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SCSL-04-15-T
(18160 - 18165)

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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER I

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

Registrar: Mr. Lovemore G. Munlo SC

Date: 27th of February, 2006

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

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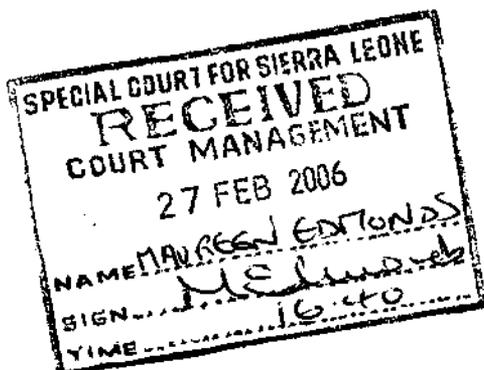
**DECISION ON THE DEFENCE MOTION FOR THE EXCLUSION OF CERTAIN PORTIONS
OF SUPPLEMENTAL STATEMENTS OF WITNESS TF1-117**

Office of the Prosecutor:
Desmond de Silva QC
James Johnson
Peter Harrison

Defence Counsel for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Shekou Touray
Charles Taku
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao:
Andreas O'Shea
John Cammegh



TRIAL CHAMBER I ("Trial Chamber I") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson, and Hon. Justice Benjamin Mutanga Itoe;

SEIZED of the "Defence Motion Requesting the Exclusion of Paragraphs 1, 2, 3, 11 and 14 of the Additional Information Provided by Witness TF1-117 dated 25th, 26th, 27th and 28th October 2005" ("Motion"), filed by Defence Counsel for the First Accused, Issa Sesay, on the 12th of January, 2006;

CONSIDERING the Response to the Motion, filed by the Office of the Prosecutor ("Prosecution") on the 23rd of January, 2006 and the Defence Reply thereto, filed on the 26th of January, 2006;

NOTING the "Prosecution Proposed Order of Appearance of Witnesses - Seventh Trial Session", filed on the 10th of February, 2006;

CONSIDERING Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rule 66(A)(ii) of the Rules of Procedure and Evidence ("Rules");

HEREBY ISSUES THE FOLLOWING UNANIMOUS DECISION:

I. INTRODUCTION

1. On the 2nd June, 2003, the Prosecution served an unredacted copy of the witness statement of protected Prosecution Witness TF1-117, dated the 12th of January, 2003. On the 11th of March, 2004, the Prosecution served Interview Notes in respect of the said witness, dated the 28th of February 2004. On the 28th of October, 2005, the Prosecution served Proofing Notes taken from the witness on 25th, 26th, 27th and 28th of October, 2005.

2. On the 12th of January, 2006, Defence Counsel for First Accused ("Defence") filed the instant Motion. On the 23rd of January, 2006, the Prosecution filed a Response, a Reply to which was filed by the Defence on the 26th of January, 2006.¹

II. PARTIES SUBMISSIONS

3. In support of its Motion, the Defence submits that paragraphs 1, 2, 3, 11 and 14 of the supplemental statements of Witness TF1-117 dated the 25th, 26th, 27th and 28th of October, 2005

¹ A Corrigendum to the Reply was subsequently filed on the same date.

("Supplemental Statements") contain wholly new allegations against the First Accused, which did not form part of the Witness's original statements. The Defence accordingly requests the Trial Chamber to order the exclusion of those parties of the Supplemental Statements unless the Prosecution shows good cause pursuant to Rule 66 of the Rules.²

4. Set out below is a summary of the specific Defence submissions in support of the Motion:

- (i) that the threefold criteria set out in the *Bagosora Case*³ govern the determination of the issue whether evidence is new or not for purposes of applications of this type;⁴
- (ii) that allegations contained in the statements in question concern the First Accused's superior responsibility including his contacts with Witness TF1-117, Sam Bockarie, and Charles Taylor as well as planning the Kono attack, which made no prior reference to First Accused in the witness' previous statements or summary of his testimony previously disclosed to the Defence.⁵
- (iii) that the frequency of late disclosure of additional witness statements suggests that additional or new evidence contained therein might not be the result of spontaneous recollection by the witness but a result of active prompting by the Prosecution.⁶

5. In its Response, the Prosecution submits that the Defence has failed to make a *prima facie* showing of breach of Rule 66 of the Rules, and that consistent with existing jurisprudence proofing of witnesses prior to their testimony is widely acknowledged and accepted.⁷

6. In its Reply to the Prosecution's Response, the Defence reiterates its main submissions as set out in paragraph 4 above.

III. APPLICABLE LAW

7. This Motion focuses on the related legal issues of the exclusion of supplemental statements of prosecution witnesses on the grounds that they contain or introduce new allegations against the

² Motion, paras 1 and 3. There is an error in the Defence numbering of certain paragraphs of the Motion.

³ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on the Admissibility of Evidence of Witness DP, 18 November 2003.

⁴ Motion, para. 5.

⁵ *Id.*, paras 7 - 10, paras 15- 16.

⁶ *Id.*, paras 17-20.

⁷ Response, see in particular paras 8-15.

Accused persons, and whether, if the allegations are new, there has been a breach of Rule 66 of the Rules on the part of the Prosecution.

8. The law governing Motions of this type, as has been consistently stated by this Chamber in its previous Decisions⁸ on the subject, is Rule 89 of the Rules. The relevant provisions are as follows:

(B) In cases not otherwise provided for in this section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence.

9. The Chamber recalls that in disposing of previous applications of this nature, it had reviewed the case law on the issue of additional, supplemental or will-say statements, and in particular the *Bagosora* case.⁹ We enunciated in our *Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 Dated Respectively 9th of October, 2004, 19th and 20th of October, 2004, and 10th of January, 2005*, what we consider to be the applicable test in stating that:

“...in determining whether to exclude additional or supplemental statements of prosecution witnesses within the framework of prosecutorial disclosure obligations, a comparative evaluation should be undertaken designed to ascertain (i) whether the alleged additional statement is new in relation to the original statement, (ii) whether there is any notice to the Defence of the event the witness will testify to in the indictment or Pre-Trial Brief of the Prosecution, and (iii) the extent to which the evidentiary material alters the incriminating quality of the evidence of which the Defence already had notice.”¹⁰

⁸ For the most relevant jurisprudence of the Special Court on this subject, see for example: *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122, 1 June 2005 (“Ruling on Witnesses TF1-361 and TF1-122”); *Id.*, Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 Dated Respectively 9th of October, 2004, 19th and 20th of October, 2004, and 10th of January, 2005, 3 February 2005 (“Ruling on Witness TF1-141”); *Id.*, Ruling on Oral Application for the Exclusion of “Additional” Statement for Witness TF1-060, 23 July 2004 (“Ruling of Witness TF1-060”); *Id.*, Ruling on the Oral Application of the Exclusion of Part of the Testimony of Witness TF1-199, 26 July 2004; *Id.*, Ruling on Disclosure Regarding Witness TF1-015, 28 January 2005; and *Id.*, Ruling on Disclosure Regarding Witness TF1-195, 4 February 2005. See also *Prosecutor v. Norman et al.*, Case No SCSL04-14-T, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004; *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005; *Id.*, Sesay - Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004.

⁹ See *supra* note 3. From the same case, see also *id.*, Decision on Admissibility of Evidence of Witness DBQ, 18 November 2003.

¹⁰ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Ruling on Witness TF1-141, *supra* note 8 para. 19; Ruling on Witnesses TF1-361 and TF1-122, *supra* note 8 para. 22. See also Ruling of Witness TF1-060, *supra* note 8, para. 11.

10. The Chamber notes that the *ratio* of the said *Ruling* is that where allegations in supplemental or additional statements, singly or cumulatively, relate to separate and constituent different episodic events, or, are, as it were, building-blocks constituting an integral part of, and connected with the same *res gestae* forming the factual substratum of the charges in the indictment, such allegations are not new.¹¹

11. In addition, the Chamber deems it useful to refer to a recent Decision rendered by a Trial Chamber of the ICTR in the so called *Military II* Case. Seized of an application for exclusion of the testimony of a witness premised upon the contention that, *inter alia*, the Defence did not have any notice of certain specific allegations against two Accused as there was no mention of them either in the witness statement or in the summary of this witness testimony. That Chamber dismissed the application on the basis that the witness in question was expected to testify to allegations already contained in the indictment. In particular, the Chamber held that:

“As the primary charging instrument, the Indictment itself has already served notice on the Accused as to the main charges against them.”¹²

IV. MERITS OF THE MOTION

12. Guided by the aforementioned principles, we have reviewed the original statements of Witness TF1-117, subsequent proofing and interview notes referred to in paragraph 3 herein as well as the charges in the Amended Consolidated Indictment, the Prosecution’s Pre-Trial and Supplementary Briefs and other related materials filed by the Prosecution.

13. On the strength of such review, the Chamber is satisfied that the allegations contained in paragraphs 1, 2, 3, 11 and 14 of the Supplemental Statements of Witness TF1-117 are not new. We also find, significantly, that the Defence did have sufficient notice of the events to which the said allegations relate, and that the said allegations do not at all enhance the incriminating quality of the evidence in respect of which the Defence had had prior notice.

¹¹ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, *Ruling on Witness TF1-141*, *supra* note 8 para. 22; *Ruling on Witnesses TF1-361 and TF1-122*, *supra* note 8 paras 23, 28-29.

¹² *Prosecutor v. Bizimungu et al.*, Case No. ICTR-00-56-T, *Decision on Bizimungu’s Motion to Exclude the Testimony of Witness AP*, 28 October 2005, para 31. It is to be noted, in addition, that the Chamber in this instance also found that the witness statement provided sufficient notice of the specific allegations that the Defence was contesting.



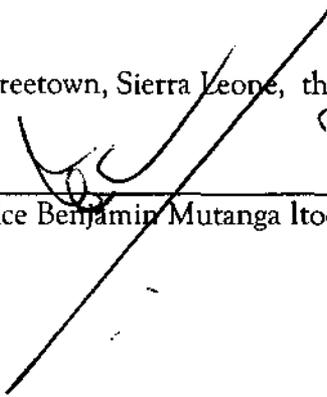


14. Predicated upon our main and significant findings, the Chamber opines that the Defence has failed to substantiate, by *prima facie* evidence, its allegation that the Prosecution has breached its Rule 66(A)(ii) disclosure obligation. The Motion, therefore, fails for want of merit.

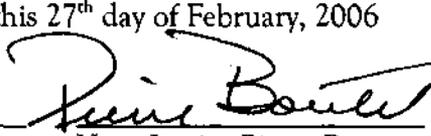
V. DISPOSITION

15. Based on the foregoing considerations, the Motion is accordingly **DENIED**.

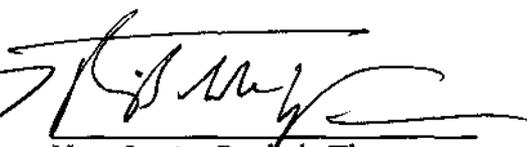
Done at Freetown, Sierra Leone, this 27th day of February, 2006



Hon. Justice Benjamin Mutanga Itoe



Hon. Justice Pierre Boutet
Presiding Judge
Trial Chamber I



Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

