SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before:	Hon. Justice Bankole Thompson, Presiding Judge Hon. Justice Pierre Boutet Hon. Justice Benjamin Mutanga Itoe	
Registrar:	Mr. Lovemore G. Munlo SC	
Date:	1st of August 2006	
PROSECUTOR	**Against**	**ISSA HASSAN SESAY** **MORRIS KALLON** **AUGUSTINE GBAO** (Case No. SCSL-04-15-T)

Public Document

DECISION ON DEFENCE MOTION TO REQUEST THE TRIAL CHAMBER TO RULE THAT THE PROSECUTION MOULDING OF EVIDENCE IS IMPERMISSIBLE

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

SEIZED of the "Defence Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court", filed by Defence Counsel for the First Accused, Issa Sesay ("Defence"), on the 3rd of May, 2006 ("Motion");

CONSIDERING the Response to the Motion, filed by the Office of the Prosecutor ("Prosecution") on the 15th of May, 2006 ("Response") and the Defence Reply thereto, filed on the 18th of May, 2006 ("Reply");

CONSIDERING Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 54, 66 and 89 of the Rules of Procedure and Evidence ("Rules");

HEREBY ISSUES THE FOLLOWING UNANIMOUS DECISION:

I. PARTIES SUBMISSIONS

a) The Motion

1. The Defence submits that the Prosecution has willingly continued to investigate by re-interviewing its existing witnesses in the deliberate pursuit of more factual allegations for the purpose of moulding their case to suit the evidence as it unfolds.[1] According to the Defence, this practice by the Prosecution involves a three stages conduct, namely 1) the Prosecution analyses whether the Defence successfully challenged its evidence as presented in Court; 2) the Prosecution re-interviews its remaining witnesses in order to obtain supplemental factual allegations to those successfully challenged by the Defence, and 3) the Prosecution discloses these factual allegations in the form of additional witness statements in pursuance of its legitimate disclosure obligations.[2]
2. The Defence also submits that, although this Court has ruled on various previous occasions that additional factual allegations are admissible whenever they are disclosed provided that they fall within the parameters of the Indictment, this Trial Chamber has declared that the Prosecution is not allowed to mould its case according to how the evidence unfolds[3] and, therefore, the moulding of the evidence is impermissible and the Court should rule accordingly with reference to this practice of the Prosecution.[4]

c) The Prosecution Response

3. In its Response, the Prosecution submits that the Chamber previously decided issues concerning the prosecutorial practice of disclosing additional witness statements in various decisions so far and, therefore, the Motion is seeking to re-litigate matters already decided upon.[5]
4. The Prosecution also submits that none of the authorities cited by the Defence supports their position in that these authorities are only concerned with defects in the form of the indictment, and in particular whether vagueness in the indictment might result in the subsequent expansion of the case against an accused person as the evidence against him unfolds in court, rather than pronouncing on the proofing of witnesses and the

disclosure and admissibility of any additional information.[6] According to the Prosecution, in the particular circumstances of this case, the Indictment against the Accused has not been declared defective.[7]

5. In conclusion, the Prosecution requests that the Chamber issues a warning to the Defence pursuant to Rule 46(C) to the effect that the Motion is frivolous and should have not been brought before the Chamber.[8]

d) Defence Reply

10. In its Reply, the Defence reiterates its argument that the Prosecution is calculatedly moulding its case by continuing to seek new evidence from its witnesses in rebuttal of evidence successfully challenged by the Defence.[9] The Defence also submits that the Prosecution is deliberately avoiding responding to the substance of this allegation and invokes the remedy of Rule 46(C) against the Prosecution.[10]

II. APPLICABLE LAW

11. This Motion is the latest of a series applications by the Defence involving disclosure of evidence by the Prosecution and raising the issue whether any breach of disclosure necessarily warrants exclusion of evidence.[11] Applications of this nature are generally governed by Rule 66, 89 and 95 of the Rules. The relevant jurisprudence of this Chamber, especially in the RUF case, is settled and extensive.

12. The Chamber reiterates that, as a matter of law, admissibility of evidence is governed by Rule 89. This Rule confers on the Chamber a discretionary power to admit any relevant evidence, as well as, on the other hand, to exclude evidence which is not relevant.[12] It is also within the Chamber's discretion to exclude evidence pursuant to Rule 95 where its admission would bring the administration of justice into disrepute. Thus, under this Rule and in pursuance of its inherent jurisdiction, the Chamber may exclude evidence whose probative value is manifestly outweighed by its prejudicial effect.[13]

13. We find that it appears to be a common feature of the Prosecution strategy in this case to hold Proofing sessions of its witnesses prior to their testimony at trial. Commenting on this practice by the Prosecution in a previous Decision, we 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.[14]

14. In that same Decision, the Chamber reiterated its findings that any new or supplemental evidence elicited during proofing sessions must be disclosed on a continuing basis pursuant to the Prosecution's obligations under Rules 66 and 68.[15] More generally, as to disclosure obligations under Rule 66, this Chamber has ruled that in order to establish that the Prosecution has breached its disclosure obligations under the said Rule, the Defence must "make a *prima facie* showing of materiality and that the requested evidence is in the custody or control of the Prosecution."[16]

15. In rare occasions, the Chamber has ordered the exclusion of evidence not properly disclosed by the Prosecution. In this regard, we underscore the position that exclusion of evidence is an exceptional remedy, warranted *inter alia* upon proof that the Prosecution failed to promptly exercise due diligence in fulfilling its disclosure obligations or has acted in bad faith.[17]

III. DELIBERATIONS

16. The instant Motion is premised on the Defence contention of an alleged deliberate and impermissible practice by the Prosecution of expanding the factual allegations relevant to the crimes pleaded in the Indictment through a calculated use of the legitimate practice of proofing its witnesses and disclosing any additional statements arising from such proofing sessions.

17. Based on a combined reading and interpretation of Rule 89 and Rule 95, it is absolutely clear that no evidence shall be admissible if obtained by methods which could subsequently cast a substantial doubt on the evaluation of its reliability or if its admission could seriously damage the integrity of the proceedings.[18] However, any direct challenge to the general integrity of the statement-taking process should be substantiated by a *prima facie* showing of foul play, either deliberate or negligent, by the Prosecution in order to justify an inquiry by the Chamber into the said process.[19]

18. Consistent with this Chamber's relevant jurisprudence concerning the Prosecution's practice of disclosure and the lack of any evidence impeaching the Prosecution's integrity herein, the Chamber is of the opinion that the Motion is merely speculative. It fails to demonstrate any *prima facie* evidence of any specific breach by the Prosecution of its disclosure obligations or of any deliberate foul play in the presentation of its case which might at this stage suggest that the administration of justice has been brought into disrepute.

FOR THESE REASONS, THE CHAMBER HEREBY

DISMISSES the Motion in its entirety

Done at Freetown, Sierra Leone, this 1st day of August 2006

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

[Seal of the Special Court for Sierra Leone]

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[1] Motion, para. 1.
[2] *Id*., para. 2.

[3] *Id*., paras 3, 10-11. The Defence relies on *Prosecutor v. Sesay*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003, para. 33. This position, according to the Defence, is supported by jurisprudence from the ICTY. See *Prosecution v. Kupreskic*, Case No. IT-95-16-A, Appeal Judgment, 23 October 2001, para. 92; *Prosecution v. Brdanin and Talic*, Case No. IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 11.
[4] Motion, paras 5 and 10. The Defence also concedes that the proofing of witnesses by the Prosecution before their testimony at trial is generally permissible. See *id*., para. 3.
[5] Response, paras. 4, 6-7, 17. In particular, the Prosecution submit that the practice of proofing witnesses prior to their testimony at trial is widely acknowledged and accepted in order to identify fully the facts known to the witness that are relevant to the charges in the Indictment. See *Id*., para. 8. The Prosecution cites the case of *Prosecutor v. Limaj*, Case No. IT-03-66-T, Decision on Defence Motion of Prosecution Practice of Proofing Witnesses, 10 December 2004
[6] Response, paras 9-14.
[7] *Id*.
[8] *Id*., para. 18.
[9] Reply, paras 1, 8, 11 and 14.
[10] *Id*., paras 1, 3, 5, 7 and 10.

[11] Previous applications involved the disclosure of specific supplemental witness statements and, in particular, whether such statements contained new evidence and whether there was a breach of Rule 66. See, for example: *Prosecutor v. Sesay et al*., Case No. SCSL-04-15-T, Decision on Defence Motion for an Order Directing the Prosecution to Effect Reasonably Consistent Disclosure, 18 May 2006; *id*., 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; *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 I*d.*, 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* Disclosure Decision"); *Prosecutor v. Sesay et al*., Case No. SCSL-04-15-T, Sesay - Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004;
[12] *Prosecutor v. Sesay et al*., Case No. SCSL-04-15-T, Written Reasoned Ruling on Defence Evidentiary Objections Concerning Witness TF1-108, 15 June 2006 ("Ruling on TF1-108"), para. 9; See *Prosecutor v. Norman, Fofana and Kondewa*., Case No. SCSL-04-14-AR65, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005, para. 22ff.
[13] *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, 23 May 2005, para. 7. See also *Id*., Ruling on TF1-108, para. 9.
[14] *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, para. 33.

[15] *Id.*, para. 19 and 34. See also Ruling on Witness TF1-141, para 24. For this Chamber's jurisprudence concerning the interpretation of the provisions of Rule 66 see, in particular, *Norman* Disclosure Decision, paras 5-7.
[16] *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, "Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules", 9 July 2004, para. 27. In its Ruling on Witness TF1-060, as well as in the *Bagosora* case, the Trial Chamber stressed its discretionary power for the assessment of which is the appropriate remedy in case of breach of disclosure obligations and found that this assessment involves an exercise of discretion by the Chamber and requires a particular factual inquiry into the evidence in question. See Ruling on Witness TF1-060, paras 2-3; *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, para. 7 and 10; With reference to the appropriate remedy when supplemental statements are found to contain new evidence, this Chamber held 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. See Ruling on Witnesses TF1-361 and TF1-122, para. 24.
[17] See Ruling on Witness TF1-195, para. 7.

[18] See, for instance, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, Decision on Joint Defence Motion Regarding the Propriety of Contacting Defence Witnesses, 20 June 2006, para. 24.
[19] In addition to this Chamber's jurisprudence already cited in this Decision in connection with the Defence requirement to make a prima facie showing of any Prosecution's breach of its disclosure obligations, see also, for instance, *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses, 6 July 2006, paras 14-17. See also *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Exclusion of Evidence Under Rule 95, 27 January 2004, para. 5.