SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Interim Registrar: Mr. Lovemore G. Munlo

Date filed: 17 February 2006

THE PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PROSECUTION RESPONSE TO DEFENCE MOTION REQUESTING THE EXCLUSION OF ADDITIONAL EVIDENCE OF WITNESS TF1-113, TF1-108, TF1-330, TF1-041 AND TF1-288

Office of the Prosecutor:
Desmond De Silva QC
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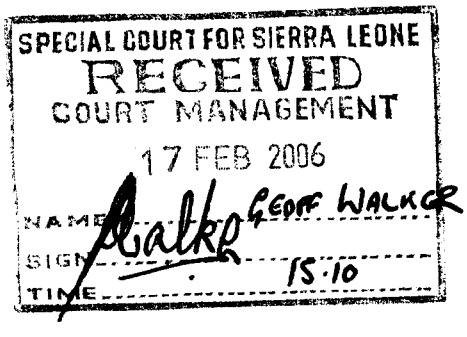

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I. INTRODUCTION

1. The Prosecution files this Response to 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," filed on behalf of the First Accused Issa Sesay on 10 February 2006 ("Motion").[1]
2. In its Motion, the Defence argues that supplementary statements served on the Defence on various dates between December 2004 and December 2005, relating to five Prosecution witnesses ("additional statements"), should be characterized as "new evidence", having reference to the ICTR case of *Prosecutor v Bagosora*.[2] As such, the Defence submits that the evidence should be excluded, unless the Prosecution shows good cause pursuant to Rule 66A of the Rules of Procedure and Evidence ("Rules").
3. The Prosecution submits that the Defence has failed to demonstrate that the additional statements contain new evidence so as to provide *prima facie* proof of a violation by the Prosecution of its disclosure obligations or that it has been afforded insufficient time to prepare its case adequately in relation to material contained in the additional statements.

II. ARGUMENT

New Evidence

4. The Motion is the sixth in a series of similar oral and written motions in relation to which this Trial Chamber has rendered four decisions so far.[3] The Prosecution submits that the jurisprudence of this Chamber provides the applicable backdrop for a consideration of the Defence's factual submissions on the additional statements.
5. In its Ruling of 23 July 2004, the Trial Chamber noted the guidelines laid down in

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[1] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-475, "Defence Motion Requesting the Exclusion of Evidence (As Indicated in Annex A) Arising from the Additional Information Provided by Witnes TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288", 10 February 2006.

[2] *Prosecutor v Bagosora*, ICTR-98-41-T, "Decision on the Admissibility of Evidence of Witness DP", Trial Chamber, 18 November 2003 ("**Bagosora Decision**").

[3] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-211, "Ruling on Oral Application for the Exclusion of 'Additional' Statement for Witness TF1-060", 23 July 2004 ("**23 July 2004 Ruling**"); *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T, "Ruling on the Oral Application for the Exclusion of Part of the Testimony of Witness TF1-199", 26 July 2004, ("**26 July 2004 Ruling**"); *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-314, "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, ("**3 February 2005 Ruling**"); *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122", 1 June 2005, ("**1 June 2005 Ruling**").

Bagosora, and repeated in paragraph 6 of the Motion, for determining the existence and admissibility of "new" allegations.[4] The Chamber considered the argument of the Defence that the additional statement in that instance alleged entirely new facts and should be deemed to be a statement from a new witness for the purposes of the interpretation and application of Rule 66(A)(ii). The Chamber concluded that while Rule 66 imposed an obligation of continuous disclosure of the statements of Prosecution witnesses to the Defence, including material relating to new developments in an investigation, the Defence had not substantiated by a *prima facie* showing the allegations of a breach by the Prosecution of Rule 66(A)(ii) of the Rules or Article 17(4) of the Statute.[5]

6. In its Ruling of 26 July 2004, the Trial Chamber stated:

> 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.[6]

7. The Trial Chamber clarified further the purpose and function of Rule 66 in its Ruling of 3 February 2005 and held that:

> the allegations embodied in the respective statements, taken singly or cumulatively, are not new evidence but rather separate and constituent 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 charges in the Indictment.[7]

8. Most recently, in its Ruling of 1 June 2005, the Trial Chamber commented on the appropriate remedy in the event that additional statements in fact contain new evidence as follows:

> this Chamber has earlier held that, as a general rule, the judicially preferred remedy for a breach of disclosure obligations by the Prosecution is an extension of time to enable the Defence to prepare adequately its case rather

[4] 23 July 2004 Ruling, para. 11.
[5] Ibid, paras 15-16.
[6] 26 July 2004 Ruling, para. 9.
[7] 3 February 2005, para. 22(v).

than the exclusion of the evidence.[8]

9. The jurisprudence makes it clear that evidence that is supplementary is admissible.[9] The Trial Chamber, in determining whether to exclude additional statements will undertake a comparative evaluation of whether the statement is new, whether the Defence has had adequate notice, and the extent to which the incriminating quality of the evidence has changed. The fact that evidence is new does not result in its automatic exclusion. As the Trial Chamber has emphasized, it possesses discretionary authority to determine the appropriate remedy in case of a breach of disclosure obligations which involves a factual inquiry into the specific evidence in question. This supports the statement in *Bagosora* that "if...the evidence is characterized as new, then the Chamber assesses the extent of the new evidence, how incriminating it is, and its remoteness from any other incidents of which the Defence has notice, to determine what period of notice is adequate to give the Defence time to prepare".[10]

The Indictment and Pre-Trial Brief

10. In paragraph 8 of its Motion the Defence accepts that the allegations contained in the additional statements are germane to the charges in the Indictment. The Defence goes on to argue that the broad nature of the Indictment means that any allegation of a crime of any kind and committed by anyone, during the period of the Indictment, in any rebel group would also be germane to the Indictment. This comment adds nothing to the Defence arguments. Rule 72 provides the appropriate basis upon which to object to defects in the form of the Indictment by way of a preliminary motion. Such a preliminary motion was brought by the Sesay Defence at the relevant time and decided upon on 13 October 2003.[11]
11. The Defence asserts further, however, that the Prosecution is using the breadth of the Indictment to justify the expansion of its case.[12] The Defence also argues that the breadth of the Indictment placed a greater onus on the Prosecution to outline in greater detail in

[8] 1 June 2005 Ruling, para. 24.
[9] Bagosora Decision, para. 6.
[10] Bagosora Decision, para. 6.
[11] *Prosecutor v Seasy*, SCSL-2003-05-PT-080, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003.
[12] Motion, para. 9.

its pre-trial brief the case against the Accused.[13] The Defence then goes as far as to assert that the Prosecution has "actively misled the Defence and the Trial Chamber" by maintaining that the crimes it seeks to prove were contained in the pre-trial brief.[14]

12. There is no basis for these assertions. War crimes trials typically occur over a period of time and witnesses may be called upon to testify about multiple events separated in time by years. Proofing is required because the interviews may have taken place a long time before the witness testifies and:

> The process of human recollection is likely to be assisted, in these circumstances, by a detailed canvassing during the pre-trial proofing of the relevant recollection of a witness. Proofing will also properly extend to a detailed examination of deficiencies and differences in recollection when compared with each earlier statement of the witness. In particular, such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial.
> Very importantly, proofing enables differences in recollection, especially additional recollections, to be identified and notice of them to be given to the Defence, before the evidence is given, thereby reducing the prospect of the Defence being taken entirely by surprise.[15]

13. The Prosecution is entitled to conduct proofing sessions and if new information is conveyed, be it exculpatory or inculpatory, it must be disclosed. Moreover, if it is relevant it is admissible, pursuant to Rule 89(C). The Prosecution is similarly entitled to continue its investigations after an indictment has been confirmed. This is settled law at the ICTR. In the case of *Barayagwiza*, the Trial Chamber stated that "the Prosecution is not prevented by the Rules to conduct on-going investigations against the accused. Indeed, the Prosecution has the responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber."[16] In *Ndayambaje* the Trial Chamber held that: "The Prosecutor is entitled to conduct on-going investigations against the accused and where new evidence has come to light she is obliged to present this evidence at trial."[17]

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[13] Motion, paras 10-11.
[14] Motion, para. 13.
[15] *Prosecutor v Limaj, Bala, Musliu*, IT-03-66-T, "Decision on Defence Motion of Prosecution Practice of Proofing Witnesses", Trial Chamber, 10 December 2004, p. 2.
[16] *Prosecutor v Barayagwiza*, ICTR-97-19-I, "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", Trial Chamber, 11 April 2000; see also *Prosecutor v. Niyitigeka*, ICTR-96-14-I, "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", Trial Chamber, 21 June 2000, para. 27.
[17] *Prosecutor v. Ndayambaje*, ICTR-96-8-T, "Decision on Prosecutor's Request for Leave to File an Amended Indictment", Trial Chamber, 2 September 1999, para. 7.

14. The Prosecution is under an obligation to act *bona fides* at all times[18] and refutes the Defence suggestion that its procedures are designed to actively mislead the Defence and the Trial Chamber.[19] There are numerous reasons why a witness may expand on a statement made years previously, one of which may be confidence in the effectiveness of protective measures ordered by the Court.

Adequate Time to Prepare

15. The Defence argues that "at some point, the Accused must be able to proceed with preparing his case in full knowledge of all the charges that have been or will be brought against him", relying on two ICTY decisions relating to applications by the prosecution to amend the indictment. The statement by the ICTY Trial Chamber in the *Delic* case was made in the context of concerns over unfair prejudice and undue delay that might result if the indictment were amended at too late a stage of the proceedings.[20] The question here does not relate to an amendment of the indictment. It is the Prosecution's submission that the information in the additional statements is not new evidence and there is no question of the Accused being asked to prepare his case without full knowledge of all the charges.

16. In the *Blagojevic* case before the ICTY,[21] the prosecution disclosed the final notes from its last proofing sessions to the defence one day before the witness was due to testify. In these circumstances the Trial Chamber considered that the Defence should not be adversely affected due to the late conclusion of prosecution proofing sessions and the late disclosure of new information from such sessions and reminded the Prosecution that proofing should be completed in sufficient time to allow the Defence to consider any new information gathered through such sessions. Thus, the Trial Chamber recognized that "new information" gathered in this way was admissible but that it must be disclosed with enough advance notice so that the defence had adequate time to consider the new information. An adjournment was granted but the witness went on to testify some days

[18] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-152, "Decision on Disclosure of Witness Statements and Cross-Examination", 16 July 2004, para. 7.
[19] Motion, para. 13.
[20] *Prosecutor v Delic*, IT-04-83, "Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment", 13 December 2005, para. 63.
[21] *Prosecutor v Blagojevic and Jokic*, IT-02-60-T, "Decision on Prosecution's Unopposed Motion for Two Day Continuance for the Testimony of Momir Nikolic", Trial Chamber, 16 September 2003, p. 2.

later.

17. In the ICTY case of *Mrksic*,[22] the Trial Chamber noted that changes in the prosecution evidence could be straightforward or of such significance - "perhaps it raises some entirely new version of fact"- as to require further investigation. The Trial Chamber emphasized the need to ensure that the defence is given adequate time to consider a material change and, accepting that addendums or proofing notes were a feature of trials before the tribunal, stated that the way to ensure the rights of the defence would be to defer all or part of the cross-examination.
18. Notably in the *Bagosora* case, although the Trial Chamber ruled that the evidence in issue was in fact new, in the circumstances two days was considered to be a sufficient period of notice for the Defence to be prepared to confront the new testimony.[23]
19. The latest date upon which additional statements which form the subject of the Motion were disclosed to the Defence is 3 February 2006, while the majority of the statements were disclosed on dates ranging between March and December 2005. The witness whose last statement was disclosed on 3 February 2006 is due to testify eighth in the trial session commencing on 28 February 2006. The Prosecution submits that it cannot reasonably be argued by the Defence that it has had insufficient time to consider the additional statements. Thus, the Prosecution submits that the Defence has failed to demonstrate any breach of Articles 17(4)(a) and (b) of the Statute.

Allegations in the Motion

20. The information referred to in paragraph 7 of the Motion and highlighted in the final column of the Motion's Annex A falls within the Prosecution's case and forms part of the factual allegations to be proved by the Prosecution for which the Indictment, the Pre-Trial Brief and the Supplemental Pre-Trial Brief have already provided notice to the Defence. These documents all give notice which is more than adequate as to the extent of the Accused's criminal responsibility for the acts alleged.
21. In addition to the wider criminal acts for which notice was given, the more specific facts of the Accused's criminal responsibility for which he has also had notice and which are

[22] *Prosecutor v Mrksic*, IT-95-13/1-T, Transcript, 8 November 2005, p. 7604-7605.
[23] Bagosora Decision, para. 8.

in tandem with the matters characterized in the Motion as new, are as follows:

a. Paragraphs 20 to 23 of the Amended Consolidated Indictment identify the Accused and describe his leadership role within the RUF, in particular the extent of his powers, authority and influence among colleagues and over subordinates;

b. Paragraphs 34 and 35 of the Amended Consolidated Indictment show the Accused's association with other senior RUF and AFRC leaders as well as Charles Taylor of Liberia and state that he acted in concert with them in the pursuit of the criminal acts alleged.

c. Paragraphs 41 to 43 of the Amended Consolidated Indictment allege that the targets of armed attacks throughout the Republic of Sierra Leone included civilians and humanitarian assistance personnel and peacekeepers, that the attacks were carried out to terrorize and punish the population, and that as part of the campaign of terror AFRC/RUF routinely captured and abducted members of the civilian population. Captured women and girls were raped and used as sex slaves and forced labour, men and boys were used as forced labour, and many abducted boys and girls were given combat training and used in active fighting.

d. Paragraphs 98-106 of the Pre-Trial Brief provide notice of crimes in Kailahun District, including attacks on civilians as part of a campaign to terrorize and collectively punish, arms supplies from Liberia, killings on orders from senior AFRC/RUF including a mass execution at Kailahun Town, forced marriage, forced labour including on farms belonging to senior AFRC/RUF commanders or their families, forced military training of women and children, and abduction of United Nations peacekeepers.;

e. Paragraphs 125-134 of the PreTrial Brief provide notice of crimes in Kono District, including attacks on civilians as part of a campaign to terrorize and collectively punish (in particular the diamond mining areas), physical violence, forced labour, conscription of civilians, widespread looting and destruction of property, forced marriage, abduction and forced labour for mining, and Operation No Living Thing and Operation Pay Yourself;

f. Paragraphs 143-146 of the Pre-Trial Brief further describe the leadership role of the Accused and reinforces the extent of his powers, authority and influence;

g. Paragraphs 5-294 of the Supplemental Pre-Trial Brief gives notice of crimes alleged against Sesay, including paras. 35-42 regarding Kono District and 43-50 regarding Kailahun District for unlawful killings; paras. 84-91 regarding Kono District and 108-115 regarding Kailahun District for sexual violence; paras. 181-188 regarding conscription and use of boys and girls under 15 throughout Sierra Leone to participate in hostilities (*esp.* para. 184); paras. 198-205 (*esp.* 201 and 204) regarding Kono District, 214-221 regarding Bombali District and 222-229 (*esp.* 225) regarding Kailahun District for forced labour; paras. 263-270 regarding Kono District for looting and burning; and paras 287-294 for attacks on UNAMSIL personnel.

22. On the basis of the Indictment, the Pre-Trial Brief and the Supplemental Pre-Trial Brief, the Prosecution submits that the additional statements do not contain new evidence. Equally, they do not result in new charges being laid against the Accused, as alleged in paragraph 14 of the Motion. In the ICTY case of *Halilovic*, the Trial Chamber reviewed the relevant case-law concerning what constitutes a "new charge" (in the context of amendments to the indictment) and found it appropriate to focus on the imposition of criminal liability on a basis that was not previously reflected in the indictment.[24] The Prosecution submits that the additional statements are merely "building blocks...forming the factual substratum of the charges in the Indictment".[25]

III. CONCLUSION

23. The Defence has failed to demonstrate that the additional statements ought to be characterized as new evidence. The Prosecution submits that in any case, the effect of new evidence being disclosed is that the Defence must be given adequate notice to investigate and defend the allegations and not that the evidence must be excluded. The Prosecution notes that relevance has not been put in issue and the information complained of is admissible. Moreover, the Defence does not argue that actual prejudice has been suffered in terms of insufficient time to prepare for the testimony of any specific

[24] *Prosecutor v. Sefer Halilovic*, IT-01-48-PT, "Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment", Trial Chamber, 17 December 2004, para. 30. See also *Prosecutor v Prlic*, IT-04-74-PT, "Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment", Trial Chamber, 18 October 2005, para. 13.
[25] See paragraph 7 above.

witness.

24. The Defence has not shown a *prima facie* breach of Rule 66(a)(ii) or Article 17(4)(a) and (b). The Defence is repeatedly bringing before the Trial Chamber in the form of motions to exclude evidence its ongoing complaint concerning what it regards as "piecemeal disclosure"[26] or an "improper disclosure regime"[27] on the part of the Prosecution. The motion appears to avoid a focussed consideration of four prior decisions of this Trial Chamber on the issue. Such an approach is not helpful to the proper administration of justice. Even if the evidence were new, which is denied, exclusion is not an appropriate remedy in the circumstances and the defence has already had ample time to investigate. Notably, the co-accused, who are just as affected by the supplementary disclosure, have not advanced similar applications. TF1-113, one of the witnesses referred to in the present motion, was to testify during the 6th Trial Session but did not due to illness, and only now is a complaint being raised. The Prosecution submits that a remedy under Rule 46(C) should be considered.
25. For these reasons the Prosecution submits that the Motion should be dismissed.

Filed in Freetown,
17 February 2006
For the Prosecution,

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Senior Trial Attorney

[26] Motion, para. 11.
[27] Motion, para. 17.

Index of Authorities

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UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-03-66-T
		Date:	10 December 2004
		Original:	English

TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: **Mr. Hans Holthuis**

Order of: **10 December 2004**

PROSECUTOR

v.

Fatmir LIMAJ
Haradin BALA
Isak MUSLIU

DECISION ON DEFENCE MOTION ON PROSECUTION PRACTICE OF "PROOFING" WITNESSES

The Office of the Prosecutor:

Mr. Andrew Cayley
Mr. Alex Whiting
Mr. Julian Nicholls
Mr. Colin Black

Counsel for the Accused:

Mr. Michael Mansfield Q.C. and Mr. Karim A. A. Khan for Fatmir Limaj
Mr. Gregor Guy-Smith and Mr. Richard Harvey for Haradin Bala
Mr. Michael Topolski Q.C. and Mr. Steven Powles for Isak Musliu

This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, is seised of a motion[1] by defence counsel for all three Accused in this case ("the Defence") pursuant to Rule 73, for an order that the Prosecution cease "proofing" witnesses with immediate effect, or an order that a representative of the Defence be permitted to attend the Prosecution's proofing sessions, or that the Defence be provided with a video or tape-recording of proofing sessions. The Prosecution filed a response on 3 December 2004[2] and a Defence reply was filed on 6 December 2004.[3]

In view of the written submissions filed, the Chamber is not persuaded that further oral submissions are necessary for the due consideration of this motion.

In support it is submitted that it is questionable whether it is necessary at all for the Prosecution to conduct any proofing sessions because witnesses have previously given one or more statements to UNMIK investigators and have been interviewed also by an ICTY investigator. Objection is taken to proofing any more extensive than to clarify what is likely to be a "handful of matters", and specifically to Prosecuting counsel spending a number of hours with a witness before evidence is given.

It is submitted that what is being done may affect the fairness of the trial. Attention is specifically drawn to the possibility that leading questions may be put to the witness by Prosecuting counsel before evidence is given. In oral submission it was made clear that it is not contended that this has occurred, merely that there is a danger that it may do so.

In reply it is further submitted that the practice of proofing extends "far beyond the ambit of witness preparation which is integral to the giving of sensitive testimony". It is contended the practice, especially numerous proofing meetings, are in essence a "re-interview" of witnesses and beyond what is said to be "the traditional understanding" of witness proofing. It is ventured that the practice could be said to be coaching, rather than proofing.

It is further said that Prosecuting counsel's proofing, intimates an attempt to usurp or unnecessarily duplicate the role of the Victims and Witnesses Section of the Tribunal.

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[1] *See* transcript of the proceedings in *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-PT, T. 1147 – 1170.
[2] *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-PT, Prosecution's Response to "Defence Motion on Prosecution Practice of Proofing Witnesses", 3 December 2004.
[3] *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-PT, Defence Reply to "Prosecution's Response to Defence Motion on Prosecution Practice of Proofing Witnesses", 6 December 2004.

The Defence submits it is seeking to avoid rehearsals of testimony that may undermine a witness's ability to give a full and accurate recollection of events.

The Prosecution's response submits that proofing is an accepted and well-established practice of this Tribunal, one which serves several important functions for witnesses and for the judicial process. It is further submitted that there is no prejudice from the present proofing practice and, in essence, that its attributes, to which the Defence point, have not ever been held to warrant interference with, or change to, the existing proofing practice which has prevailed throughout the life of this Tribunal.

The practice of proofing witnesses, by both the Prosecution and Defence, has been in place and accepted since the inception of this Tribunal. It is certainly not unique to this Chamber. It is a widespread practice in jurisdictions where there is an adversary procedure.

It has a number of advantages for the due functioning of the judicial process. Some of them may assist a witness to better cope with the process of giving evidence.

It must be remembered that when a witness is proofed this is directed to identifying fully the facts known to the witness that are relevant to the charges in the actual Indictment. While there have been earlier interviews there was no Indictment at that time. Matters thought relevant and irrelevant during investigation, are likely to require detailed review in light of the precise charges to be tried, and in light of the form of the case which Prosecuting counsel has decided to pursue in support of the charges, and because of differences of professional perception between Prosecuting counsel and earlier investigators.

In cases before this Tribunal, including this case, it is also relevant that the events founding the charges occurred many years ago. Interviews by investigators were also conducted a long time ago. The process of human recollection is likely to be assisted, in these circumstances, by a detailed canvassing during the pre-trial proofing of the relevant recollection of a witness. Proofing will also properly extend to a detailed examination of deficiencies and differences in recollection when compared with each earlier statement of the witness. In particular, such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial.

Very importantly, proofing enables differences in recollection, especially additional recollections, to be identified and notice of them to be given to the Defence, before the evidence is given, thereby reducing the prospect of the Defence being taken entirely by surprise.

It is advanced that in this case the number of proofing sessions, of some witnesses, is excessive. This has also given rise to conjecture that improper or undesirable practices may be causing excessive proofing. In the Chamber's view many of the factors identified already in these observations, and the range and nature of the factual and procedural factors to be canvassed, all aggravated in time by the need for translation, serve to explain proofing sessions of the duration mentioned in submissions.

In this respect it is more a matter of the time spent, rather than the number of sessions into which that time happens to be divided, which is relevant.

Also particularly relevant are the cultural differences encountered by most witnesses in this case, when brought to The Hague and required to give a detailed account of stressful events, which occurred a long time ago, in a formal setting, and doing so in response to structured precise questions, translated from a different language. Such factors also demand time in preparing a witness to cope adequately with the stress of these proceedings. These matters, in the Chamber's view, are properly the realm of proofing, and are not to be left to the different form of support provided by the Victims and Witnesses Section.

The other concerns raised by the Defence are really inherent in the established and accepted proofing procedure. There are clear standards of professional conduct which apply to Prosecuting counsel when proofing witnesses. What has been submitted does not persuade the Chamber that there is reason to consider these are not being observed, or that there is such a risk that they may not be, as to warrant some intervention by the Chamber.

The Chamber will not make orders such as those sought.

The submissions also sought to call in aid what are in truth distinct issues. These were late notice of new material, and a failure to provide signed statements of new or changed evidence. In addition, there was a failure to provide notice of new or changed evidence in Albanian, the language of the Accused.

Late notice is an issue which may require measures to overcome resulting difficulties to the Defence. That will depend on the circumstances. Any example raised will be considered on its merits. Except perhaps where the subject of a notice of a new item of evidence, or a change of evidence is extensive, there is not any sufficient reason to require a signed statement. The prosecution has volunteered that it will provide Albanian translations in future. There is no need, therefore, to comment further on this concern.

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For these reasons the motion is dismissed.

Done both in English and French, the English version being authoritative.

Judge Parker
Presiding

Dated this tenth day of December 2004
At The Hague,
The Netherlands

[Seal of the Tribunal]

17988

Case No. : ICR-98-8-T

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

Office of the President
Bureau du Président

Arusha International Conference Centre
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Trial Chamber II

Before: Judge William Sekule, Presiding
Judge Mehmet Güney
Judge Navanethem Pillay

Original : English

Registry: Mr. John Kiyeyeu.

Decision of: 2 September 1999

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THE PROSECUTOR
versus
ELIE NDAYAMBAJE

Case N°: ICR-96-8-T

DECISION ON THE PROSECUTOR'S REQUEST FOR LEAVE TO FILE AN AMENDED INDICTMENT

Office of the Prosecutor:

Mr. Japhet Mono
Ms. Celine Tonye
Mr. Ibukunolu Aloa Babajide
Mr. Robert Petit

Counsel for the Defence:

Ms. Veronique Laurent.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: AMINATTA L. R. N'GUM
SIGNATURE: ... DATE: 02/09/99

Case No. : ICR-98-8-T

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal)

SITTING AS Trial Chamber II composed of Judge William H. Sekule presiding, Judge Mehmet Güney and Judge Navanethem Pillay ;

CONSIDERING a motion filed by the Prosecutor for leave to amend the indictment against the accused, Elie Ndayambaje (the "accused"), pursuant to Rule 50 of the Rules of Procedure and Evidence (the "Rules");

NOTING that the indictment against the accused, dated 17 June 1996 was confirmed by Judge T.H.Khan on 20 June 1996;

HAVING HEARD the parties at a hearing on 9 August 1999.

The Prosecutor's Submissions

1. The Prosecutor's motion was supported by a brief containing her submissions and two Annexures marked "A" and "B" respectively. According to the Prosecutor, Annexure "B" contains materials and documentary evidence in support of the new counts proposed as amendments to the indictment against the accused.

2. The Prosecutor submitted *inter alia*, that:

2.1 the amendment of the indictment is justified in law. Rule 50 of the Rules and the jurisprudence established by the Tribunal allow for the amendment of the indictment after the initial appearance of the accused;

2.2 the amendment to the indictment is justified on the available evidence against the accused. These additional counts proposed as amendments to the existing indictment accurately reflect the alleged criminal conduct of the accused. The amendments sought are based on evidence presently available to the Prosecutor, which was not available in June 1996 when the indictment against the accused was confirmed. The Prosecutor's on-going investigation have uncovered evidence of a plan of certain individuals in Rwanda, including the accused, to gain political control over the country. Evidence of how this alleged plan was carried out in Butare and the accused's alleged involvement in its execution was also uncovered.

2.3 the accused has a fundamental right to an expeditious hearing but this right must be weighed against the Prosecutor's need to present the full scope of the available evidence, at the trial of the accused. This would entail amending the indictment against the accused, so that all available evidence could be presented at the trial of the accused.

The Defence Submissions

3. The Defence submitted *inter alia* that:

3.1. there is a need for clarification as to whether the applicable version of Rule 50 is the rule as it read prior to its amendment in June 1999 or the rule as it presently reads;

3.2 both the previous and present versions of Rule 50 refer to Rules 47(g) and 53 *bis*. The text of the rules as it read prior to its amendment in June 1999 did not have a Rule 53 *bis*;

3.3 an amendment to the Rules could have retrospective effect provided it does not infringe on the rights of the accused. Rule 53 *bis* is not just an amendment to a Rule but an adoption of an entirely new rule and therefore the provisions of Rule 53 *bis* cannot be applicable to this motion;

3.4 the Prosecutor is relying on the same set of allegations for the counts she intends to add to the existing indictment. In the recent case of the Prosecutor v. Kayishema and Ruzindana (ICR-95-1-T), Trial Chamber II found that the same set of facts cannot qualify for cumulative charges;

3.5 the Prosecutor's submission that she is relying on evidence gathered in the course of Operation NAKI must be rejected, since this operation was not organised to gather evidence against the accused. Further, evidence of the accused's alleged conduct existed in the Belgian files and the statements of witnesses taken, following Operation NAKI do not provide new evidence to support the charges against the accused;

3.6 if the amendment to the indictment is granted, this could result in an undue delay in the commencement of the trial against the accused, thus causing severe prejudice to the accused. Further, the case against the accused is not legally or factually complex to justify a delay of this nature and therefore any delay in the commencement of the accused's trial is unreasonable;

3.7 the Prosecutor has not made disclosure of Annexure "B". This annexure is essential because it contains the material on which the Prosecutor relies, in support of her motion for leave to amend the indictment against the accused. The accused has the right to have disclosed to him the materials as contained in Annexure "B" and to utilize such materials in response to this motion;

AFTER HAVING DELIBERATED,

4. The Trial Chamber notes that Rule 50 has been subject *inter alia* to the following amendments:

(i) Rules 47(G) and 53 *bis* now apply *mutatis mutandis* to Rule 50 (A). This amendment was adopted in at the Plenary held in June 1998 and is applicable to the accused. Rule 53 *bis* which was also adopted at the Plenary in June 1998, makes provision for the service of an indictment on an accused. Where an indictment has been amended, such an indictment will be served on an accused pursuant to the provisions of Rules 47(G) and 53 *bis*;

(ii) the word "that" in the phrase "granted by that Trial Chamber", in Rule 50(A) was replaced by the word "a". This amendment was adopted at the Plenary in June 1999 and came into force immediately thereafter. It is accordingly not retroactively applicable to the accused.

5. The Trial Chamber applies the rulings made by the Appeals Chamber in the case of Anatole Nsengiyumva versus the Prosecutor (ICR-96-12-A) and Joseph Kanyabashi versus the Prosecutor (ICR-96-15-A), to the effect that a motion for leave to amend an indictment must be heard by the Trial Chamber, as constituted for the initial appearance of the accused. In this case the Chamber that conducted the initial appearance of the accused was composed of Judges W.H.Sekule, Y. Ostrovsky and N. Pillay. An exceptional circumstance arose as a consequence of the unavailability of Judge Ostrovsky for medical reasons. The President, by the authority vested in her, pursuant to the Statute of the Tribunal and the Rules, in particular Rules 15(E), 27(A), (B) and (C), assigned Judge M. Güney. to the Chamber to replace Judge Ostrovsky. The President's authority in this regard is recognised in the aforementioned decisions of the Appeals Chamber.

6. Rule 50 does not explicitly prescribe a time limit within which the Prosecutor may move to amend the indictment against the accused, thus the Trial Chamber has the discretion to assess each individual case on its own merits and circumstances. In Prosecutor versus Alfred Musema (ICR-96-13-T) the Trial Chamber held that:

"A key consideration would be whether, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial."[1]

7. The Prosecutor is entitled to conduct on-going investigations against the accused and where new evidence has come to light she is obliged to present this evidence at trial. The Prosecutor is also obliged to present the full scope of available evidence at the trial of the accused that accurately reflects the totality of the alleged criminal conduct of the accused, as uncovered by her investigations. In the case of the Prosecutor versus Alfred Musema, it was also held that:

"In order that justice may take its proper course, due consideration must also be given to the Prosecutor's unfettered responsibility to prosecute the accused to the full extent

[1]Prosecutor versus Alfred Musema, ICR-96-13-T, P4, Para.17

of the law and to present all relevant evidence before the Trial Chamber."[2]

On whether any amendment to the indictment will cause undue delay in the proceedings against the accused.

8. The Trial Chamber has an obligation pursuant to Article 19 of the Statute, to ensure that the accused is tried in a fair and expeditious manner and with full respect for the rights of the accused. Article 20 of the Statute guarantees the accused the right to be tried without "undue" delay. The issue is whether the proposed amendments to the indictment, if granted, will cause an "undue" delay in the commencement of the trial of the accused, to the prejudice of the accused.

9. In ascertaining whether a delay in the criminal proceedings against the accused is "undue", it is essential to take into consideration the length of the delay, the gravity, nature and complexity of the case against the accused and the prejudice that may be suffered by the accused. The Defence submission that the accused has been in custody for one thousand five hundred and three days, has little bearing on any possible future delay in the criminal proceedings against the accused, that may arise following an amendment to the indictment. The Trial Chamber has not been persuaded by the Defence submission that an amendment to the indictment would result in an "undue" delay in the commencement of the trial against the accused.

On the cumulative charges.

10. On the issue of cumulative charges, as raised by the Defence, the Trial Chamber notes that the principle of cumulative charges was applied by Trial Chamber I[3] in the case of Prosecutor versus Jean Paul Akayesu (ICR-96-4-T) .and the accused was convicted on more than one offence based on the same set of facts, whilst in the case of the Prosecutor versus Kayishema and Ruzindana (ICR-95-1-T), before Trial Chamber II[4], the majority held that the accused could not be convicted for more than one offence on the same set of facts. Both these cases are now being taken on appeal. The Trial Chamber is of the view that the appropriate stage to assess the applicability of cumulative charges is at the close of the Prosecution case, once the evidence has been led, rather than at the stage of confirmation or amendment of the indictment.

On the non-disclosure of Annexure "B"

11. The Trial Chamber notes that in support of her motion the Prosecutor submitted under Annexure "B", supporting material to the proposed new counts in the indictment. This

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[2]ibid

[3]Trial Chamber I comprised Judges L. Kama, L Aspegren and N. Pillay.

[4]Trial Chamber II comprised Judges W. H. Sekule, T. H. Khan and Y. Ostrovsky..

supporting material was not disclosed to the Defence.

12. The Trial Chamber notes that where the Prosecutor's request to add new counts to the indictment is granted, the accused must make an "initial appearance" in accordance with Rules 50(B) and 62 to enter a plea on these new counts. The Prosecutor is thereafter obliged to disclose to the Defence all supporting material in respect of these new counts within thirty days of this "initial appearance", as envisaged in Rule 66 (A)(i) of the Rules. Therefore, disclosure of any material in support of the proposed new counts at this stage of the proceedings may be construed as pre-mature.

13. The Trial Chamber notes that the provisions of Rule 66 must be applied subject to the provisions of Rules 53 and 69. Rule 69 makes provision for the protection of victims and witnesses. Parties generally file motions requesting the implementation of certain protective measures for witnesses and victims after the initial appearance of the accused. Where such measures are granted, this has a direct bearing on the timing, nature and extent of disclosure made to the Defence. It is essential for the proper administration of justice to balance the interests of the victims and witnesses against the right of the accused to disclosure.

14. The Trial Chamber notes that pursuant to Rule 72, the Defence has the opportunity to raise any objections on defects in the form of the indictment. This Rule further provides that such objections may be raised within sixty days following disclosure of the supporting material. The accused therefore suffers no prejudice if disclosure of the supporting material is not made at this stage of the proceedings.

15. The Trial Chamber distinguishes between the procedural requirements of Rules 47 and 50. Pursuant to Rule 47, a single judge reviewing an indictment presented for confirmation, is required to establish from the supporting material that a *prima facie* case exists against the suspect. A Trial Chamber seized with a motion, requesting leave to amend an indictment pursuant to Rule 50, against an accused who has already been indicted, has no cause to inquire into a *prima facie* basis for proposed amendments to the indictment. Since such a finding has already been made in respect of the accused, it is not necessary for the Trial Chamber to consider the supporting material tendered as Annexure "B".

16. The Trial Chamber finds that in considering the Prosecutor's motion for leave to amend the indictment, pursuant to Rule 50, the onus is on the Prosecutor to set out the factual basis and legal motivation in support of her motion.

17. The Trial Chamber is not satisfied that amendments to the indictment, if granted will cause an an undue delay in the commencement of the trial against the accused, and consequent prejudice to the accused.

18. The Trial Chamber is satisfied that sufficient grounds exist, both in fact and in law, to justify the amendments to the indictment, as requested by the Prosecutor.

FOR THESE REASONS THE TRIBUNAL,

GRANTS the Prosecutor's motion for the amendment of the indictment against the accused;

ORDERS the amendment of the indictment by adding:

(I) the count of CONSPIRACY TO COMMIT GENOCIDE, pursuant to Articles 2(3)(b), 6(1) and 6(3) of the Statute;

(ii) the count of DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE, pursuant to Articles 2(3)(c), 6(1) and 6(3) of the Statute;

(iii) the count of CRIMES AGAINST HUMANITY (PERSECUTION), pursuant to Articles 3(h), 6(1) and 6(3) of the Statute;

(iv) the count of COMPLICITY TO COMMIT GENOCIDE as a separate and individual count, pursuant to Articles 2(3)(e), 6(1) and 6(3) of the Statute;

(v) individual criminal responsibility, pursuant to Article 6(3) of the Statute, to all existing counts;

FURTHER ORDERS that the indictment reflecting the amendments as ordered above, is filed with the registry and served on the accused immediately.

Arusha, 2 September 1999

William H. Sekule
Presiding Judge

Navanethem Pillay
Judge

Mehmet Güney
Judge

(Seal of the Tribunal)