

TRIAL CHAMBER I (“Trial Chamber”) 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 “Notice of Motion by Morris Kallon pursuant to Rules 54 and 66(2) [sic] of the Rules of Procedure and Evidence of the Special Court for Sierra Leone for an Order Directing the Prosecutor to Effect Reasonably Consistent Disclosures” (“Motion”), filed on the 12th of December, 2005 by Defence Counsel for the Second Accused, Morris Kallon (“Defence”) and requesting the Chamber to order or direct the Prosecution to make reasonably consistent disclosure of witness statements and supplemental witness statements within a reasonable period prior to the testimony of prosecution witnesses;¹

NOTING the Response to the Motion filed by the Prosecution on the 15th of December, 2005, submitting that the Motion failed to show any *prima facie* evidence of a breach of Rule 66 of the Rules of Procedure and Evidence (“Rules”) by the Prosecution;²

NOTING that the Defence did not file any reply within the prescribed time limits;

CONSIDERING that the Defence submit that late disclosure of supplemental witness statements too close to the actual date of testimony of a witness has become customary in the RUF case and effectively deprives both the Trial Chamber and the Defence of having adequate time and notice to prepare for trial and violates the Accused rights contained in Article 17 of the Statute and, consequently, that the Prosecution must show reasonable cause as to why the supplemental statements were not obtained and disclosed within a reasonable time.³

CONSIDERING that the Prosecution submits that most of its witnesses were first interviewed a long time ago, and that at times it is difficult to promptly contact these witnesses either because they have moved from their original location or because they were initially afraid to testify, and that this Trial Chamber’s jurisprudence recognized the subsequent proofing of witnesses prior to their testimony at trial as being a legitimate practice that serves the interest of justice and is essential to the efficient running of the trial.⁴

¹ Motion, para. 1.

² Response, para. 9.

³ Motion, paras 17, 19, 21.

⁴ Response, paras 7-8, 15.

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CONSIDERING that this Motion concerns again, albeit in more general terms, the related legal issues of "supplemental" or "will say" statements of Prosecution witnesses on the grounds that they contain or introduce new allegations against the Accused persons, and whether there has been a breach of Rule 66 of the Rules on the part of the Prosecution;⁵

CONSIDERING that this Trial Chamber recently restated and applied three specific guiding principles deducible from the jurisprudence on this subject, as follows:

firstly, that additional, supplemental, or will-say statements containing allegations which, 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 are not new allegations; secondly, that as the primary charging instrument, the indictment itself, together with the Prosecution Pre-Trial Brief and Supplemental Pre-Trial Brief, has already served notice on the Accused as to the material facts alleged in the charges against him; and thirdly, a principle which is a logical extension of the first and the second is that allegations in supplemental, additional or will-say statements which are not new cannot, *ipso facto*, enhance the incriminating quality of the evidence against the Accused of which the Defence already has notice.⁶

CONSIDERING that, consequently, the evidence sought to be adduced by the Prosecution as a result of these statements which provide additional or supplemental information relevant to the Indictment would be admissible upon its compliance with these guiding principles.

⁵ 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, 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 on 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 ("Ruling on Witness TF1-195"). See also *Prosecutor v. Norman et al.*, Case No SCSL-04-14-T, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004 ("Norman Decision"); *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004. For a definition of "supplemental" or "will-say" statements, see Ruling on Witness TF1-141, *supra*, para. 23 and *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Admissibility of Evidence of Witness KDD, 1 November 2004, para. 9.

⁶ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on the Defence Motion Requesting the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-168, TF1-165 and TF1-041, 20 March 2006, ("Decision on Witnesses TF1-168, TF1-165 and TF1-041"), para. 10; see also *id.*, Decision On The Defence Motion For The Exclusion of Certain Portions of Supplemental Statements of Witnesses TF1-117, 27 February 2006, paras 10-11 and 13; *Id.*, Decision On The Defence Motion For the Exclusion of Evidence Arising From the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-288, 27 February 2006, paras 9, 11 and 13.

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CONSIDERING that, with reference to proofing sessions by the Prosecution of its witnesses, this Chamber previously held that:

proofing witnesses prior to their testimony in court is a legitimate practice that serves the interest of justice. This is especially so given the particular circumstances of many of the witnesses in this trial who are testifying about traumatic events in an environment that can be entirely foreign and intimidating for them.⁷

CONSIDERING that, pursuant to the Prosecution's obligations under Rule 66 and 68 of the Rules, any new evidence elicited during proofing sessions must be disclosed on a continuing basis.⁸

CONSIDERING that the obligation of disclosure by the Prosecution of the evidence in its custody which it intends to introduce to establish material facts of the charges and the allegations contained in the indictment does differ from, and should not be confused with its obligation to state the material facts constituting the charges against the accused persons in the indictment and as to the form and contents of the indictment.⁹

CONSIDERING that, in the Ruling on Witness TF1-060, the Trial Chamber re-affirmed the existence of its discretionary power as regards the assessment of which is the appropriate remedy in case of breach of disclosure obligations, observing that this assessment involves an exercise of discretion by the Chamber and requires a particular factual inquiry into the evidence in question.¹⁰

REITERATING that, as a general rule, the judicially preferred remedy for a breach of disclosure obligations by the Prosecution, if proven, is an extension of time to enable the Defence to adequately prepare rather than the direct exclusion of the evidence concerned.¹¹

⁷ *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, ("Decision on Witness TF1-141"), para. 33. See also *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice of 'Proofing Witnesses', 10 December 2004.

⁸ Decision on Witness TF1-141, *supra* note 7, paras 19 and 34. For this Chamber's jurisprudence concerning the interpretation of the provisions of Rule 66 see, in particular, *Norman* Decision, *supra* note 5, paras 5-7.

⁹ Decision on Witnesses TF1-168, TF1-165 and TF1-041, *supra* note 6, para. 11. For a general guidance on the form and contents of an indictment, see *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, paras 50ff.

¹⁰ Ruling on Witness TF1-060, *supra* note 5, paras 2-3. See also *Prosecutor v. Bagosora et al.*, Case No. ICTR-41-T, Decision on Certification of Appeal Concerning Will-Say Statements of Witness DBQ, DP and DA, 5 December 2003, paras 7 and 10.

¹¹ Ruling on Witnesses TF1-361 and TF1-122, *supra* note 5, para. 24. In certain instances, it has to be noted, the Chamber has also ruled for the exclusion of evidence not properly disclosed by the Prosecution. See Ruling on Witness TF1-195, *supra* note 5, para. 7.

CONSIDERING that, in the Ruling of Witnesses TF1-361 and TF1-122, the Chamber already expressed its concerns that the Prosecution practice of proofing its witnesses prior to their testimony was becoming systematic in producing supplemental or additional statements and indicated that such practice would require all parties to act at all times in good faith pursuant to Rule 66;¹²

FINDING, however, in the present circumstances, that the Defence has failed to make a *prima facie* showing of any specific breach on the part of the Prosecution of its Rule 66 disclosure obligation arising from the proofing of its witnesses before their testimony at trial;

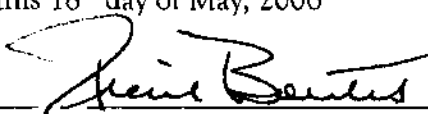
PURSUANT to Article 17 of the Statute of the Special Court for Sierra Leone and Rules 54, 66 and 89 of the Rules;

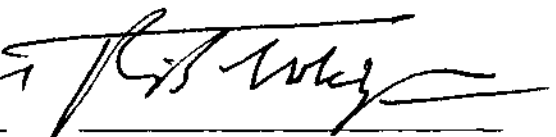
THE CHAMBER

DENIES the Motion.

Done at Freetown, Sierra Leone, this 18th day of May, 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]



¹² Ruling on Witnesses TF1-361 and TF1-122, supra note 5, paras 31-32.