in the case of *Prosecutor v. Sesay et al.* ("RUF case") before Trial Chamber I.[1]

3. The following is a chronology of relevant events which are not in dispute:

   (i) Late 2002: Prosecution became aware of identity of proposed witness.

   (ii) September 2005: Prosecution learned of whereabouts of proposed witness.

   (iii) 25 October 2005: Prosecution investigators met with proposed witness.

   (iv) 4, 29 November, 10, 12 December 2005: Prosecution investigators held additional meetings with proposed witness.

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[1] *Prosecutor v. Issa Sesay et al.*, Case No. SCSL-04-15-T.

(v) 21 November 2005: Prosecution closed its case.

(vi) 24, 25 January 2006: Prosecution investigators held meetings with proposed witness at which he agreed to testify.

(vii) 9 - 14 February 2006: Prosecution investigators held additional meetings held with proposed witness.

(viii) 17 - 19 February, 2006: Additional meetings were held between members of the Office of the Prosecutor and the proposed witness.

(ix) 10 March 2006: The Prosecution in the RUF Case filed a motion to add the proposed witness to its witness list.

(x) 6 April 2006: In RUF Case, Trial Chamber I granted the afore-mentioned motion.

(xi) 5 June 2006: Defence opened its case.

(xii) 15 June 2006: In RUF Case, Trial Chamber I ordered protective measures for the proposed witness.

(xiii) 20 July 2006: In RUF case, proposed witness began his testimony.

(xiv) 25 July 2006: Prosecution filed present Motion to reopen its case.

4. By the time the Prosecution filed the present Motion on 25 July 2006, the Defence had completed the testimonies of 27 Defence witnesses, including the First Accused Brima. All of those witness, with the exception of Brima, were witnesses called in common for all three Accused. The Second Accused Kamara and the Third Accused Kanu elected not to give evidence in their own defence.

II. PRELIMINARY MATTER

5. At para. 25 of the Motion, the Prosecution states as follows:

> *"In the event that this motion is not granted, the Prosecution reserves its right to call this witness as a rebuttal witness, if the relevant requirements are met".*

6. The Trial Chamber emphasises that at this stage it regards itself as seised solely of a motion to reopen the Prosecution case, and not of an application for leave to call evidence in rebuttal. Accordingly, the latter issue will not be addressed in this decision.

III. SUBMISSIONS OF THE PARTIES

Prosecution Motion

7. The essence of the Prosecution's argument is that the evidence of the proposed witness satisfies the two criteria held by the ICTY Appeals Chamber to be applicable in determining an application for reopening a case to allow for the admission of fresh evidence.[2]

8. In respect of the first criterion, i.e. "whether the evidence could have been found before the close of the prosecution case with the exercise of due diligence"[3], the Prosecution refers to its efforts to find and secure the testimony of the proposed witness and submits that it has exercised reasonable diligence but that such evidence was only obtainable after the Prosecution case had closed[4].

9. As regards the second criterion, i.e. whether the probative value of the new evidence substantially outweighs the need to ensure a fair trial, the Prosecution submits that the evidence would be highly probative and "would serve the overall interests of justice by providing valuable assistance to the Trial Chamber in the ascertainment of the truth". It further submits that this application is made at an early stage in the Defence case and would not cause prejudice to the Defence, nor would calling the proposed witness lead to significant delays in the case[5].

Joint Defence Response

10. The Defence claims that because of the *ex parte* filing of the Annex and the confidentiality of the transcripts of the evidence of the proposed witness given in Trial Chamber I, it cannot adequately respond to the Motion. The Defence argues that since protective measures for the proposed witness have been put in place by Trial Chamber I, the confidential disclosure of the information contained in the Annex cannot lead to any risk of the identity of the proposed witness being exposed. Accordingly, the Defence requests the Trial Chamber to annul the *ex parte* nature of the Annex, order the Prosecution to disclose the redacted transcripts of the testimony of the proposed witness given before Trial Chamber I, and suspend a decision on the Motion until the Defence has had an opportunity to address these materials.[6]

11. Alternatively, the Defence submits that the Prosecution has not satisfied either of the two criteria laid down in the *Celebici Appeal Judgement* for the reopening of a case.[7] In regard to the first criterion, the Defence argues that the reasonable diligence standard continues to apply after the close of the Prosecution case "in order to assess prosecutorial behaviour".[8]

12. In regard to the second criterion, the Defence claims that the reopening of the Prosecution case would have a detrimental effect on the fairness of the trial. The Defence also disputes the Prosecution assertion that the application is made at an early stage in the Defence case. The Defence points out that they "had already called 26 common defence witnesses and thus made substantial progress in

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[2] *Prosecutor v. Delalic et al.*, Case No IT-96-21-A, Judgement, 20 February 2001, par. 283 ("*Celebici Appeal Judgement*").
[3] Motion, para. 7.
[4] Motion, paras. 14-17.
[5] Motion, paras. 18-25.
[6] Response, paras. 3-5.
[7] Response, paras. 7-24.
[8] Response, para. 13.

their case having concluded that presentation of Defence witnesses regarding several important crime base regions".[9]

Prosecution Reply

13. The Prosecution replies that the Defence is not handicapped by the *ex parte* nature of the Annex and the confidentiality of the transcripts of the proposed witness in Trial Chamber I. This is because the details given in the Motion of the efforts made to contact the witness do not differ from those contained in the Annex apart from the omission of any identifying data, which would not be required by the Defence to respond to the question of due diligence. Also, the Motion sets out details of the evidence to be given by the proposed witness which is sufficient for the Defence to "assess the impact of the testimony on the case against the Accused and to address the issue of the probative value and possible cumulative nature of the evidence".[10]

14. With regard to the determination of whether the reasonable diligence standard has been met, the Prosecution submits that the decision in the *Celebici Appeal Judgement* makes it clear that the cut off point is the conclusion of the Prosecution case, and that any subsequent delay in an application to reopen is relevant only to the question of whether the probative value of the evidence is outweighed by fair trial issues.[11]

IV. DELIBERATIONS

The Applicable Law

15. The Rules allow the Prosecution, with leave, to present additional evidence in rebuttal, but do not give it any right to reopen its case.

16. Rule 85 (A), which governs the order of presentation of evidence in a trial, provides as follows:

> (A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:
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> (i) Evidence for the prosecution;
> (ii) Evidence for the defence;
> (iii) Prosecution evidence in rebuttal, with leave of the Trial Chamber;
> (iv) Evidence ordered by the Trial Chamber.

17. However, although not specifically provided for in the Rules, international jurisprudence recognises that the Prosecution "may further be granted leave to re-open its case in order to present new evidence not previously available to it".[12]

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[9] Response, para. 17.
[10] Reply, para. 4.
[11] Reply, paras. 7, 8.
[12] *Celebici Appeal Judgement*, supra note 2, para. 27, noting the holding of the Trial Chamber in *Prosecutor v. Delalic et al.*, IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998, para. 26 ("*Celebici Trial Decision*").

18. In establishing the criteria for the admissibility of fresh evidence, the ICTY Appeals Chamber in the *Celebici Appeal Judgement* held that:

> *"the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application. If it is shown that the evidence could* ***not*** *have been found with the exercise of reasonable diligence before the close of the case, the Trial Chamber should exercise its discretion as to whether to admit the evidence by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings. These latter factors can be regarded as falling under the general discretion, reflected in Rule 89(D) of the Rules, to exclude evidence where its probative value is substantially outweighed by the need to ensure a fair trial.*[13]

19. The Rules do not contain a provision equivalent to Rule 89(D) of the ICTY Rules. Nevertheless, we hold that a general discretion rests with the Trial Chamber to exclude evidence where its probative value is substantially outweighed by the need to ensure a fair trial.

20. "Fresh evidence" was defined by the *Celebici* Trial Chamber *"not merely as evidence that was not in fact in the possession of the Prosecution at the time of the conclusion of its case, but as evidence which by the exercise of reasonable diligence could not have been obtained by the Prosecution at that time".*[14]

21. In testing for reopening, reasonable diligence is a threshold inquiry: if a party cannot establish that the evidence could not, with reasonable diligence, have been obtained and presented during its case in chief, the application fails, and the Trial Chamber need not consider the probative value of the evidence.[15]

22. If the reasonable diligence standard is satisfied, the Trial Chamber still has a general discretion to deny reopening if the probative value of the proposed evidence is substantially outweighed by the need to ensure a fair trial.[16] The principle to be applied in the exercise of this discretion was stated in the *Celebici* Trial Decision[17], and affirmed in the *Celebici* Appeal Judgement[18] as being that:

> *Great caution must be exercised by the Trial Chamber lest injustice be done to the accused, and it is therefore only in exceptional circumstances where the justice of the case so demands that the Trial Chamber will exercise its discretion to allow the Prosecution to adduce new evidence after the parties to a criminal trial have closed their case.*

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[13] *Celebici* Appeal Judgement, para. 283.
[14] *Celebici* Trial Decision, para. 26; Affirmed in the *Celebici* Appeal Judgement, para. 286.
[15] *Prosecutor v. Milosevic*, Case No IT-02-54-T, Decision on Application for a Limited Re-opening of the Bosnia and Kosovo Components of the Prosecution Case With Confidential Annex, dated 13 December 2005, para. 22.
[16] *Celebici Appeal Judgement*, para. 283; See also *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, 13 December 2005, para. 12 ("Milosevic").
[17] *Celebici* Trial Decision, para. 27.
[18] *Celebici* Appeal Judgement, para. 288.

23. The burden of proving that the new evidence could not have been obtained by the Prosecution with the exercise of reasonable diligence before the close of its case rests squarely on the Prosecution.[19]

24. Before considering whether the Prosecution has satisfied the first criterion, it is convenient to address two other matters of contention between the parties, namely: (i) the *ex parte* filing of the Annex, and (ii) whether the reasonable diligence standard continues to apply after the close of the Prosecution case.

(i) The *Ex Parte* Filing of the Annex

25. In view of the protective measures already put in place for the proposed witness by Trial Chamber I, we think that the Annex could have been filed confidential and *inter partes*, rather than *ex parte*, without endangering the identity of the witness.

26. Nevertheless, in our opinion the *ex parte* filing of the Annex and the confidentiality of the transcripts of the testimony of the proposed witness given in the RUF case do not prevent the Defence from adequately responding to the Motion. We agree with the Prosecution that, with regard to the issue of reasonable diligence, the details given in the Motion do not differ in any material respect from those given in the Annex, except that identifying data has been omitted. Furthermore, we consider that the information set out in the Motion in respect of the probative value of the evidence of the proposed witness is sufficient for the Defence to answer the Motion. We therefore decline to grant the order sought by the Defence in its Response.[20]

(ii) Whether the Reasonable Diligence Standard Continues to Apply After the Close of the Prosecution Case.

27. The Defence submits that the Prosecution had ample opportunity to present the proposed witness before the start of the Defence case but did not apply to do so until almost 6 months after the proposed witness had agreed to testify and more than 4 months after it purportedly realised the significance of his testimony in respect of the AFRC case. By that time, all three Accused had already finished a substantial part of their case by calling 26 common defence witnesses. Therefore, according to the Defence, the Prosecution has failed to discharge its burden of proving that reasonable diligence was exercised with regard to the obtaining and presenting of the evidence of the proposed witness, since the burden continues to apply after the close of the prosecution case "in order to assess prosecutorial behaviour".[21]

28. The Defence bases its argument on the statement by the ICTY Appeals Chamber in the *Celebici* Appeal Judgement that "*it was necessary for the Prosecution to establish that the evidence could not have been obtained, even if after the close of its case, at an earlier stage in the trial.*"[22] It should be noted, however, that

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[19] *Celebici* Trial Decision, para. 26; Affirmed in the *Celebici* Appeal Judgement, par. 286; See also *Milosevic*, *op.cit.*, para. 11.
[20] See para. 10 above.
[21] Response, paras. 13 - 15.
[22] Response, para. 13; See also *Celebici* Appeal Judgement, para. 286.

the ICTY Appeals Chamber predicated that statement by reference to the exceptional circumstances of that particular case where the evidence was sought to be presented not only after the close of the Prosecution case, but long after the close of the case of the relevant accused. In fact, the ICTY Appeals Chamber went on to point out that the stage in the trial at which the evidence is sought to be adduced and the potential delay that will be caused to the trial, are matters highly relevant to the fairness of the trial of the accused, and that the Trial Chamber was justified in taking into account the stage of the trial only in the sense of its impact on the fairness of the trial.[23]

29. We are therefore of the view that, in the present case, the stage in the trial at which fresh evidence is sought to be adduced is not a matter for consideration under the first criterion of "reasonable diligence", but is a highly relevant consideration in weighing the probative value of such evidence against the fairness of the trial of the accused (the second criterion).

The Question of Reasonable Diligence

30. Having considered the submissions of the parties and the facts provided by the Prosecution, we find that the Prosecution has not discharged its burden of proof that the evidence could not have been found before the close of the Prosecution case with the exercise of reasonable diligence. Our finding is based on the following reasons, any one of which is fatal to the Motion.

31. Firstly, information in the Annex shows that the name of the proposed witness came up in a number of witness statements in the early stages of the Prosecution investigations as long ago as 2002. These statements left no doubt that the proposed witness was potentially a very important one.

32. Although the Annex states that the Prosecution's Investigations Section has been "actively involved" in efforts to locate the proposed witness for over 3 years, the details supplied of such efforts do not lead to that conclusion. The Annex merely states that on three occasions over that period information was received but could not be acted upon because of its conflicting nature. In fact, the Annex shows that the Prosecution investigators did not act on any information until September 2005. It appears that there were no vigorous attempts to locate the proposed witness prior to that, despite having been alerted in 2002 to his potential importance. If in fact the Prosecution did take active steps to locate him during the period from 2002 to 2005 it did not disclose them to the Trial Chamber.

33. Furthermore, although information as to his whereabouts was received by the Prosecution's Investigation Section in September 2005, the first meeting with him did not take place until 25 October 2005. The Annex explains that the source of the information had to be contacted several times to verify the information and to provide for his safety, but that does not satisfactorily explain why a meeting could not have been arranged at an earlier date.

34. On those facts, we are unable to conclude that the Prosecution exercised reasonable diligence in its efforts to locate the proposed witness. Since the onus of demonstrating reasonable diligence rests on the Prosecution, where it fails to provide sufficient information to permit a thorough

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[23] *Celebici* Appeal Judgement, para. 290.

evaluation of its application, the Trial Chamber can only conclude that it has not discharged its burden.[24]

35. Secondly, we cannot accept the Prosecution's claim in relation to the proposed witness that "his true significance was only realized after 10 March" (which was the date on which the Prosecution in the RUF Case filed a motion seeking to add the proposed witness to its core witness list).[25] The potential importance of the proposed witness was evident from statements taken in 2002. In addition, the name of the proposed witness had already been mentioned in the testimonies of at least nine Prosecution witnesses in the present case, many of whom were insider witnesses.[26] The Prosecution's professed ignorance of the importance of the proposed witness's testimony is therefore not reasonable in the circumstances. A reasonably diligent Prosecution would have realised the potential importance of the testimony of the proposed witness and would have decided whether it was necessary to present it before closing its case.[27]

36. Thirdly, the Prosecution in this case made no attempt to contact the proposed witness after he had been located in September 2005, despite having long-standing previous knowledge of his potential importance. There is no explanation at all regarding the Prosecution's inactivity in this regard. Clearly, the reasonable diligence standard is not satisfied where no attempt to locate or obtain the evidence in question was made until after the close of the party's case, and no adequate explanation for such delay is provided.[28]

37. The final example of the Prosecution failing to satisfy the reasonable diligence standard is that it failed to mention to the Court that it may seek to call another witness prior to closing its case on 21 November 2005. Had it done so, the Trial Chamber would have been able to make appropriate orders so that the Prosecution case need not have closed without the testimony of the proposed witness. In this regard, we cite with approval the holding of the ICTY Trial Chamber in *Hadzihasanovic* that one of the aspects of "due diligence" is that if a diligent party *"has reason to believe that it will be unable to conclude its investigation before the close of its case, it must inform the Chamber as promptly as possible so that the Chamber may rule on any procedural consequence this may have".*[29]

38. Our finding - that the Prosecution has not discharged its burden of demonstrating that even with reasonable diligence the evidence of the proposed witness could not have been previously obtained and presented as part of its case - is a sufficient basis on which to dispose of the Motion and it is not necessary for the Trial Chamber to consider the probative value of the proposed evidence.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DISMISSES THE MOTION.

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[24] *Milosevic, op. cit.*, para. 28.
[25] Motion, paras. 16, 17.
[26] This is a public decision so we will not give the pseudonyms of these witnesses here, as it may serve to identify the proposed witness.
[27] *Prosecutor v. Hadzihasanovic*, Case No IT-01-47-T, Decision on Prosecution's Application to Re-Open its Case, dated 1 June 2005, para. 41.
[28] *Milosevic, op. cit.*, para. 26.
[29] *Hadzihasanovic, op. cit.*, para. 42.

Done at Freetown, Sierra Leone, this 28th day of September 2006.

Justice Teresa Doherty

Justice Richard Lussick
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]