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

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

Registrar: Mr. Lovemore G. Munlo

Date filed: 28 February 2006

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

Case No. SCSL-04-15-T

PUBLIC
PROSECUTION RESPONSE TO DEFENCE MOTION REQUESTING THE EXCLUSION OF EVIDENCE ARISING FROM THE ADDITIONAL INFORMATION PROVIDED BY WITNESS TF1-168, TF1-165 AND TF1-041

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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 TF1-168 (14th, 21st January and 4th February 2006), TF1-165 (6th/7th February 2006) and TF1-041 (9th, 10th, 13th February 2006)," filed on behalf of the First Accused Issa Sesay on 23 February 2006 ("**Motion**").[1]
2. In its Motion, the Defence argues that supplementary statements served on the Defence on various dates between January 2006 and February 2006, relating to three 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 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 seventh in a series of similar oral and written motions in relation to which this Trial Chamber has rendered six decisions so far.[3] The jurisprudence of this Chamber provides the applicable backdrop for a consideration of the Defence's factual

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[1] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-493, "Defence Motion Requesting the Exclusion of Evidence (As Indicated in Annex A) Arising from the Additional Information Provided by Witness TF1-168 (14th, 21st January and 4th February 2006), TF1-165 (6th/7th February 2006) and TF1-041 (9th, 10th, 13th February 2006)", 23 February 2006 ("**Motion**").

[2] *Prosecutor v Bagosora*, ICTR-98-41-T, "Decision on the Admissibility of Evidence of Witness DP", 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**"); *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-495, "Decision on the Defence Motion for the Exclusion of Certain Portions of Supplemental Statements of Witness TF1-117", 27 February 2006, ("**27 February 2006 Ruling**"); *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-496, "Decision on the Defence Motion for the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF!-113, TF1-108, TF1-330, TF1-041 and TF1-288", 27 February 2006, ("**Further 27 February 2006 Ruling**").

submissions on the additional statements.

5. In its Ruling of 23 July 2004, the Trial Chamber noted the guidelines laid down in *Bagosora* 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. In its Ruling of 27 February 2006, the above finding was held to constitute the ratio of the 3 February 2005 Ruling.[8] 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

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[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).
[8] 27 February 2006 Ruling, para. 10.

> extension of time to enable the Defence to prepare adequately its case rather than the exclusion of the evidence.[9]

9. The jurisprudence makes it clear that evidence that is supplementary is admissible.[10] 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".[11]

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 Prosecution submits that the case law cited from the United States Supreme Court relates to the specificity of an indictment.[12] 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.[13]

11. 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. ...
> 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

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

Defence being taken entirely by surprise.[14]

12. 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. In the ICTR 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."[15]
13. The Prosecution refutes the suggestion that it is manipulating the Court's process. 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. The Prosecution disagrees that the ICTY decision in *Brdanin and Talic*,[16] cited at length by the Defence, is apposite. That decision concerned defects in the amended indictment and is taken out of its proper context.

Adequate Time to Prepare

14. 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 the ICTY case of *Delic*.[17] However, the statement 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.[18] The question here does not relate to an amendment of the indictment. 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.

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[14] *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.
[15] *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, and *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: "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."
[16] *Proscution v Brdanin and Talic*, IT-99-36, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001, para 11.
[17] Motion, para. 5(e).
[18] *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.

15. In the *Blagojevic* case before the ICTY,[19] the prosecution disclosed the final notes from its last proofing sessions to the defence one day before the witness was due to testify. 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. The Trial Chamber held that "new information" from proofing sessions was admissible but it must be disclosed with sufficient 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 later.
16. In the ICTY case of *Mrksic*,[20] 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.
17. 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.[21] In its 27 February 2006 Ruling, the Trial Chamber found "significantly, that the Defence did have sufficient notice of the events to which the ...allegations relate".[22]
18. The latest date upon which additional statements which form the subject of the Motion were disclosed to the Defence is 13 February 2006, while the majority of the statements were disclosed on dates ranging between 21 June 2004 and 7 February 2006. The witness whose last statement was disclosed on 13 February 2006 is due to testify 16th in the 7th trial session. It cannot reasonably be argued by the Defence, particularly in light of the jurisprudence, that they have had insufficient time to consider the additional statements.

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[19] *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.
[20] *Prosecutor v Mrksic*, IT-95-13/1-T, Transcript, 8 November 2005, p. 7604-7605.
[21] Bagosora Decision, para. 8.
[22] 27 February 2006 Ruling, para. 13.

Allegations in the Motion

19. The information referred to in paragraph 7 of the Motion 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. The role of CARITAS and child combatants is not new evidence, it exists in the statements of TF1-174 and TF1-186. Evidence of Sesay, Kallon and Gbao's culpability for the abduction of UN peacekeepers exists in the Amended Consolidated Indictment, the Pre-Trial and Supplemental Pre-Trial Briefs, and several witness statements. The evidence of Peleto being a bodyguard to Sesay, and that senior commanders sent bodyguards to report to them exists in the statements of TF1-366. Evidence of looting in Kono, including from Bumpe to Koidu, and forced mining in Kono District, exists in several witness statements, for example TF1-071. TF1-362's statement says that Sesay had Small Boys Units ("**SBUs**").
20. 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 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 38 and 39 of the Amended Consolidated Indictment show the Accused's liability under Article 6.1 and in addition, or alternatively, under Article 6.3 of the Statute.
    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 Pre-Trial 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 reinforce the extent of his powers, authority and influence.

g. Paragraphs 181-188 of the Supplemental Pre-Trial Brief give notice of the intention to prove that Sesay knew that children under 15 were conscripted to take part in the war, in particular para. 184(g) states that Sesay had with him armed child soldiers as young as 10 years of age in Kailahun and para. 187(e) states that Sesay requested in 1998 that an SBU be established specifically for him.

h. Paragraphs 287-294 of the Supplemental Pre-Trial Brief give notice that Sesay, Kallon and Gbao were responsible for the abduction of UNAMSIL personnel, in particular para. 289(b), (g), (h), (k), (l) and 290 state Sesay's role in attacks on UNAMSIL personnel, their capture and detention.

i. Paragraphs 263-270 of the Supplemental Pre-Trial Brief give notice of the intention to prove looting in Kono District (the area of Bumpe to Koidu is in Kono District), in particular para. 264 refers to Operation Pay Yourself, para. 266 states that Sesay planned, instigated, ordered or committed looting and burning of civilian property in Kono District, and para. 269(b) states that Sesay's subordinates were in regular communication with the AFRC/RUF leadership during the commission of these crimes.

j. Paragraphs 198-205 of the Supplemental Pre-Trial Brief give notice of the

intention to prove abductions and forced labour in Kono District (Bumpe is in Kono District), in particular para. 201(b), (c), and (e) state that Sesay was present in camps where civilians were forced to carry goods and perform domestic labour, that Sesay was in charge of mining in Kono District, and that Sesay instructed subordinates to forcibly bring in mine workers when there was a "manpower" shortage, and para. 204(c) and (d) states that Sesay's subordinates engaged in the abduction of civilians and used them as forced labour and that Sesay's subordinates were in regular communication with the AFRC/RUF leadership during the commission of these crimes.

k. Although the Prosecution reading of the additional information of TF1-168 did not in the mind of the Prosecution lead to the result that Sesay was criminally culpable for the drowning of 30 civilians (the passage reads "After we got out of the boats and went up the bank we were arrested. Sesay was the first one to fire his gun in the air. About 30 civilians drowned in the river in the panic from the gun shots."), paras. 43-50 of the Supplemental Pre-Trial Brief give notice of the intention to prove that Sesay is culpable for unlawful killings in Kailahun District.

l. The Supplemental Pre-Trial Brief paragraphs 25(b) and (c), 33(c), 41(a) and (b), 49(b), 57(c) and (d), 65(b) and (c), 73(a) and (b), 81(a) and (b), 90(c) and (d), 98(d) and (f), 106(c) and (d), 114(c) and (d), 122(a) and (b), 130(a) and (b), 139(d) and (e), 147(c) and (d), 155(a) and (b), 163(b)-(e), 171(a) and (b), 179(a) and (b), 187(a) and (b), 196(a) and (b), 204(c) and (d), 212(b) and (c), 220(b) and (c), 228(b) and (c), 236(a) and (b), 244(a) and (b), 253(b) and (c), 261(b) and (c), 269(a) and (b), 277(a) and (b), 285(a) and (b), and 293(a) and (b) give notice that Sesay was in a position of command and authority in the AFRC/RUF and that his subordinates were in regular communication with the AFRC/RUF leadership during the commission of crimes, and para. 42(b) gives notice that reports were made to Sesay by subordinates of atrocities committed in villages geographically close to Koidu.

21. On the basis of the Indictment, the Pre-Trial Brief and the Supplemental Pre-Trial Brief, the additional statements do not contain new evidence. The additional statements are merely "building blocks...forming the factual substratum of the charges in the

Indictment".[23]

III. CONCLUSION

22. 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. Relevance has not been put in issue and the information complained of is admissible. Moreover, the Defence does not expand upon its alternative argument that the evidence lacks the fundamental notice which would enable a fair trial[24] in the sense of showing that actual prejudice has been suffered in relation to any specific witness.

23. The Defence has not shown a *prima facie* breach of Rule 66(a)(ii) or Article 17(4)(a) and (b). The Motion ignores the prior decisions of this Trial Chamber on the issue in a manner that is unhelpful 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. The co-accused, who are just as affected by the supplementary disclosure, have not advanced similar applications. The Prosecution reiterates its submission made in its responses to two previous defence motions of this kind that a remedy under Rule 46(C) should be considered.

24. For these reasons the Prosecution submits that the Motion should be dismissed.

Filed in Freetown,

For the Prosecution,

28 February 2006

James C. Johnson

Peter Harrison

[23] See paragraph 7 above.
[24] Motion, para. 2.

Index of Authorities

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