

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

SEIZED of the "Defence Motion Requesting the Exclusion of Evidence (as Indicated in Annex A) Arising from the Additional Information Provided by Witness TF1-168 (14th, 21st January and 4th of February 2006), TF1-165 (6th/7th February 2006) and TF1-041 (9th, 10th, 13th February 2006)" ("Motion"), filed by Defence Counsel for the First Accused, Issa Sesay ("Defence"), on the 23rd of February, 2006;

NOTING the "Order for Expedited Filing" of the 23rd of February, 2006;

CONSIDERING the Response to the Motion, filed by the Office of the Prosecutor ("Prosecution") on the 28th of February, 2006;

CONSIDERING the Defence Reply, filed on the 1st of March, 2006 and the Corrigendum thereto, filed on the 2nd of March, 2006;

NOTING the "Prosecution Proposed Order of Appearance of Witnesses - Seventh Trial Session", filed on the 10th of February, 2006;

NOTING the "Decision on the Defence Motion for the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288" of the 27th of February, 2006;

CONSIDERING that Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rule 66(A)(ii) of the Rules of Procedure and Evidence ("Rules");

HEREBY ISSUES THE FOLLOWING UNANIMOUS DECISION:

I. INTRODUCTION

1. On various dates prior to the 26th of April, 2004, the Prosecution served on the Defence a number of original and supplementary statements relating to protected witnesses TF1-168, TF1-165 and TF1-041 pursuant an Order by the Trial Chamber.¹ Subsequently, in different dates between

¹ See *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial, 1 April 2004.





February 2004 and February 2006, the Prosecution also served supplemental statements for these witnesses.²

2. On the 23rd of February 2006, Counsel for the First Accused ("Defence") filed the instant Motion. On the 28th of February 2006, the Prosecution filed an expedited Response in compliance with the Chamber's Order for Expedited Filing dated the 23rd of February 2006, to which an expedited Reply was also filed by the Defence on the 1st of March, 2006.

II. PARTIES SUBMISSIONS

3. In support of its Motion, the Defence alleges that on "various dates between February 2004 and February 2006 the Prosecution have actively re-interviewed" the witnesses referred to in paragraph 1 above "with the calculated aim of increasing the evidence against the Accused and moulding their case according to their ongoing assessment of the way in which their case has progressed."³ The Defence, accordingly, requests that the Trial Chamber orders the exclusion of all such evidence on the ground that the said evidence violates the rights of the Accused as guaranteed by Article 17(4) of the Court's Statute.⁴

4. Mainly, the specific Defence submissions put forward in support of the Motion are as follows:

- (i) that the supplemental evidence might be introduced as new evidence;⁵
- (ii) that having regard to Article 17(4) of the Statute of the Court, to the fundamental principles governing a fair criminal trial are (a) there is an absolute obligation on the Prosecution to set out with much specificity and particularity, either in the Indictment or Pre-Trial Brief, the facts which form the basis of the case against the Accused, (b) that disclosure of all facts or the evidentiary material which form the case against the Accused should be served promptly, and in any event within a reasonable time before the commencement of the trial, (c) the Prosecution is expected to know its case before it goes to trial, (c) any new allegations of a material fact must be pleaded in the indictment if the Prosecution is to lead evidence about it at trial, and (e) at some point an Accused must be able to proceed with

² The relevant dates of these statements are particularized in Annex A to the Motion. For the purposes of the present Decision, such statements will be generally referred herein as "Supplemental Statements".

³ Motion, para. 1.

⁴ *Id.*, paras 2 and 18.

⁵ *Id.*

preparing his case in full knowledge of all the charges that have been or will be brought against him.⁶

5. Additional Defence submissions specifically pertaining to the Supplemental Statements also herein noted are embodied in paragraphs 7-15 of its Motion.

6. In its Response, the Prosecution submits that the Defence has failed to adduce *prima facie* evidence of a breach of Article 17 of the Statute and Rule 66(a)(ii) of the Rules by the Prosecution and that the Defence has ignored various decisions previously rendered by the Trial Chamber and establishing that supplemental evidence arising from witness summaries is admissible.⁷ In particular, the Prosecution submits that the Defence has failed to demonstrate that the Supplemental Statements ought to be characterized as new evidence.⁸ The Prosecution also submits that, even if the evidence contained in these Statements were new, the Defence had adequate notice to prepare and, consequently, the evidence should not be excluded.⁹

7. In its Reply to the Prosecution's Response, the Defence states that the relevant obligations concerning disclosure of evidence for the preparation of the Defence case applicable at the Special Court differ from those of the ICTY, the ICTR, the European Court of Human Rights and all known national jurisdictions, and that the Prosecution has failed to respond to any of these Defence submissions.¹⁰ In addition, the Defence requests the Trial Chamber to clarify, based upon its applicable test for the admissibility of evidence contained in supplemental witness statements, whether "the consequence of the ruling that all evidence is admissible if it "singly or cumulatively, relate(s) to separate and constituting different episodic events, or as it were building blocks constituting an integral part of, and connected with the same *res gestae* forming the factual substratum of the charges in the indictment" is that all evidence which is relevant to the indictment and pre-trial Brief is admissible notwithstanding what factual allegations it contains and when it is disclosed".¹¹

III. APPLICABLE LAW

8. This Motion raises again the related legal issues of the exclusion of supplemental statements of prosecution witnesses on the grounds that they contain or introduce new allegations against the

⁶ *Id.*, para. 3-5.

⁷ Response, paras 4-9 and 23.

⁸ *Id.*, paras 19-22.

⁹ *Id.*, paras 14-18, 22.

¹⁰ Reply, paras 2-3.

Accused persons, and that therefore there has been a breach of Rule 66 of the Rules on the part of the Prosecution.¹²

9. The Chamber observes that consistent with the established jurisprudence on applications of this nature Rule 89 is the governing law. The relevant provisions are in these terms:

(B) In cases not otherwise provided for in this section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence.

10. In two very recent Decisions on the same subject, *Decision On The Defence Motion For The Exclusion of Certain Portions of Supplemental Statements of Witnesses TF1-117* and *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*, the Chamber restated and applied three specific guiding principles emerging from the jurisprudence on the subject: 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.¹³ Consequently, the evidence sought to

¹¹ *Id.*, para. 5.

¹² 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; *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; *Id.*, Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060, 23 July 2004; *Id.*, Ruling on the Oral Application of the Exclusion of Part of the Testimony of Witness TF1-199, 26 July 2004; *Id.*, Ruling on Disclosure Regarding Witness TF1-015, 28 January 2005; and *Id.*, Ruling on Disclosure Regarding Witness TF1-195, 4 February 2005. 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; *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; *Id.*, Sesay - Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004.

¹³ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision On The Defence Motion For The Exclusion of Certain Portions of Supplemental Statements of Witnesses TF1-117, 27 February 2006, paras 10-11 and 13; *Id.*, Decision On The

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

11. The Chamber would like to observe 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.¹⁴

12. The Chamber would, however, like to say here that, for the purpose of further safeguarding the rights of the Accused as provided for in Article 17(4)(a) and 17(4)(b) of the Statute, it would be prepared to grant an application, if it were made and premised on reasonable and legally acceptable grounds, for an adjournment so as to enable the Defence to examine the various options and strategies open to the Defence in relation to those supplemental statements.

IV. MERITS OF THIS MOTION

13. Guided by the foregoing principles, we have reviewed the original statements of witness TF1-168, alongside his supplemental statements of the 14th, 21st of January and the 4th of February, 2006, and those of TF1-165 and TF1-041 alongside their respective supplemental statements of the 6th/7th of February 2006 and of the 9th, 10th, 13th of February, 2006 as well as in each case the charges in the Amended Consolidated Indictment, the Prosecution's Pre-Trial and Supplementary Briefs and other related matters.

14. On the basis of such review, the Chamber is satisfied firstly, that the allegations contained in the supplemental statements of each of the aforementioned Witnesses TF1-168, TF1-165, and TF1-041 are not new allegations, secondly, that the Defence did have sufficient notice of the same, and thirdly, that the said allegations do not constitute new evidence.

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.

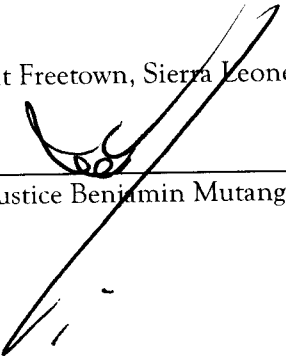
¹⁴ For a general guidance on the form and contents of an indictment, see *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, paras 50ff.

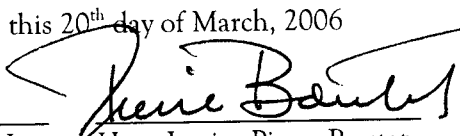
15. Based on the foregoing findings, the Chamber rules that the Defence has failed to make a *prima facie* showing of breach on the part of the Prosecution of its Rule 66 disclosure obligation. The Motion, therefore, lacks merit.

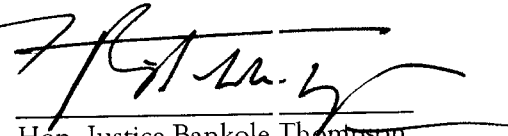
V. DISPOSITION

16. The Motion is accordingly DENIED

Done at Freetown, Sierra Leone, this 20th day of March, 2006


Hon. Justice Benjamin Mutanga Itoe


Hon. Justice Pierre Boutet
Presiding Judge
Trial Chamber I


Hon. Justice Bankole Thompson

