SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before:	Hon. Judge Benjamin Mutanga Itoe, Presiding Judge Hon. Judge Bankole Thompson Hon. Judge Pierre Boutet	
Registrar:	Robin Vincent	
Date:	23 July 2004	
PROSECUTOR	**Against**	**Issa Hassan Sesay** **Morris Kallon** **Augustine Gbao** (Case No.SCSL-04-15-T)

RULING ON ORAL APPLICATION FOR THE EXCLUSION OF "ADDITIONAL" STATEMENT FOR WITNESS TF1-060

Office of the Prosecutor:
Luc Coté
Lesley Taylor

Defence Counsel for Issa Hassan Sesay:
Tim Clayson
Wayne Jordash

Defence Counsel for Morris Kallon:
Shekou Touray
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 an oral application by the Defence Counsel for Issa Hassan Sesay, Morris Kallon and Augstine Gbao ("the Defence") and their supporting grounds and submissions during the trial proceedings on 19 July 2004 for the exclusion of evidentiary material contained in a

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supplemental statement of Witness TF1-060 disclosed to the Defence by the Prosecution on 16 July 2004, and the Prosecution's Response to the said Application;

CONSIDERING Rule 66(A)(ii) of the Rules of Procedure and Evidence ("Rules"), Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and the Trial Chamber's Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial dated 1 April 2004 ("Order for Disclosure');

AFTER DELIBERATION

HEREBY ISSUES THE FOLLOWING RULING:

1. This is the unanimous Ruling of the Trial Chamber of the Special Court for Sierra Leone on the oral application by Counsel for the First Accused (with whom the other Defence Counsel associated) on 19 July 2004 for the exclusion of the alleged "additional" statement of witness TF1-060 disclosed by the Prosecution to the Defence on 16 July 2004.
2. It will be recalled that during the course of the trial of this case on 19 July 2004, learned Counsel for the First Accused, Issa Hassan Sesay, sought from this Court an order to exclude a supplemental statement made by Witness TF1-060 on 16 July 2004.
3. The Defence contended that the aforesaid statement contains evidence relating to a new count, to wit, 14 charging the offence of pillaging, and makes a direct reference to and specific allegations against the First Accused. The Defence forcefully submitted that the said statement cannot, in law, be considered as an addition to or clarification of, the original statement previously disclosed by the Prosecution on 2 June 2003 but that it is in essence a new statement from the witness alleging entirely new facts, and it should be deemed to be a statement from a new witness for purposes of the interpretation and application of Rule 66(A) of the Rules.
4. The Defence further submitted that the disclosure of the alleged "additional statement" is in breach of Rule 66(A)(ii) of the Rules, the for Disclosure and Article 17(4) of the Statute of the Court guaranteeing an accused person the right to adequate facilities for the preparation of his defence.
5. The Defence also argued that Rule 66(A)(ii) should be interpreted in a purposive manner consistent with Article 31 of the *Vienna Convention on the Law of Treaties*[1] so as to require the Prosecution to show good cause for the admission of the additional statement akin to facts emanating from a new witness. It was also submitted by the Defence that on a plain and literal interpretation of Rule 66(A)(ii), the Prosecution has the burden of showing good cause whenever it wishes to disclose to the Defence, statements of additional witness rather than additional statements from the same witness, and that having failed to do so in this case, it should not be allowed to adduce the evidence contained in the contested supplemental statement. The Defence firmly argued that in any event if the statement is considered to be supplemental in law, the Defence would need time to investigate new allegations for purposes of an effective cross-examination.
6. In response, the Prosecution submitted that it did disclose the additional statement as soon as possible and argued that Rule 66(A)(ii) does not apply to additional statements

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but rather to additional witness. The Prosecution also argued that the Defence has already been put on sufficient notice as to the evidence pertaining to Witness TF1-060 from the previous disclosures, and that the testimony should be permitted to proceed as scheduled.

7. The merit or otherwise of the Defence application revolves around both the proper interpretation to be given to Rule 66(A)(ii) as to the obligation of the Prosecution to disclose witness statements to the Defence and its application to the statement alleged to be objectionable.

8. In our most recent Decision entitled Decision on Disclosure of Witness Statements and Cross-Examination[2] dated 16 July 2004, interpreting Rule 66, the Trial Chamber had this to say:

As a matter of statutory interpretation, it is the Chamber's opinion that Rule 66 requires, *inter alia*, that the Prosecution disclose to the Defence copies of the statements of all witnesses which it intends to call to testify and all evidence to be presented pursuant to Rule 92bis, within 30 days of the initial appearance of the Accused. In addition, the Prosecution is required to continuously disclose to the Defence, the statements of all additional Prosecution witnesses it intends to call, not later than 60 days before the date of trial, or otherwise ordered by the Trial Chamber, upon good cause being shown by the Prosecution.[3]

9. Commenting on the rationale behind the statutory framework for disclosure obligations of the Court, the Chamber observed as follows:

It is evident that the premise underlying the disclosure obligations is that the parties should act *bona fides* at all times. There is authority from the evolving jurisprudence of the International Criminal Tribunals that any allegation by the Defence as to a violation of the disclosure rules by the Prosecution should be substantiated with *prima facie* proof of such a violation.[4]

We underscored the importance of these principles of law with citations from two of the Chamber's recent Decisions on the same subject, to wit, *Prosecutor v. Sesay*[5] and *Prosecutor v. Kondewa*.[6]

10. Taking due cognizance of the importance of Article 17(4) of the Statute in ensuring ample protection of the rights of an accused to have time and adequate facilities for the preparation of his case, and also to examine or have examined the witnesses against him, the Trial Chamber emphasized its role to enforce disclosure obligations in the interest of a fair trial "where evidence has not been disclosed or is disclosed so late as to prejudice the fairness of the trial"[7]. In this regard, the Chamber indicated that its judicial option in such an eventuality would be "to apply appropriate remedies which may include exclusion of such evidence."[8]

11. Consistent with the foregoing exposition of the law, we note that in the case of *Prosecutor v. Bagosora*,[9] the Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") reasoned as follows:

(i) that the issue whether the material disclosed is new requires a comparative assessment;

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(ii) that such an assessment requires an examination of the allegedly new statement and the original statement of the witness including any reference of the event in question in the Indictment and the Pre-Trial Brief of the Prosecution;

(iii) that such an examination should also include a consideration of notice to the Defence that the particular witness will testify on that event, and the extent to which the evidentiary material alters the incriminating quality of the evidence of which the Defence already had notice.[10]

> 12. The reasoning of this same Chamber was similar to the above regarding the admissibility on the same grounds of the evidence of another witness in the same case. On that issue, the Chamber had this to say:

These Rules and the arguments of the parties give rise to three distinct questions. First, is this evidence relevant to the charges in the Indictments, or do they constitute entirely new charges? Second, do the will-say statements merely provide additional details of matters already disclosed in Witness DBQ original witness statement, or in other materials disclosed to the Defence? Third, if this is indeed new evidence, should it be admitted and under what conditions? [11]

> 13. Guided by these principles and reasoning, the major question for determination by this Chamber is whether the Defence has demonstrated or substantiated with *prima facie* proof that the Prosecution is in breach of its disclosure obligations under Rule 66(A)(ii) and in violation of the Article 17(4) of the Statute rights of the Accused persons herein on the alleged grounds of disclosing at this stage a witness statement constituting entirely new allegations from those in the Indictment, and one that is not at all supplemental in character vis-à-vis the original statement of the witness but which amounts to, as it were, an entirely new statement of an entirely new witness.
> 14. In order to determine if there has been such a breach, the Chamber has carefully reviewed the original statement of witness TF1-060 alongside the purported supplemental statement, the Indictment,[12] the Prosecution's Supplemental Pre-Trial Brief,[13] and the Prosecution's Compliance Report of 11 May 2004,[14] and finds specifically as follows:

(i) That the allegations in the second statement are germane to those charged and particularized in Counts 1, 2, 3, 4, 5, 6, 8, 10, 11 and 12 of the Indictment.

(ii) That the allegations in the second statement are clearly supplemental to those specified and particularized in the Indictment and at page 102 of the Prosecution's Supplemental Pre-Trial Brief.

(iii) That indeed the second statement cannot objectively be legally characterized as an entirely new statement having regard to its contents in relation to the original statement of the witness in that the second statement is congruent in material respects with matters deposed to in the entire original statement dated 2 February 2003 about the alleged combined attack on Tonga Field by members of the RUF/AFRC, the armed factions to which the Accused are alleged to have belonged and led by Sam Bockarie alias Mosquito and more specifically with that portion of the original statement which states as follows:

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Two days after our selection as I had stated earlier, we came to Kenema to the late Paramount Chief of Lower Bambara, Chief Farmer who persuaded us to form a caretaker committee for the sake of our people and protect them from AFRC/RUF atrocities.

(iv) That by reason of our findings in (i), (ii) and (iii), the supplemental statement is not a statement of an additional witness within the meaning of Rule 66(A)(ii).

> 15. As a matter of law, the Chamber would like to reiterate what it emphasized in a previous Ruling that Rule 66 does impose upon the Prosecution the obligation to continuously disclose to the Defence copies of statements of all witnesses whom they intend to call which include new developments in the investigation[15] whether in the form of "will-say statements" or interview notes or any other forms obtained from a witness at any time prior to the witness giving evidence in trial.
> 16. Based on the foregoing considerations and our specific findings, the Chamber is of the opinion that the Defence has not substantiated by a *prima facie* showing the allegations of breach by the Prosecution of Rule 66(A)(ii) of the Rules, Article 17(4) of the Statute, and the Chamber's Order for Disclosure dated 1 April 2004.
> 17. Accordingly, the application for exclusion or suppression of the supplemental evidence is denied, on the understanding however, that the Defence reserves its right to cross examine this witness on all issues raised including those in the supplemental statement.

Done at Freetown this 23rd day of July 2004

Hon. Judge Pierre Boutet	Hon. Judge Benjamin Mutanga Itoe Presiding Judge, Trial Chamber	Hon. Judge Bankole Thompson

[Seal of the Special Court for Sierra Leone]

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[1] *United Nations Treaty Series*, vol. 1155, p. 331.
[2]*Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004.
[3] *Id*. para 5.
[4] *Id*. para 7.
[5]*Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of Rules, 9 July 2004, para 27.
[6]*Prosecutor v. Kondewa*, Case No. SCSL-04-14-T, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68, 8 July 2004, para 10.
[7] *Prosecutor v. Norman et al.*, *supra* note 2, para 7.
[8] *Id*.

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[9] *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DP, 18 November 2003.
[10] *Id*., para 6.
[11] *Id*., Decision on Admissibility of Evidence of Witness DBQ, 18 November 2003. See also *Id*., Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA, 5 December 2003.
[12]*Prosecutor v. Sesay et al*., Case No. SCSL-04-15-PT, Amended Consolidated Indictment, 13 May 2004.
[13]*Prosecutor v. Sesay et al*., Case No. SCSL-04-15-PT, Prosecution Supplemental Pre-Trial Brief Pursuant to Order to OTP to File a Supplemental Pre-Trial Brief of 30th March as Amended by Order of 2 April 2004, 21 April 2004.
[14]*Prosecutor v. Sesay et al*, Case No. SCSL-04-15-PT, Updated Compliance Report Filed Pursuant to Undertaking by the Prosecution in Pretrial Conference Held 29 April 2004 (RUF), 11 May 2004.
[15] *Prosecutor v. Norman et al*., *supra* note 2, para 6.

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