

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 Evidence (as Indicated in Annex A) Arising from the Additional Information Provided by Witness TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288 (“Motion”), filed confidentially by Defence Counsel for the First Accused, Issa Sesay, on the 10th of February, 2006;

CONSIDERING the Response to the Motion, filed by the Office of the Prosecutor (“Prosecution”) on the 17th of February, 2006 and the Defence Reply thereto, filed on the 22nd of February, 2006;

NOTING the “Prosecution Proposed Order of Appearance of Witnesses – Seventh Trial Session”, filed on the 10th of February, 2006;

CONSIDERING that 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 various dates prior to the 26th of April 2004,¹ the Prosecution served on the Defence, a number of statements relating to protected witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288. Subsequently, in different dates between December 2004 and December 2005, the Prosecution also served supplemental statements² for these witnesses arising from various proofing sessions conducted with them.³

2. On the 10th of January, 2006, the Defence filed the instant Motion seeking an order from the Trial Chamber for the exclusion of the Supplemental Statements of the aforementioned Witnesses.

¹ For reference, see *Prosecutor v. Sesay et al.*, Case No. SCSL04-15-T, Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial, 1 April 2004.

² The relevant dates of these statements are contained in Annex A to the Motion. However, this Annex has been filed confidentially as it also indicates the names of the protected witnesses. For the purposes of the present Decision, such statements will be generally referred herein as “Supplemental Statements”.

³ For general reference on proofing sessions by the Prosecution with its witnesses, see *Prosecutor v. Sesay et al.*, Case No. SCSL04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005.

3. The Motion was filed confidentially due to the fact that its Annex A contained references to various protected witnesses. However, the Prosecution's Response and the Reply thereto were subsequently filed publicly as they did not make any specific reference to such witnesses. Having regard to the principle requiring that criminal trials be conducted in public and consistent with established jurisprudence of the Court,⁴ the Chamber deems it necessary that this Decision be now filed publicly, omitting, if necessary and as may be required, any information that could disclose the identity of any protected witnesses.

II. PARTIES SUBMISSIONS

4. In support of its Motion, the Defence submits that, applying the reasoning in the *Bagosora* Case,⁵ this further supplemental evidence served by the Prosecution ought to be characterised as new evidence, and accordingly requests the Trial Chamber for an order directing the exclusion of the said Supplemental Statement unless the Prosecution shows good cause pursuant to Rule 66 of the Rules.⁶

5. 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 govern the determination of the issue whether evidence is new or not for the purposes of applications of this type;⁷
- (ii) that the new allegations complained of as new are those detailed in paragraph 7 of the Motion paper;
- (iii) that the Defence accepts that the allegations produced by the Prosecution, through "the so-called proofing sessions" are germane to the general allegations set out at pages 2 - 8 of the Amended Consolidated Indictment and in the charges as specified and particularised in Counts 1 - 18 thereof, but that so would be any allegation of any crime committed by any rebel group;⁸

⁴ See, for instance, *Prosecutor v. Sesay et al.*, Decision on the Motion by Morris Kallon for Bail, 23 February 2004, paras 19-21. See also *Prosecution v. Brima et al.*, Case No. SCSL-04-16-T, Decision on the Confidential Joint Defence Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu, 23 May 2005, para. 22. See also *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005, paras 2-4.

⁵ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on the Admissibility of Evidence of Witness DP, 18 November 2003.

⁶ Motion, paras 2 and 6.

⁷ *Id.*

⁸ *Id.*, para. 8.

- (iv) that the breadth of the present indictment should not be used to justify the expansion of the Prosecution's case, and that compared with ICTY and ICTR, the present Indictment infringes the right of the Accused to know the case against them from the outset;⁹
- (v) that the evidence contained in the supplemental statement is entirely new because generally it alters the incriminatory quality of the evidence in respect of which the Defence already has notice, and specifically because (a) it has not been disclosed by the Defence until recently, (b) the Prosecution did not intend it to be part of its case when it purported to be complying with Rule 73(B), and (c) it provides a wholly different factual basis upon which the Trial Chamber could convict the Accused, irrespective of the evidence which has been disclosed to the Defence thus far.¹⁰

6. In its Response, the Prosecution submits that the Defence has failed to demonstrate that the Supplemental Statements contain new evidence and, consequently, to provide *prima facie* evidence of any Prosecution violations of its disclosure obligations.¹¹ The Prosecution also adds that the Motion is the latest of a series of oral or written motions filed by the Defence for the First Accused, in relation to which the Trial Chamber has already rendered various decisions so far, clearly establishing that supplemental evidence arising from witness summaries is admissible.¹²

7. In its Reply, the Defence reiterates and reinforces its previous submissions. In particular, the Defence states that there is no judicial authority or precedent for a continuous disclosure of new factual allegations which would allow a prosecuting authority to investigate during the course of the trial, with the sole aim of adding to its case to fit any new evidence discovered.¹³

III. APPLICABLE LAW

8. The law governing Motions seeking orders for the exclusion of supplemental statements of witnesses on the grounds that they contain new allegations is Rule 89 of the Rules. The relevant provisions are in these terms:

⁹ *Id.*, para. 9.

¹⁰ *Id.*, paras 13-16.

¹¹ Response, paras 3, 20-24.

¹² *Id.*, paras 4-9.

¹³ Reply, paras 1, 4-5, 9-11 and 17.

(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. It is now settled law in this Chamber that in determining whether a supplemental or additional statement of a prosecution witness embodies new allegations justifying exclusion and a finding of breach of disclosure obligation on the part of the Prosecution of Rule 66 of the Rules, the Chamber must be satisfied that (i) the alleged supplemental or additional statement is new in relation to the original statement, (ii) that there was no notice to the Defence in the Indictment or Pre-Trial Brief of the Prosecution of the event the witness will testify to, and (iii) that the evidence in the supplemental or additional statement enhances the incriminating quality of the evidence which the Defence already had notice.¹⁴

10. This Chamber has consistently applied this principle in a series of Motions that have recently come before it on the same issue, notably, in our most recent “Decision on the Defence Motion for the Exclusion of Certain Portions of Supplemental Statements of Witness TF1-117”, as well as the “Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122”, the “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”, and, finally, the “Ruling on Oral Application for the Exclusion of “Additional” Statement for Witness TF1-060.”¹⁵

11. In the Chamber’s considered view, the guiding principle that has logically evolved from an application of the principle in *Bagosora Case*¹⁶ for the purpose of determining whether a supplemental or additional statement of a prosecution witness is new or not is whether the

¹⁴ For the relevant jurisprudence of the Special Court on this subject, see for example: *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on the Defence Motion for the Exclusion of Certain Portions of Supplemental Statements of Witness TF1-117, 27 February 2005 (“Decision on Witness TF1-117”); *Id.*, 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; *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.

¹⁵ See *supra*.

allegations contained therein, singly or cumulatively, relate to separate and constituting different episodic events, or, as it were, building-blocks constituting an integral part of, and connected with the same *res gestae* forming the factual substratum of the changes in the indictment.¹⁷

IV. MERITS OF THE MOTION

12. Applying the aforementioned principles, the Chamber has reviewed each of the original statements of witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288 alongside their respective supplemental statement 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.

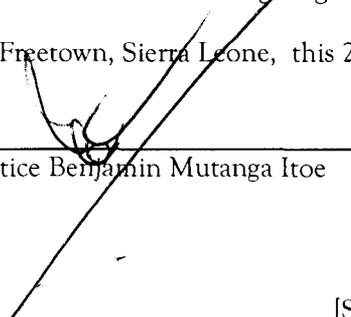
13. On the basis of such review, we find irresistible the inference that the allegations contained in the supplemental statements of each of the said witnesses are indeed germane to matters contained in the Amended Consolidated Indictment and other relevant Prosecution materials and constitute integral parts of, and connected with the same *res gestae* forming the factual substratum of the changes in the Indictment, taking into account the fact that “as the primary charging instrument, the indictment itself has already served notice on the Accused as to the main charges against them”.¹⁸

14. Predicated upon the foregoing significant finding, it is our considered view that the Defence has failed to make a *prima facie* showing of breach of Rule 66 of the Rules on the part of the Prosecution as regards disclosure of the Supplemental statements which are the subject matter of the present Motion. The Motion, therefore, fails for want of merit.

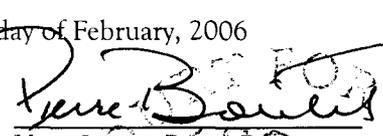
V. DISPOSITION

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

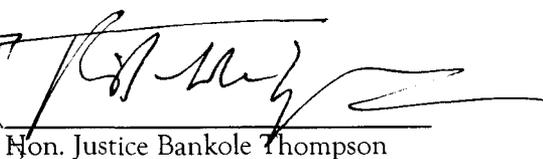
Done at Freetown, Sierra Leone, this 27th day of February, 2006



Hon. Justice Benjamin Mutanga Itoe



Hon. Justice Pierre Bouter
Presiding Judge
Trial Chamber I



Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

¹⁶ See *supra* note 5. From the same case, see also Decision on Admissibility of Evidence of Witness DBQ, 18 November 2003.

¹⁷ See Decision on Witness TF1-117, *supra* note 14, para. 10. See also Ruling on Witness TF1-141, *supra* note 14, para. 22.

¹⁸ See *Prosecutor v. Nindilyimana 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.