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: 26 July 2004

PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao
(Case No.SCSL-04-15-T)

RULING ON THE ORAL APPLICATION FOR THE EXCLUSION OF PART OF THE TESTIMONY OF WITNESS TF1-199

Office of the Prosecutor:
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Defence Counsel for Morris Kallon:
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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 Augstine Gbao during the trial proceedings on 23 July 2004 for the exclusion of part of the testimony of Witness TF1-199; and the Prosecution's oral Response thereto;

CONSIDERING Rule 66 and 67 of the Rules and Article 17 of the Statute of the Special Court ("Statute");

AFTER DELIBERATION

HEREBY ISSUES THE FOLLOWING RULING:

INTRODUCTION

1. Witness TF1-199 testified before this Court on 19 July 2004. The Prosecution had previously disclosed the redacted written statement for this Witness on different dates between November 2003 and December 2003[1] while its unredacted version had been disclosed in accordance with the witness protection orders.
2. Based on Rule 89(C) of the Rules and Article 17 of the Statute, the Defence submits that the part of the testimony of Witness TF1-199 pertaining to the kidnapping of UNAMSIL personnel in Makeni should be excluded on the grounds that it is fresh evidence and it has not been given notice of this event from the disclosure referred to above and that, as a result, it cannot properly prepare to cross-examine this Witness. The Defence claims that evidence which cannot be properly tested by the Defence cannot be given probative value and therefore should be excluded.[2]
3. The Prosecution submitted that it acted diligently in disclosing the witness statement for this Witness and that, in addition to such statements, the Amended Consolidated Indictment and the Pre-Trial Brief provide sufficient notice to the Defence on the specific allegations on the kidnapping of UNAMSIL personnel. Further, the Prosecution contends that the impugned testimony is not fresh evidence but rather an expansion of the evidence presented by this Witness in open court, consistent with the principle of orality. The Defence therefore did not suffer any prejudice and, if any, it will be given the chance to test the probative value of this evidence in cross-examination.

DELIBERATION

4. This Chamber is called upon to determine whether the Defence has demonstrated that the Prosecution is in breach of its disclosure obligations under Rule 66 and Rule 67 of the Rules and Article 17(4) of the Statue on the rights of the Accused on the alleged grounds that it has not diligently disclosed in a timely manner evidence by Witness TF1-199 on the kidnapping of UNAMSIL personnel in Makeni. Further, this Chamber should also determine whether the evidence being challenged, as it arose during testimony in court, is new evidence for which the Defence has not been given sufficient time to investigate and to prepare for cross-examination and whether this consequently warrants its exclusion.
5. In particular, this Chamber notes that the written statement in question states the following on this point:

When the RUF attacked the UN Peacekeepers, they left Lunsar and went to Freetown. There was a heavy attack on Gbari Junction. [Witness] saw UN vehicles drive [sic] by with RUF soldiers as drivers. They were wearing the UN caps.

Furthermore, the interview notes of 31 February 2004 state the following:

I heard about the attacks on the UN peacekeepers when I was at an interim care centre. I saw rebels wearing UN caps and driving UN vehicles. We knew that the rebels had attacked the UN. At this time, the rebe;s were still mixed with AFRC and RUF.

6. This Chamber has repeatedly addressed various issues regarding disclosure of evidence.[3] In the *Norman* Decision, the Chamber observed that:

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]

7. Further, 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"[5]. 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.[6]

8. With reference to the evaluation of the novelty of evidence presented in Court during testimony, this Chamber already considered that it may not be possible to include every matter that a witness will testify upon at trial in a witness statement of whichever nature. Pursuant to the principle of orality, witnesses shall be ideally heard directly in open court. In the *Norman* Decision, this Chamber held that:

While there is a duty for the Prosecution to diligently disclose witness statements that identify matters that witnesses will testify about at trial, thereby providing the Defence with essential information for the preparation of its case, it is foreseeable that witnesses, by the very nature of oral testimony, will expand on matters mentioned in their witness statements, and respond more comprehensively to questions asked at trial.[7]

Where a witness has testified at trial to matters not directly or expressly contained in a witness statement, an opposing party might well wish to highlight any such discrepancy and further inquire on this point by means of cross-examination.

9. Further, an assessment of whether material disclosed or evidence adduced orally in court is new requires a comparative assessment of the allegedly new evidence, the original witness statement as well as the Indictment and the Pre-Trial Brief, combined with the period of notice to the Defence that the particular witness will testify on that event and the extent to which the alleged new evidence alters the evidence the Defence has already notice of. If the evidence is not new, but merely supplements evidence which has previously been disclosed in accordance with the Rules, it is then admissible.[8]

10. The Chamber has carefully reviewed the original statements of witness TF1-199, as well as the Indictment and the Prosecution's Pre-Trial Briefs,[9] in order to determine if there has been any breach in its disclosure obligations pursuant to Rule 66 by the Prosecution and if the allegations on the kidnapping of UNAMSIL personnel in Makeni amounts in the circumstances to new evidence.

11. In light of the foregoing considerations and our specific findings, the Chamber is of the unanimous opinion that the Defence has not substantiated by a *prima facie* showing the allegations of negligence or lack of diligence by the Prosecution. Furthermore, we also find that the Defence has been sufficiently put on notice and given adequate time to prepare on the allegations concerning the kidnapping of UNAMSIL personnel in Makeni from both the Indictment and the Pre-Trial Briefs and, in the instant case, from the disclosed written statement of Witness TF1-199.

RULING

12. Accordingly, the application for exclusion of the evidence of Witness TF1-199 on the kidnapping of UNAMSIL personnel is dismissed and Defence may proceed with the cross-examination of Witness TF1-199 if Counsel so desires.

Done at Freetown this 26th 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]

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[1] The Prosecution disclosed the written statement of Witness TF1 199 dated 16 August 2003 to each of the three accused on , respectively, 14 November 2003, 10 December 2003 and 17 December 2003. See Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of the Trial of 1 April 2004, 26 April 2004, Cover Page 2, Compliance Report, p. 44. The Prosecution further obtained interview notes from Witness TF1 199 on 31 February 2004.

[2] See *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admissibility of Wintess DBQ, 18 November 2003, paras 8 and 24.

[3] Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060, 23 July 2004 ("Ruling of 23 July 2004"); Decision on Defence Motion for Disclosure Pursuant to Rule 66 and 68 of the Rules, 9 July 2004; Decision on Defence Motion, 15 July 2004 ("*Sesay* Decision"); Ruling on Oral Application for Respect of Disclosure Obligations, 9 July 2004. See also *Prosecutor v. Norman et al*., SCSL-04-14-T, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004 ("*Norman* Decision").

[4] *Norman* Decision, para 7. See also *Sesay* Decision, paras 21-22.

[5] *Id*., para.7.

[6] *Id.*, para 7. See also *Prosecutor v. Furundzija*, IT-95-17/1, Scheduling Order, 29 April 1998.
[7] *Norman* Decision, para. 25.
[8] Ruling of 23 July 2004, para. 11. See also *Prosecutor v. Bagosora et al*., Decision on Admissibility of Evidence of Witness DP, 18 November 2003, para. 6.
[9] Amended Consolidated Indictment, 13 May 2004; 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. See also Prosecution Chart Indicating Documentary and Testimonial Evidence by Paragraphs of Consolidated Indictment Pursuant to Trial Chamber Order Dated 1 April 2004., 4 May 3004. See also Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of the Trial of 1 April, 2004, 26 April 2004, Cover Sheet 3 – Witness Summaries, p. 158.