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SCSL-04-15-1
(27705 - 27770)
THE SPECIAL COURT FOR SIERRA LEONE

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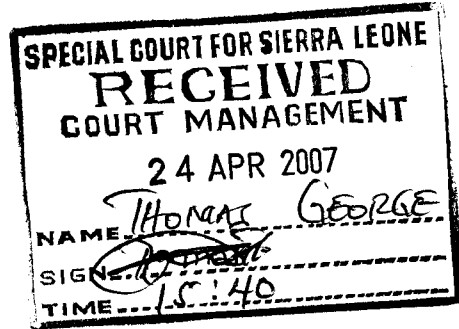
BEFORE:

Hon. Justice Bankole Thompson, Presiding
Hon. Justice Benjamin Itoe,
Hon. Justice Pierre Boutet

Acting
Registrar: Mr Herman Von Hebel

Date filed: 24th April 2007

The Prosecutor



-v-

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No: SCSL-04-15-T

PUBLIC

**DEFENCE MOTION SEEKING A STAY OF THE INDICTMENT AND DISMISSAL
OF ALL SUPPLEMENTAL CHARGES**
(Prosecution's Abuse of Process and/or Failure to Investigate Diligently)

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INTRODUCTION

Submission I: Egregious manipulation of the process of the Court necessitating a stay of the indictment

1. The Sesay Defence (the “Defence”) submits that the Prosecution has manipulated the Court’s process. In breach of a stated prohibition,¹ the Prosecution re-investigated its case afresh throughout its duration in order to mould the case to suit the evidence as it unfolded. The principal aim of this interference with the process was to strengthen their case by rectifying errors and compensating for a lack of due diligence in their pre-trial investigation. The resulting moulding contravened an explicit prohibition previously recognised by Trial Chamber I.² This impropriety has been compounded by the deliberate concealment of the manipulation of the process. Notwithstanding the Prosecution’s refusal to admit or deny the conduct, the available evidence demonstrates beyond any reasonable doubt that the process has been manipulated.
2. The Defence submits that this manipulation is so egregious that it amounts to an abuse of process. To proceed with the trial in the face of this deliberate manipulation would contravene the Court’s sense of justice.³ The Defence therefore seeks a stay of the Indictment.

Submission II: The impossibility of a fair trial

3. The Prosecution’s improper practice of “moulding their case to suit the evidence as it unfolds” (a practice recognised and rightly condemned by Trial Chambers at the International Tribunal for Yugoslavia⁴ and (previously) by Trial Chamber I at the Special Court⁵) and the

¹ *Prosecutor v Sesay*, SCSL-03-05-080, “Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment”, 13 October 2003, paragraph 33; and *Prosecutor v Brdanin and Talic*, IT-99-36, “Decision on Form of Further Amended Indictment and Prosecution Application to Amend”, 26 June 2001, paragraph 11.

² In order to ensure judicial economy the Defence refers the Chamber to its earlier arguments in *Prosecutor v Sesay et al*, SCSL-04-15-541 “Motion to Request the Trial Chamber to Rule that the Prosecution’s Moulding of the Evidence is Impermissible and a Breach Article 17 of the Statute of the Special Court”, 3 May 2006. The Defence takes cognisance of the fact that the Motion was denied on the basis that “any direct challenge to the general integrity of the statement 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 ... [t]he 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 administration of justice might be brought into disrepute” *Prosecutor v Sesay et al*, SCSL-04-15-616, “Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution’s Moulding of the Evidence is Impermissible”, 1 August 2006, paragraphs 17-18. The Defence submits that there is ample evidence and refers the Trial Chamber to paragraphs 12 to 15 of this motion and Annex B. It is submitted that, without more, this evidence provides powerful proof of the claims herein. At the least it imposes a positive duty on the Trial Chamber to investigate and make proper enquiry into the alleged conduct.

³ *Prosecutor v Barayagwiza*, ICTR-97-19, “Appeals Chamber Decision”, 3 November 1999, paragraphs 73-86; *but see* paragraph 77.

⁴ *Prosecutor v Kupreskic*, IT-95-16-A, “Appeal Judgement”, 23 October 2001, paragraph 82; and *Brdanin and Talic*, 26 June 2001, paragraph 11.

⁵ *Prosecutor v Sesay*, SCSL-03-05-080, “Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment”, 13 October 2003, paragraph 33.

ongoing concealment amounts to conduct lacking bona fides. Moreover, the overall impact upon the fairness of the trial (and the resulting prejudice to Mr Sesay) is incalculable but overwhelming. The trial process and the attendant rights of Mr Sesay have been so tainted by the Prosecution's conduct that, irrespective of the view taken of the seriousness of the impropriety, a fair trial is not possible. The unfairness cannot be remedied by the trial process. In these circumstances the Indictment must be stayed.

Submission III: Further and in the alternative to Submissions I and II, the only available remedy would be for a dismissal of all the additional factual allegations

4. The Prosecution has moulded its case to suit the evidence as it unfolded and continually re-investigated and supplemented its pre-trial charges. The former amounts to an egregious manipulation of the Court's process. Notwithstanding the correctness of this assertion, in these circumstances the re-investigation and supplementation process deprives Mr Sesay of his rights intrinsic to a fair trial, namely the ability to cross-examine fully or effectively on those additional factual allegations/charges.
5. Some of the resulting unfairness could have been cured by the recall of witnesses to allow cross-examination on the supplementary factual allegations/charges. As has been correctly stated by Trial Chamber I, "[I]mperative necessity dictates for a party to be given or allowed the opportunity to examine or to cross-examine witnesses that have been called for or against him and this with a view to testing the veracity of the evidence so adduced".⁶ Yet the recall of witnesses, in the circumstances which exist in Mr Sesay's case, would necessitate a significant adjournment of the trial. In light of this previous ruling of the Trial Chamber Mr Sesay cannot avail himself of this opportunity without occasioning a breach of Article 17(c) of the Statute, the right for the accused to be tried without undue delay, and Rule 26bis, the right to a fair and expeditious trial.
6. In light of this inevitable breach (and in the alternative to Submissions I and II), the Defence seeks the only remaining remedy: the dismissal of all allegations/charges contained in statements disclosed after the commencement of the trial, including those arising from oral testimony, witness statements, clarification interviews, and the so-called proofing notes.

⁶ *Prosecutor v Sesay et al*, SCSL-I-04-15-623, "Written Reasons on Majority Decision on Oral Objection taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371", 2 August 2006 (Justice Boutet dissenting), paragraph 22.

REASONING**Submissions I and II: Manipulation of the Court's process necessitating a stay of the indictment and/or leading to such unfairness a fair trial is no longer possible****Moulding of the evidence and ongoing concealment of the conduct: The law**

7. The abuse of process doctrine in international criminal law was discussed in the case of *Barayagwiza*⁷ which noted that the doctrine could be relied upon in two distinct situations: (i) where delay has made a fair trial for an accused impossible; and (ii) where, in the circumstances of a particular case, proceeding with the trial of an accused would contravene the Court's sense of justice.⁸ The *Barayagwiza* Court was concerned that the repeated violations of the accused's rights could result in such irreparable damage to the integrity of the judicial process that the only effective remedy would be to discontinue the trial. The Court observed that this disposition might well help to deter the commission of such serious violations in the future.⁹
8. It is accepted that the burden of proof rests upon the Defence.¹⁰ However a rigid and uniform application of this approach can give rise to injustice. There are important issues that have little possibility of being definitively proven. The Chamber ought readily to draw inferences where the Prosecution has failed, without proper explanation, to provide information or respond when it could reasonably do so. Where the Prosecution has failed to call evidence to explain or refute any allegation or involvement in bad faith conduct the Court should be prepared to draw the necessarily strong inferences.¹¹
9. Such a situation was resolved in favour of the defence in *R v Grant*.¹² The Court readily accepted that, where a plain inference of bad faith conduct lay open after the Defence presents evidence, and where there has been no, or no credible, Prosecution response, the burden shifts to the Prosecution.

The conduct

10. Whilst it is acceptable to investigate throughout the trial and to seek clarification of witness evidence through the "proofing" of witnesses,¹³ it is, as noted (at the outset of the trials) by

⁷ *Barayagwiza*, paragraphs 73-86.

⁸ *Ibid.*, paragraph 77.

⁹ *Ibid.*, paragraph 108. See also *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] 1 AC 42 at 62A-C per Lord Griffiths, and at 74G- 75A, per Lord Lowry; *R v Latif and Shahzad* [1996] 1 WLR 104 at 112 F- 113B per Lord Steyn; *R v Mullen* [1999] 3 WLR 777 at 791C-E, per Rose LJ; *Connolly v DPP* [1964] AC 1254, 1301 as well as Lord Devlin at p. 1354; Lord Nicholls in *R v Looseley* [2001] 1 WLR 2060, at 2069, paragraph 25; *R v Grant*, [2005] EWCA Crim 1089, 4.5.05., [2005] 3 WLR 437, at paragraphs 54-58.

¹⁰ *Sesay et al.*, 3 May 2006, paragraph 17. See also the English Law, which would appear to mirror that of the ICTR and ICTY; *R v Telford JJ ex p. Badhan* 93 Cr App R 171 at 179; *R v CC Norwich, ex parte Belsham* (1992) 94 Cr App. R 382 at 393-4; and *Tan v Cameron* [1992] 2 AC 205, at 224G-225G.

¹¹ *Gibbs v Rea*, [1998] AC 786 PC: see 798G- 801A.

¹² *R v Grant*, paragraphs 44-45 and 49.

¹³ *Prosecutor v Limaj, Bala, Musliu*, IT-03-66-T, "Decision on Defence Motion of Prosecution Practice of Proofing Witnesses", Trial Chamber, 10 December 2004, page 2.

Trial Chamber I in the present case, unacceptable to mould the case during the trial according to how the evidence unfolds.¹⁴

11. The Prosecution has deliberately and repeatedly flouted the prohibition by (i) changing their method of “proofing” (from clarification to re-interviewing); (ii) using in-court testimony as the basis for re-interviewing; and (iii) seeking evidence from their existing witnesses according to their assessment of how it will mould around pre-existing court led evidence. The Prosecution has deliberately and repeatedly sought to conceal this conduct by obfuscating to avoid having to admit or deny specific allegations of this prohibited conduct.
12. The Defence submits that there is ample evidence to prove that the Prosecution has manipulated the Court’s process by moulding its case to suit the evidence as it has unfolded. First, they have admitted the underlying conduct.¹⁵ Second, it is apparent from the Prosecution’s rolling disclosure program; inferences can be readily drawn from (i) an objective analysis of *the manner* in which the allegations/charges have multiplied throughout the Prosecution case¹⁶ and (ii) the Prosecution’s failure to offer any, or any credible response to direct allegations of bad faith conduct. The Prosecution’s admission and the inferences are sufficient to demonstrate an egregious manipulation of the Court’s process sufficient. In any event, the evidence logically demonstrates that the unfairness arising cannot be remedied. A fair trial is now impossible.

Prosecution Admission

13. The Prosecution admits that it has continued to investigate by re-interviewing witnesses on issues pertinent to the case.¹⁷ The Prosecution admits that its process of proofing is designed evidentially to “cover not only issues that are dealt with in the witnesses’ previous statements, but also other issues that may be within the witnesses’ knowledge and which are pertinent to the case”.¹⁸ This practice is not supported by any authority. Conversely every piece of jurisprudence arising from any of the International Tribunals and from all civilised national jurisdictions roundly condemns and prohibits this conduct, if it leads to an ever expanding case against the Accused.¹⁹ The whole body of criminal law is premised upon the

¹⁴ *Sesay*, 13 October 2003, paragraph 33; *Brdanin and Talic*, 26 June 2001, paragraph 11; and *Kupreskic*, 23 October 2001, paragraph 82. There are a multitude of reasons for this prohibition.

¹⁵ *Prosecutor v Sesay et al*, SCSL-04-15-635, “Prosecution Response to Sesay Defence Application for Leave to Appeal the Decision of 1st August 2006”, 23 August 2006, paragraph 7.

¹⁶ See Annex B for some of the supporting evidence.

¹⁷ *Prosecutor v Sesay et al*, SCSL-04-15-635, “Prosecution Response to Sesay Defence Application for Leave to Appeal the Decision of 1st August 2006”, 23 August 2006, paragraph 7.

¹⁸ *Ibid.*

¹⁹ In the International Criminal Court in the case of *Prosecutor v Dyilo*, Case No. ICC-01/04-01/06, “Decision on the Practices of Witness Familiarisation and Witness Proofing”, 8th November 2006, at paragraphs 33 and 42: the court went further and stated that the practice of proofing (that is anything beyond the familiarisation of the witness with the mechanics of the process, such as informing the witness of their rights or providing medical

immovable truth that the Prosecution cannot add factual allegations continuously throughout their case. The reasons for this are obvious; in colloquial terms the defence cannot hit a moving target. The unfairness arising is much greater when the target is being intentionally directed by a Prosecution policy which actively seeks to mould the case. The Prosecution refuses to *clearly* outline and confess to the practice because they are fully cognisant of its impropriety.²⁰

14. The inferences from the Prosecution's admission and rolling disclosure program are reasonable and compelling. During the re-interviews the Prosecution has sought evidence that will support its case as it has unfolded in court. Preparation for this re-interviewing has been based upon an on-going assessment and analysis of *this* case, anticipated future evidence (deduced from their pre-existing witness statements) and the Defence cases (as disclosed through cross-examination).²¹ Prosecuting Counsel must have attended the re-interviews with annotations (consisting of previous court testimony and other *aide memoires* referable to the court testimony) to ensure that re-interviews were focused and conducted according to the ongoing assessment. In other words, the Prosecution's claimed right to proof and seek additional evidence providing the additional evidence is *pertinent* to the case is a full admission to actively seeking to obtain new evidence to be moulded around the case as it has unfolded during the previous court hearings. The process is that alleged by the Defence on four occasions and obfuscated by the Prosecution on each occasion.²² It is still open to the Prosecution to deny these specific allegations or to offer an alternative interpretation.
15. In light of this admission the additional information obtained during re-interviews is not the product of providing an "opportunity [for a witness] to confirm that" the original statement was correct or a "chance to clarify the statement" or the product of a process of clarification

assistance) was not "a widely accepted practice in international criminal law" and is "not embraced by any general principle of law were it to be derived from the national laws of the legal systems of the world".

²⁰ *Ibid* at footnote 17. In the same paragraph the Prosecution rather disingenuously claim that the proofing of witnesses has been found by this Trial Chamber to be a "legitimate practice that serves the interests of justice". This is misleading. Trial Chamber I have not addressed the legitimate boundaries of the practice of proofing, despite it having been raised by the Defence on a number of occasions e.g. *Prosecutor v Sesay et al*, SCSL-04-15-468, "Reply to Prosecution Response to Defence Motion Requesting the Exclusion of Paragraphs 1, 2, 3, 11 and 14 of the Additional Information Provided by TF1-117 Dated 25th, 26th, 27th and 28th October 2005", 26 January 2006, paragraph 4. In fact, the Trial Chamber I has expressed its disquiet at the "almost systematic Prosecution Practice of producing supplemental or additional statements for its witnesses" (*Prosecutor v Sesay et al*, SCSL-04-15-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122", 1 June 2005, paragraph 31).

²¹ The alternative inference (that the re-investigation was haphazard and random) is self evidently absurd.

²² See *Sesay*, 3 May 2006; *Prosecutor v Sesay et al.*, SCSL-04-15-461, "Defence Motion Requesting the Exclusion of Paragraphs 1,2,3,11 and 14 of the Additional Information Provided by Witness TF1-117, Dated 25th, 26th, 27th and 28th October 2005", 12th January 2006; *Prosecutor v Sesay et al.*, SCSL-04-15-493, "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 2006) and TF1-041 (9th, 10th, 13th February 2006)", 23rd February 2006; *Prosecutor v Sesay et al.*, SCSL-04-15-518, "Public Sesay Defence Response to Prosecution Request for Leave to Call Additional Witnesses and for Order for Protective Measures Pursuant to Rules 69 and 73bis (E)", 20th March 2006.

if “the witness feels that something has been misinterpreted”.²³ Nor has the additional information arisen through a process involving a “detailed examination of deficiencies and differences in recollection when compared with each earlier statement of the witness”.²⁴ There is little, if any difference, between the process admitted by the Prosecution and that commonly known as “training or coaching” a witness. As noted by the Court of Appeal in England and Wales in the case of *R v Momodou*:

*There is a dramatic difference between witness training or coaching and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be improved.*²⁵

16. A more eloquent summary of the mischief caused by the Prosecution’s continuous process of investigating through re-interviewing witnesses would be difficult to find. The very fact of asking a witness about additional issues pertinent to the case is more than sufficient to provide cues as to the evidence required and to taint the evidence of even an honest witness. The damage to the process is incalculable and it cannot be remedied by any aspect of the proceedings. The Defence submits that there is ample evidence of conduct necessitating intervention by the Trial Chamber, because the conduct is so egregious or because it has led to irremediable unfairness.

Submission III: Further and/or in the alternative, the Prosecution has manipulated the Court’s process by moulding its case and/or reinvestigating its case leading to unfairness necessitating dismissal of all additional factual allegations/charges

17. The Prosecution’s continuous and purposeful manipulation of the Court’s process by moulding its case²⁶ and/or reinvestigating its case (to rectify the impact or compensate for its lack of diligence in their pre-trial investigations) has given rise to the continuous disclosure of additional/supplementary charges. These were neither explicitly pleaded in the Indictment nor contained in the Prosecution’s pre-trial briefs or in any other materials. They appeared only in witness statements and/or the so-called proofing notes. These have been disclosed throughout the Prosecution case. Throughout its case the Prosecution has deliberately and

²³ *Prosecutor v Mrksic Radic*, IT-95-13/1-T, 8 November 2005, transcript pp. 1323-1334.

²⁴ *Prosecutor v Limaj*, paragraph 6.

²⁵ *R v Momodou* (2006) EWCA Crim. 177, paragraph 61.

²⁶ The Defence allege that this improper process involves a three-stage course of conduct. Stage 1 involves the analysis of the success (or otherwise) of the Defence challenge to its evidence and in particular the effectiveness of cross-examination. Stage 2 involves the re-interviewing of any remaining witnesses to obtain supplementary factual allegations. Stage 3 involves the production of “additional information” (“so-called proofing notes”) which correspond to the objectives of the re-interviewing process.

unfairly created many new and distinct factual bases for conviction.²⁷

18. The unfairness arising from the creation of a multitude of new factual bases for conviction cannot be fully ameliorated. Examples of prejudice include: the denial of a complete overview of the prosecution case rendering strategising from the outset impossible; the loss of investigation opportunities prior to cross-examination; and the wasting of resources in planning and preparation as the case has continually shifted and changed in emphasis and focus. The whole strategy of an Accused and his approach to trial depends upon being informed explicitly of the specific factual allegations prior to the commencement of trial.²⁸
19. The Prosecution accepts the possibility of potential prejudice to the Defence has arisen due to their rolling disclosure program and the Trial Chamber's rulings on the admissibility of

²⁷ According to the Appeal Chamber at the Special Court for Sierra Leone, substantive changes, which seek to add fresh allegations amounting either to separate charges or to a new allegation in respect of an existing charge ought to be the subject of an amendment to an Indictment, (*Prosecutor v Norman et al*, SCSL-04-14-397, "Decision on Amendment of Consolidated Indictment", 16 May 2005, paragraph 80). Further, as noted in *Prosecutor v Halilovic*, IT-01-48-PT, "Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment", 17 December 2004, paragraph 30, the key focus when considering whether the Prosecution is seeking to rely upon "a new charge" is whether there exists a basis for conviction "that is factually and/or legally distinct from any already alleged in the indictment". 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", 18th October 2005, paragraph 13: "[i]f a new allegation does not expose an Accused to an additional risk of conviction, then it cannot be considered a new charge". See also, *Prosecutor v Krnojelac*, IT-27-95-PT, "Decision on Prosecutor's Response to Decision of 24 February 1999", 24 February 1999, paragraph 20, it was observed that the presence or absence of new counts in the indictment did not determine whether the Prosecution had sought to add new charges: "the Trial Chamber has obtained the impression that the prosecution may have taken the opportunity to add new charges for which leave is required pursuant to Rule 50(A). It is true, as the prosecution says, that no new counts have been added to the indictment. But that is only because of the pleading style adopted by the prosecution in this case: each count has been pleaded only in the terms of the Statute, and thus in terms of absolute generality, leaving it to the material facts pleaded in respect of that count to reveal specific details which are required ... and which should, strictly, have been pleaded in the count itself. In some cases in the proposed amended indictment, it is at least arguable that there has been an insertion of entirely new factual allegations in support of existing counts, either in substitution for or in addition to the factual situations, which had been pleaded in the original indictment. Even though the count remains pleaded in the same terms of the Statute, these substitutions may nevertheless amount effectively to new charges". This latter authority would appear to be highly apposite to the Sesay Indictment, which consists merely of broad legal categories of crimes allegedly committed in districts within a period of several months, for example, unlawful killings in Kono between 14th February 1998 and 30th June 1998, (as opposed to specifying *actual* incidents and situating them in place and time). The Prosecution have used these broad categories as empty vessels into which specific factual allegations obtained through moulding their case or through re-investigation have been poured *at will and according to their ongoing assessment of the requirements of their case*.

²⁸ The concept of the nature and cause of the charge and the disclosure of the same affords an accused two distinct guarantees – to be informed of the charges against him and to be in a position to prepare his defence in due time. But these guarantees are not the same. There are two distinct phases: the first phase when the Accused is first informed of the Indictment and thereafter the phase devoted to the preparation of his defence. The latter phase, occurring between the issuance of the indictment and the start of the trial, assumes a more detailed level of information which may not be available at the time the indictment is framed. See *Prosecutor v Blaskic*, IT-95-14, "Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Notice of Charges)", 4th April 1997, paragraphs 9-11. See also *Aycoban and others v Turkey*, 42208/02, 43491/02 and 43495/02, 22 December 2005, paragraph 21; *De Salvador Torres v Spain*, E.H.R.R. 601 paragraphs 32-33; *Sadak and others v Turkey (No.1)* 29900/96, 29901/96, 29902/96 and 29903/96 12 March 2003, paragraph 48-50; and *Pelissier and Sassi v France*, 25444/94, 25 March 1999.

supplementary statements disclosed during the Prosecution case.²⁹ The Prosecution accepts that the disclosure to the Defence of a supplemental statement containing facts that the Defence would have liked to put to an earlier witness in cross-examination “may be relevant in determining whether there is good cause for permitting the Defence to recall the earlier witness”.³⁰

20. In any event, the only aspect of unfairness resulting that could be ameliorated or addressed, if only in part,³¹ is the loss of cross-examination opportunities. The disclosure of specific factual allegations after the commencement of the trial and throughout the Prosecution case has deprived Mr Sesay of a multitude of cross-examination opportunities (as outlined at Annex A). The admission of incriminating evidence without sufficient notice obliges the Chamber to allow the Defence to recall witnesses for cross-examination if opportunities have been lost.³²
21. Trial Chamber I, in a Majority Decision, recognises that “[o]ne of the procedural tenets that is encapsulated in the doctrine of fundamental fairness in a trial is the imperative necessity for a party to be given or allowed the opportunity to examine or to cross-examine witnesses that have been called for or against ... with a view to testing the veracity of the evidence”.³³ An Accused, ambushed by the Prosecution to face a new and incriminating allegation on which he forfeited his right to cross-examine earlier witnesses due to prudent professional and/or strategic reasons, or indeed through lack of knowledge, obligated the Chamber “not only to allow the Defence to recall the witnesses who have testified on this incident, but also to adjourn the proceedings so that the Defence can conduct their own investigations prior to the recall of those witnesses ... to enable them to be fully equipped and prepared to properly conduct the said cross-examination”.³⁴
22. Yet, the right to have witnesses recalled for cross-examination on subsequently disclosed allegations has to be considered in light of both Article 17 of the Statute and Rule 26*bis* of the Rules of Procedure and Evidence.³⁵ The Majority finding of Trial Chamber I is thus applicable to the Defence of Mr Sesay, namely that the admission of a single factual

²⁹ *Prosecutor v Sesay et al*, SCSL-04-15-638, “Prosecution Response to Sesay Defence Application for Leave to Appeal the Decision of 3rd August 2006”, 1 September 2006, paragraph 19.

³⁰ *Prosecutor v Sesay et al*, SCSL-04-15-593, “Prosecution Response to Sesay Motion for a Ruling that the Defence has been Denied Cross-Examination Opportunities”, 10 July 2006, paragraph 13.

³¹ It is respectfully submitted that recall could only ameliorate *some* of the unfairness occasioned by the Prosecution’s moulding or re-investigating. The effectiveness of the Defence challenge to the Prosecution’s case against the accused relies upon being able to have a clear overview of all the evidence. Only with that overview is nuanced decision making and long-term tactical strategy possible. The loss of this opportunity cannot be fully appreciated retrospectively.

³² *Sesay et al*, 2 August 2006, paragraphs 22-23.

³³ *Ibid*, paragraph 22.

³⁴ *Ibid*, paragraph 23.

³⁵ *Ibid*, paragraphs 17-19, 26 and 31

allegation, relating to a single crime base, requires an adjournment to allow the recall of witnesses and that this would cause an “undue delay of the proceedings” which would “impair the principle of expeditiousness of the proceedings” sufficient to amount to a violation of the minimum guarantee provisions of Article 17 of the Statute and of Rule 26bis of the Rules of Procedure and Evidence.³⁶

- 23. Further, the number and range of witnesses required to be recalled in the case of Mr Sesay would be far in excess of those required to deal with the unfairness to Mr Gbao which would have arisen but for the exclusion of the evidence by the majority. The consequential adjournment to the trial would have to be significantly longer and the breaches of Article 17 and Rule 26bis more heinous.
- 24. The Defence submits that there is no procedural remedy to rectify the unfairness arising from the supplemental charges that have been created by the Prosecution since the commencement of its case. This submission does not rely upon the means by which the charges were created but the very fact of their late creation and the inability of the Defence to be able to properly test them.

REQUEST AND REMEDY

- 25. The Defence submits that the Prosecution ought to answer the allegations herein, and provide explanation concerning their rolling disclosure program. The evidence herein provides a reasonable basis for those allegations. In the event that the Prosecution is unwilling or unable to refute the allegations (and the evidence), the Trial Chamber ought to draw strong inferences against the Prosecution.
- 26. The Defence submits that the available evidence amply demonstrates the Prosecution has subverted and caused inestimable damage to the integrity of the Court’s process. The conduct outlined is so offensive to justice and propriety, and/or has caused such irremediable unfairness, that the Defence seeks a stay of the indictment for abuse of process.
- 27. The Defence, further or in the alternative, seeks the dismissal of all charges arising from the Prosecution’s rolling disclosure program, namely those arising from the so-called proofing notes.³⁷

Dated



Wayne Jordash
Sareta Ashraf

³⁶ *Sesay et al*, 2 August 2006.

³⁷ See Annex B for a sample of the factual allegations which fall to be dismissed.

LIST OF AUTHORITIES

Decisions

- Aycoban and others v Turkey*, 42208/02, 43491/02 and 43495/02, 22 December 2005.
- Connolly v DPP* [1964] AC 1254.
- De Salvador Torres v Spain*, E.H.R.R. 601.
- Gibbs v Rea*, [1998] AC 786 PC.
- Pelissier and Sassi v France*, 25444/94, 25 March 1999.
- Prosecutor v Barayagwiza*, ICTR-97-19, "Appeals Chamber Decision", 3 November 1999.
- Prosecutor v Blaskic*, IT-95-14, "Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Notice of Charges)", 4 April 1997.
- Prosecutor v Brdanin and Talic*, IT-99-36, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001.
- Prosecutor v Dyilo*, Case No. ICC-01/04-01/06, "Decision on the Practices of Witness Familiarisation and Witness Proofing", 8 November 2006.
- Prosecutor v Halilovic*, IT-01-48-PT, "Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment", 17 December 2004
- Prosecutor v Krnojelac*, IT-27-95-PT, "Decision on Prosecutor's Response to Decision of 24 February 1999", 24 February 1999
- Prosecutor v Kupreskic*, IT-95-16-A, "Appeal Judgement", 23 October 2001.
- Prosecutor v Limaj, Bala, Musliu*, IT-03-66-T, "Decision on Defence Motion of Prosecution Practice of Proofing Witnesses", Trial Chamber, 10 December 2004.
- Prosecutor v Norman et al*, SCSL-04-14-397, "Decision on Amendment of Consolidated Indictment", 16 May 2005.
- 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", 18 October 2005.
- Prosecutor v Sesay*, SCSL-03-05-080, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003.
- Prosecutor v Sesay et al*, SCSL-04-15-616, "Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible", 1 August 2006.
- Prosecutor v Sesay et al*, SCSL-1-04-15-623, "Written Reasons on Majority Decision on Oral Objection taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371", 2 August 2006.
- Prosecutor v Sesay et al*, SCSL-04-15-468, "Reply to Prosecution Response to Defence Motion Requesting the Exclusion of Paragraphs 1, 2, 3, 11 and 14 of the Additional Information Provided by TF1-117 Dated 25th, 26th, 27th and 28th October 2005", 26 January 2006
- Prosecutor v Sesay et al*, SCSL-04-15-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122", 1 June 2005.
- R v CC Norwich*, ex parte Belsham (1992) 94 Cr App. R 382.
- R v Grant*, [2005] EWCA Crim 1089, 4.5.05, [2005] 3 WLR 437.
- R v Horseferry Road Magistrates Court* ex parte Bennett [1994] 1 AC 42.
- R v Latif and Shahzad* [1996] 1 WLR 104.

R v Looseley [2001] 1 WLR 2060.

R v Momodou (2006) EWCA Crim. 177.

R v Mullen [1999] 3 WLR 777.

R v Telford JJ ex p. Badhan 93 Cr App R 171.

Sadak and others v. Turkey (No.1) 29900/96, 29901/96, 29902/96 and 29903/96 12 March 2003.

Tan v Cameron [1992] 2 AC 205.

Motions

Prosecutor v Sesay et al., SCSL-04-15-461, “Defence Motion Requesting the Exclusion of Paragraphs 1,2,3,11 and 14 of the Additional Information Provided by Witness TF1-117, Dated 25th, 26th, 27th and 28th October 2005”, 12th January 2006.

Prosecutor v Sesay et al., SCSL-04-15-493, “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 2006) and TF1-041 (9th, 10th, 13th February 2006)”, 23rd February 2006.

Prosecutor v Sesay et al., SCSL-04-15-518, “Public Sesay Defence Response to Prosecution Request for Leave to Call Additional Witnesses and for Order for Protective Measures Pursuant to Rules 69 and 73bis (E)”, 20th March 2006.

Prosecutor v Sesay et al., SCSL-04-15-541 “Motion to Request the Trial Chamber to Rule that the Prosecution’s Moulding of the Evidence is Impermissible and a Breach Article 17 of the Statute of the Special Court”, 3 May 2006.

Prosecutor v Sesay et al., SCSL-04-15-593, “Prosecution Response to Sesay Motion for a Ruling that the Defence has been Denied Cross-Examination Opportunities”, 10 July 2006.

Prosecutor v Sesay et al., SCSL-04-15-635, “Prosecution Response to Sesay Defence Application for Leave to Appeal the Decision of 1st August 2006”, 23 August 2006.

Prosecutor v Sesay et al., SCSL-04-15-638, “Prosecution Response to Sesay Defence Application for Leave to Appeal the Decision of 3rd August 2006”, 1 September 2006.

Transcripts

Prosecutor v Mrksic Radic, IT-95-13/1-T, 8 November 2005, transcript pp. 1323-1334.

PUBLIC ANNEX A: Recall list

TF1	Allegation	Date of testimony containing relevant allegation	Date of statement containing relevant allegation	Date of disclosure of relevant allegation	Witnesses who would have been sought to be recalled (with reasons)
371	Bodyguards were there to provide security for commanders but they would also be the eye for the particular commander to pass on intelligence information. Sesay's bodyguards were Boys aka Musa Vandj, Victor and Amara Peleto.	20/07/06 p77-78	(a) Statement 17/02/06 p23798 for a reference to Boys and 23729 for a reference to Peleto and (b) PN 2,3,5/07/06 p1 17/02/06 p23797	(a) 08.05.06	(NB the notion of bodyguards/security acting as a reporting structure first arose in the evidence of TF1-366 and was subsequently introduced into the supplemental statements of TF1-041 and TF1-367).
	Peleto was the bodyguard of Sesay and was based in Tongo in 1998 prior to the intervention. He was reporting to Sesay.	20/07/06 p52, 78		08.05.06 [11.04.06 redacted]	045: to seek evidence of effective command and control of 366 while he is in Tongo. To examine TF1-371's account of Peleto's role and test its veracity. 366: to test the veracity of his account and to compare it with the contrasting account of TF1-371. 035: to question 035 concerning the evidence of TF1-366 and the reporting structure he belonged to.

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					<p>036, 045, 360, 361, 362: the role of bodyguards as a separate reporting structure within the RUF. The role of Pelato within the RUF and a complete picture of his movements in 1998. By comprehensive cross-examination of 371's allegations it would have been possible to definitively impeach either (or both) 366 or 371 and this purported reporting structure.</p>
<p>The Intelligence Officers reported the killings in Tombodu by Savage and other SLA's in this area.</p>	<p>21/07/06 p6</p>	<p>IN 17-19/02/06 p23811</p>	<p>08.05.06 [11.04.06 redacted]</p>	<p>036, 041, 071, 078, 360, 361: to test the credibility of this account. The fact that some or all of these witnesses remained unaware of the alleged reports from Tombodu would have been hugely significant. If 036 had been unaware of these reports this would have raised more than a reasonable doubt as to the veracity of 371's account.</p>	
<p>Meeting at Buedu in December 1998 possibly attended by some or all of Sam Bockarie, Superman, Issa Sesay, Isaac Mingo, Morris Kallon, Augustine Gbao Peter Vandy, Akim Turay, Gullit, Ibrahim Kamara to plan the attack on Kono and the recapture of Freetown. The plan was called</p>	<p>21/07/06 p 44-46</p>	<p>(a) IN 10/12/05 p23763-23764 and (b) IN 17-19/02/06 p23812</p>	<p>(a) 08.05.06 [11.04.06 redacted] (b) 08.05.06 [11.04.06 redacted]</p>	<p>036, 071, 360, 361, 362, 334: all could have potentially testified on this alleged event. Any differences in the account could have raised a significant doubt about this contested meeting. It is the Defence case that this meeting did not take place and the RUF contingent being led by</p>	

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	<p>Operation No Living Thing, which meant no POW or threat to the movement should be tolerated.</p>				<p>Sam Bockarie did not have an express plan to enter Freetown. The Prosecution will use this meeting to allege Sesay's involvement in the SLA's attack on Freetown in January 1999. Cross-examination of these witnesses would have centred on disproving that this meeting took place.</p>
<p>367</p>	<p>Amara Salia [aka Peleto] was an RUF soldier who was initially Issa Sesay's bodyguard. Bodyguards served to protect you and your family but would also being information to you as to whether anything was being said about you or if negative things against you were being planned.</p>	<p>21/06/06 p56- 57 & 107); 22/06/06 p94 lines 4-16</p>	<p>PN 11,14,21, 22/02/06, p21010</p>	<p>08.05.06 [07.03.06 redacted]</p>	<p>036, 045, 078, 041, 071, 360, 361, 362: the role of bodyguards as a separate reporting structure within the RUF. It is noteworthy that 367 that the role attributed to bodyguards by 367 is different to what 366 and 371 later claimed. The latter claimed that bodyguards reported crimes against civilians and not plots against the commander. Cross-examination of these witnesses would have centred upon an examination of both claims.</p>
	<p>Witness states that he remembers 045 as involved in mining in Tongo fields in 1997. Also remembers Major Goy, Boys, BCH and JR. OG was for ML and Boys and BCH were Sesay's boys. There was forced labour.</p>	<p>21/06/06 p58-60</p>	<p>PN 11,14,21, 22/02/06 p21010</p>	<p>08.05.06 [07.03.06 redacted]</p>	<p>045: to ask for confirmation of 045's involvement in mining in Tongo field and confirmation of 367's account. At the time 045 was cross-examined 367's account was unknown and could not be compared and contrasted. These allegations</p>

<p>are intended to prove Sesay's control and participation in a substantial crime base. If these allegations are found proven they potentially link Mr. Sesay to a system of forced labour that might attract sentences upwards of ten years. Comprehensive cross-examination – with all allegations known – was required.</p>				<p>During the retreat, Sesay gave the instruction for the RUF to move from Masiaka to Makeni.</p>
<p>035, 060, 129, 122, were not cross-examined about 045's alleged role or the presence of these alleged persons due to the fact that the Prosecution did not provide any notice of these allegations until after his testimony.</p>			<p>23/06/06 p 11 lines 4-11</p>	
<p>060: who was a member of the caretaker committee in Tongo and would need to be cross-examined on the existing structure in Tongo and presence of IS's men.</p>				
<p>All insiders who were part of this movement to test the credibility of this allegation. Cross-examination on this allegation – which implies both command and control on the part of Sesay</p>	<p>08.05.06 [07.03.06 redacted]</p>	<p>PN 11,14,21, 22/02/06 p21010</p>		

<p>-would have shown this allegation to be demonstrably false. This opportunity was denied.</p> <p>Examples: 036, 045, 114, 117, 167, 184, 334, 360, 361, 362, 366.</p>				
<p>012, 041, 071, 078, 360, 361, 362, 366: to test the credibility of the account. These witnesses all testified upon the issue of diamond mining and yet could not be cross-examined upon the specifics of 367's account because of the Prosecution's rolling disclosure program. Witness 367 claims to have been directly answerable to Sesay and is a link alleged between Sesay and forced labour in 1998 in Kono. The Defence were denied the specifics of his account until February 2006 and could not test their veracity through these witnesses. The advantage to the Prosecution is substantial.</p>	<p>(a) 08.05.06 [14.02.05 redacted]</p> <p>(b) 08.05.06 [07.03.06 redacted]</p>	<p>(a) Statement 20/08/04 and</p> <p>(b) PN 11, 14, 21 and 22/02/06 p21007-21009</p>	<p>22/06/06 p28-30</p>	<p>367 had been sent to mine diamonds in Kono before the 1998 attack and had come with loads carried by civilians. The mining at that time was forced.</p>
<p>071 and 078: to test the credibility of the account. This alleged fact should have been crystal clear to any or all of</p>	<p>08.05.06 [07.03.06 redacted]</p>	<p>PN 11, 14, 21 and 22/02/06 p21012</p>	<p>22/06/06 p 35</p>	<p>Sesay's security at the time of the Kono attack (December 1998) was made up of children and adults aged 12 yrs-15 yrs.</p>

					<p>these witnesses. Each of these witnesses could potentially have rebutted this allegation. This is particularly significant in relation to 071 and 078 who gave substantial exculpatory evidence as regards Sesay's liability for many of the crimes alleged on the indictment. 078 met Sesay when he arrived in Kono at the beginning of the Kono campaign. But for the Prosecution's rolling disclosure program they would have been cross-examined and could have given similarly powerful exculpatory evidence in relation to Count 12.</p> <p>Also witnesses 077, 197, 304, 263, 015, 195, 012 and 141 might have been able to refute this allegation but for these lost cross-examination opportunities.</p> <p>078, 366: to test the credibility of the account and to explore the account. In particular these witnesses could have confirmed that Sesay was not involved.</p> <p>077, 197, 304, 263, 015, 195, 012, 078, 366, 071, 045, 015, 361, 036: to test the credibility of</p>
<p>Diamonds once mined and counted were handed over to Sesay at his house in Small Lebanon.</p> <p>Sesay was also doing private mining in Kessambo and No 11 with Bukero, Col Lion, Small</p>	<p>22/06/06 p42-44</p> <p>22/06/06 p 48-52</p>	<p>Statement 20/08/04 p21008</p> <p>(a) Statement 20/08/04 p21008 and</p>	<p>08.05.06 [14.02.05 redacted]</p> <p>(a) 08.05.06 [14.02.05 redacted]</p>		

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	<p>Kamare and OM supervising forced labour. Superman, Morris Kallon and Komba Gbudema also had private mining. As civilians from Kono had run away they brought in civilians from Makeni and Magburaka to mine.</p>		<p>(b) PN 11, 14, 21, 22/02/06 p21012</p>	<p>(b) 08.05.06 [07.03.06 redacted]</p>	<p>this account. These witnesses would, to a lesser or greater degree, have been able to comment on the details surrounding these belated allegations.</p> <p>This account was the first time that it had been alleged that Sesay (and the other named alleged subordinates of Sesay) was responsible for private mining during 1999 and onwards. Cross-examination to test these contentious issues was essential.</p>
	<p>Sesay ordering MPs to tie Witness to mango tree and beat him for misappropriating a diamond.</p>	<p>22/06/06 p44-46</p>	<p>Statement 20/08/04 p21009</p>	<p>08.05.06 [14.02.05 redacted]</p>	<p>041, 071, 078, 366: the Prosecution rely upon this allegation to assert command and control over forced mining. This is denied. It was an absolute right of the accused to be able to examine this account through witnesses such as the aforementioned who could have refuted this allegation and supported the defence case, namely that command and control vested in others.</p>
<p>041</p>	<p>The Sesay led attack to recapture Koidu in December 1998 killed more than 50 civilians. Witness</p>	<p>10/07/06 p55-56</p>	<p>PN 9,10, 13/02/06 p18133</p>	<p>14.02.06</p>	<p>078, 304, 015, 362, 036, 045: recall of all those who were present for the attack on Koidu</p>

<p>buried them.</p>				<p>(or who remained afterwards or who may have received reports) and who can give details about the attack and speak to whether there were civilian casualties and if so how they occurred. It is the defence case that there were no crimes committed against civilians during this attack due to Sesay's clear instructions and severe disciplinary warnings. This would have been dealt with throughout the Prosecution case but no notice was ever given of this specific factual allegation until after 58 Prosecution witnesses had been called.</p>
<p>Mr. Sesay instructed the witness to arrange for 100 civilians to be captured and forced to mine in Kono.</p>	<p>10/07/06 p42-43 The evidence in court lacked this degree of specificity but at page 52, line 22 041 alleges that 50 civilians were forced to mine under Kennedy in 1998.</p>	<p>PN 16-24/05/05 p17841</p>	<p>06.06.05</p>	<p>For the these allegations in relation to Kono district, it will be necessary to recall the following witnesses to cross-examine them on their knowledge of the events described by TF1-041: 217, 077, 197, 304, 263, 071, 078, 366, 362, 304.</p>
<p>Sesay involved in incident of sending forced labour to Kono after Lome.</p>	<p>10/07/06 p62</p>	<p>PN 16-24/05/05 p17841</p>	<p>06.06.05</p>	<p>Thirty-four witnesses had been called by the Prosecution before the Defence were given notice of this specific factual allegation.</p>

<p>It will be relied upon by the Prosecution to support count 13. Mr. Sesay could, without an adequate opportunity to test the reliability of this allegation through cross-examination of the aforementioned previous witnesses, be convicted of a Crime Against Humanity – carrying a sentence of many years imprisonment. More than a reasonable doubt could have been created by cross-examination of these witnesses.</p>				<p>Sesay involved in arranging children to be sent for military training (1999/2000).</p>
<p>The following witnesses may reasonably have been expected to have knowledge of such a significant event and would have provided the Defence with the opportunity to thoroughly test this false allegation.</p> <p>362, 141, 167, 012, 071, 078</p>	<p>06.06.05</p>	<p>PN 16-24/05/05 p17841</p>	<p>10/07/06 p60-61</p>	
<p>Defence would like to recall witnesses to explore the credibility of the reporting structure through bodyguards</p> <p>045: would have been in a position to be cross-examined about the role he played with a senior commander of the RUF.</p>	<p>14.02.06</p>	<p>PN 9-13/02/06, p18132</p>	<p>10/07/06 pp 27-29 and 11/07/06 pp 4-8</p>	<p>All the big commanders like Bockarie, Sesay, Superman, Komba Gbudema would send their bodyguards to various places to report back to them.</p>

					<p>036: could have been cross-examined about the role of Mosquito's bodyguards. Opportunity denied.</p> <p>041, 071: could give information about any of the reporting systems and ought to have been aware of whether, aside from the Joint Security Unit, there in fact was any other system, as alleged. Opportunity denied.</p>
117	<p>Sesay would usually address the Muster parade in Kono.</p>	<p>Sesay was present at muster parades at Kono and Makeni - 03/07/06 p15. Muster parades are also mentioned 29/06/06 p94 and 30/06/06 p105-106 but only Sankoh and SB plus others are mentioned specifically.</p>	<p>PN 25-28/10/05, p16852</p>	<p>28.10.05</p>	<p>041, 071, 360: witness could have been cross-examined to test the credibility of this account which is categorically denied; as is the suggestion that Sesay had anything to do with child soldiers. Witnesses may well have been able to place Sesay some distance from these alleged events.</p>
	<p>Sesay attended a meeting of the AFRC and RUF commanders in Kailahun from Freetown after the re-instatement of Kabbah. The purpose was to plan to attack the government. After this AFRC and</p>	<p>30/06/07 p8-9 (meeting) and 10-12.</p>	<p>PN 25-28/10/05, p16853</p>	<p>28.10.05</p>	<p>There is a substantial amount of evidence to illustrate that Sesay did not mobilise at this time and commit crimes against civilians. There would have been much more if the Defence had been</p>

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	RUF were mobilized to attack towns again where civilians were killed, houses burnt, limbs amputated and kerosene looted.				given notice of this false allegation before the following witnesses gave evidence: 078, 071, 015, 036, 361, 366, 362.
	Witness was on board the convoy, which was led by Mr Sesay to attack the UN at Mabanta. Mr Sesay observed the operation. Sesay also supervised the attack at the second location	30/06/07 p25-28 and 29-32	PN 28/02/06, p18204	01.03.06	There are a number of accounts from insider witnesses (none from the UNAMSIL witnesses) which suggest that Sesay was involved in an attack on UNAMSIL in May 2000 (e.g. TF1-366). Naturally the optimum position would have been to know all the different allegations before the case commenced so that each account could have been compared and contrasted (during cross-examination) with each other. Another opportunity denied. 078, 071, 361, 360, 036, 093, 366, 042, 044
334	Papa, Bazy and Gullit spoke with Mr. Sesay from Rosos, Col Eddie Town, in the jungle after Kobawater,	07/07/06 p51 lines 6-11 and p52 lines 3-5 and pp53-54.	PN 16/03-20/04/05, p14677	14.09.05	These allegations were disclosed after the Prosecution had called 43 witnesses to give evidence. The Prosecution rely upon these allegations to suggest that the RUF were involved in the January 6 th 1999
	Issa Sesay spoke to Papa Bangura from Kailahun in 1998	18/05/05 p. 36	18/05/05 p. 36	14.09.05	

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	stating that Kono would soon receive supplies.	20/05/05 p. 43	20/05/05 p. 43	14/09/05	<p>attack on Freetown. A number of witnesses could have refuted these false allegations including 167, 362, 036 and especially 361, 360. Unfortunately (for the Defence and the Accused) these allegations were not dealt with through these witnesses because of the late disclosure by the Prosecution. At the very least the Defence ought to be entitled to cross-examine 361 and 362 on these demonstrably false allegations.</p> <p>Forty-four witnesses gave evidence before this allegation was disclosed to the defence. It is logical to assume that the following witnesses might have been able to comment on the truth or otherwise of this</p>
	The boys of Sesay were mining during the 1998 RUF occupation of Koidu.	20/05/05 p. 43	20/05/05 p. 43	14/09/05	
	Following the discovery of a microphone at Batkanu Gullit spoke to Sesay	24/05/05 p. 33	24/05/05 p. 33	14/09/05	
	At Colonel Eddie Town Gullit spoke to Sesay.	13/06/05 p. 33	13/06/05 p.33	14/09/05	
	Gullit whilst at Hastings (late Dec/early Jan 1999) spoke to Sesay.	13/06/05 p. 91	13/06/05 p. 91	14/09/05	
	Bockarie ordered Bazzy Kamara to be the commander of the West Side.	15/06/05 p. 23	15/06/05 p.23	14/09/05	
	Mosquito gave order to Bazzy that he should be the Commander of the Western Jungle.	06/07/06 p65	AFRC TT 15/06/05 p15695 (p23)	14.09.05	
113	Sesay ordered his 4 bodyguards to beat the brother of the witness. After he had been beaten he was locked in a cell and he died from his injuries.	02/03/06 p76-79	PN 1-5/11/05 p16979	08.11.05	

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					<p>uncorroborated allegation: 071, 078, 015, 362, 361, 360, 314 and especially 036.</p>
RUF had a forced farm at Sogbagbehun/Togbagbehun.	02/03.06 p70-71 and 06/03/06 p32-33	PN 1-5/11/05 p16979-16980	08.11.05	<p>036, 114: present in Kailahun district and given their positions would be expected to comment knowledgeably on such propositions. Additionally this farm ought to have been common knowledge so it could be expected that 362, 361, 360, and 036 may well have known about it – if true.</p>	
The RUF were engaged in forced mining diamonds in 1998 in Kailahun district in Mofidor and Giema.	6 th March 2006 pp. 23	PN 1-5/11/05 p16980	08.11.05	<p>114: present in Kailahun and sufficiently close to the senior officers to give an account and test the credibility of the allegation. Given the Prosecution's central thesis that diamond prospecting lay at the heart of the RUF endeavours this allegation, if true, would have been well known by the rank and file of the RUF e.g. 362, 361, 360, and 036.</p> <p>It is the defence case that there was no forced labour in Kailahun in 1998. This allegation thus would have been attacked through all of these witnesses.</p>	

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	Sesay's wife had SGU's.	02/03/06 p69	PN 1-5/11/05 p16979	08.11.05	114, 366, 036: present in Kailahun and sufficiently close to the senior officers to give an account and test the credibility of the allegation.
108	Sesay had a rice farm in Ngeima in 1997, 1998 and 1999, where civilians were forced to farm.	07/03/06 p104-105 and 113	PN 19-26/11-07/12/05 p17449	13.01.06	036, 114: present in Kailahun and sufficiently close to the senior officers to give an account and test the credibility of the allegation.
	Sesay had small boys working for him in Ngeima: Boys, Moses and Abdullai.	07/03/06 113-116	PN 19-26/11-07/12/05 p17449	13.01.06	036, 113, 114: present in Kailahun and sufficiently close to the senior officers to give an account and test the credibility of the allegation.
	Korpomeh went to villages and forced civilians to harvest coffee for the RUF.	08/03/06 p23-24	PN 19-26/11-07/12/05 p17449	13.01.06	036, 113, 114: present in Kailahun and sufficiently close to the senior officers to give an account and test the credibility of the allegation.
	Witness forced to hunt and fish for Benjamin Yeaten. Sesay, Kallon, Gbao and Superman present.	08/03/06 p26-28	PN 19-26/11-07/12/05 p17450	13.01.06	036, 114: present in Kailahun and sufficiently close to the senior officers to give an account and test the credibility of the allegation.
	Throughout 1996/1997 and 1998 the women of Dodo Kotuma were forced to fish for Sesay.	07/03/06 p92-04 and 09/03/06 p46-48	PN 19-26/11-07/12/05 p17450	13.01.06	036, 113, 114, 366: present in Kailahun and sufficiently close to the senior officers to give an

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						account and test the credibility of the allegation.
	Civilians forced to mine in Ngeima, Yandohun, Monfindor and Jojoima in 1998. Patrick Bangura was in charge.	08/03/06 37-41	PN 19-26/11-07/12/05 p17450	13.01.06		036, 114: present in Kailahun and sufficiently close to the senior officers to give an account and test the credibility of the allegation.
	Sesay had two bush wives near a village called Dodo Kotuma. One was called Bondu.	09/03/06 p4-6	PN 19-26/11-07/12/05 p17452	13.01.06		036, 114: present in Kailahun and sufficiently close to the senior officers to give an account and test the credibility of the allegation.
330	Throughout 1997, 1998, and 1999 Gbao gave orders that civilians should be forced to work for the RUF. All the farming goods were sent to Sesay.	14/03/06 p23-25	PN 1-7, 20/12/05, p17460-17461	13.01.06		036, 114: present in Kailahun and sufficiently close to the senior officers to give an account, test the credibility of the allegation and comment on the inconsistency with 330 .
	Enslavement in the Kailahun district: details given relating to: (i) Cultivating 'Government farms', (upland and swamp rice farms) at Talia, Sembehun and Giema with Sesay's involvement;	14/03/06 p25 14/03/06 p41-46	PN 1-7, 20/12/05, p17460-17463 PN 1-7, 20/12/05, p17460-17463 PN 1-7, 20/12/05, p17461-17462	13.01.06 13.01.06 13.01.06		036, 114, 366: present in Kailahun and sufficiently close to the senior officers to give an account and test the credibility of the allegation. These allegations were put to 371 and in large part, he refuted the allegations. It is clear thus that Prosecution witnesses who were based in Kailahun could

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	<p>(ii) Production and transporting of palm oil, cocoa, coffee, fishing, mining. (Talia/Sandeyaru/Yan dohun/between Monfidor and Sahbahun);</p> <p>(iii) Brushing of Kailahun town;</p> <p>(iv) Abduction and sexual violence of girl from Bandajuma Sine by Sesay;</p> <p>(v) Goods inspected by Gbao and sent to Sesay.</p>	<p>e.g. 15/03/06 p17-19</p> <p>e.g. 14/03/06 p25</p>	<p>PN 1-7, 20/12/05, p17462</p> <p>PN 1-7, 20/12/05, p17462-17463</p>	<p>13.01.06</p> <p>13.01.06</p>	<p>have commented on the allegations. Given the uncorroborated nature of the specific allegations and the refutation by 371 it is more than reasonable to presume that others would have further undermined the allegations. The lack of opportunity denied the defence this further forensic possibility.</p>
<p>168</p>	<p>G5 sub commanders could report 3 ways: to the G5 commander, to the BGC or to BFC.</p>	<p>03/04/06 p50-51</p>	<p>Statement 11/04/03, p17561-17562. G5 commanders reported to Sankoh or BGC from 1991-1994</p>	<p>17.01.06</p>	<p>This allegation was disclosed to the Defence after 58 witnesses had been called by the Prosecution. This goes to the heart of the way in which the RUF allegedly functioned as a military organisation. Almost all of the RUF witnesses would have been able to confirm or otherwise this allegation, including 071, 078, 362, 361, 360, 045 and 114. It is telling that this allegation was not corroborated by any witness. The evidence given by 036 contradicted the allegation. This</p>

							suggests that what 168 stated was untrue. Cross-examination of the aforementioned witnesses could well have put the matter completely beyond doubt.
						27.02.06	114 to be recalled to give evidence of his account as he is mentioned as being present.
						17.01.06	036, 113, 114: all RUF insiders, present in Kailahun district at the time.
						17.01.06	036, 113, 114: all RUF insiders, present in Kailahun district at the time. 036 and 114, as a result of their assignments, would be expected to have knowledge of such an event.
						(a) 13.09.05 (b) 11.10.05 (c) 28.10.05	All witnesses who had connections with Superman: 167, 336, 041, 071, 078, 360, 036, and 361. This witness claimed to have closely associated with
						(a) Statement 26/03/03 p13844, (b) Video Transcript 14/01/04 p16818, (c) Video Transcript	
						31/03/06 p 78-79 03/04/06 p31	Executions in Buedu of 3 SLAs who were alleged to have spent a night at a Kamajor position. Heard Sesay's voice at the time of the execution when Witness was in detention. Denis Koker, Tom Sandy and Kaisuku were also present.
						31/03/06 p81	Execution of sick Nigerian ECOMOG POW, Hassan Fada, in March 1999.
						31/03/06 p 79-80	Execution of AFRC officer Kallon who had permission to go to Lofa county but who had gone to Monrovia on the orders of Bockarie.
093						29/11/05 p 76	Claims she was forced to be in the company of Superman from 1996.

			(Translated) p16831, 16833.			Superman for a large part of the conflict. However this was not disclosed to the Defence until after 43 witnesses had been called to give evidence.
	Sacrifice of 7 pregnant women who were buried alive in Kailahun on the orders of Superman.	29/11/05 p90-92	Statement 29/11/02 p13835	13.09.05 [26.04.04 redacted]		036, 362, 114: these insider witnesses would have been able to test the credibility of this account.
045	Major Gweh (RUF) was mining for RUF in Tongo in 1997. Capt Yamao Kati was the overall commander. Gweh reported to Bockarie as did Kati. Forced labour was used and Bockarie also had his private mines. Captain Yati was deputized by Capt Eagle. Sgt Junior was in the OC Secretariat.	18/11/05 p58-68	(a) PN 13-25/10/05 p16853 for Major Gweh, Tongo and diamonds. (b) PN 14/04 to 07/05/05 p13184-13185.	(a) 26.10.05 (b) 13.09.05		362: 045 travelled to Freetown from Kenema with this witness and may have been in a position to give evidence about these alleged connections and characters. 035: the Defence were unable to cross-examine this witness and put this account to him. 035 does not mention these people as being there and so might reasonably be expected to assist the defence case.
	Amuyepeh, Tactical and Boys were in Tongo. Boys was Sesay's bodyguard. Tactical was Bockarie's bodyguard. They were involved in mining. There were SBUs in Tongo field.	18/11/05 p77	PN 13-25/10/05 p16853.	26.10.05		060: was a member of the caretaker committee in Tongo this witness was called to give evidence 6 months before the Prosecution decided to inform the Defence that this allegation from 045 was going to form part of their case against Sesay. It is

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	<p>Meeting of the AFRC and RUF Supreme Council in late September 1997 at the Wilberforce barracks, Sesay, Lamin, Kallon, Massoquoi, Eldred Collins, Rambo, Gen Bropleh and Mongo were present. Harassment of civilians was discussed as was looting and raping, the shipment of arms into Sierra Leone through Magburaka was also discussed.</p>	<p>18/11/05 p 81</p>	<p>PN 14/04 to 07/05/05 p13185-13186</p>	<p>13.09.05</p>	<p>only the Prosecution who gain from this late disclosure and the defence who suffer prejudice by being denied cross-examination opportunities.</p> <p>The following witnesses could be expected to speak about any AFRC-RUF meetings at Wilberforce barracks or at the Youyi building.</p> <p>362, 167 and 036</p>
<p>There was a meeting in Buedu in December 1998 attended by Sesay, Kallon, Lamin, Syb Rogers, Bockarie and others. Roger said they were to attack Kono, Tongo, Segbwema, Daru, Bunumbu and Kenema, to obey our commands and to destroy everything. This order was reinforced by Sesay saying that all houses that were fit to burn should be burnt, all people who were fit to die should die and roads should be destroyed – this was called Operation Spare No</p>	<p>21/11/05 p71-75</p>	<p>PN 16-23/06/05, p13190</p> <p>Describes planning for attack on Daru, Kono, Kenema, Makeni and Magburaka. The operation was called 'Operation Free Sankoh'. Sesay alleged to have explicitly supported Bockarie in his demand that</p>	<p>13.09.05</p>	<p>Clearly this allegation – disclosed in one form on the 13th October 2005 (and later adduced in court in a different form) is an important allegation. The Prosecution will seek to rely upon the allegation to support the JCE with the AFRC (and thereby link the RUF with the January 6th 1999 attack on Freetown) (This is a presumption since this allegation and many more have not been legally categorised by the Prosecution. Presumably this</p>	

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	Soul.		atrocities be committed.		will be done at some stage). The Defence would have liked to contrast this belated account with other accounts or questioned the following witnesses to test its veracity: 071, 078, 360, 361, 362, 114, 036.
366	Sesay ordered the killing of the Kamajors. There were 62 of them.	08/11/06 p58-62	Statement 30/08/04 p13673-13674	13.09.05 [14.02.05 redacted]	This allegation is one of the most infamous and gross deliberate killing events in the indictment period. Fairness dictated that this allegation was known to the defence from the outset of the case. Instead this false allegation was disclosed after 114 and 036 had both given evidence. It is impossible that these two witnesses would not have been able to testify to this event yet the defence were denied this opportunity.
	Sesay sent armed men including Major Goy and Musa Vandi (aka Boys) to guard the civilians at the mines in Kono.	07/11/06 91-92	Statement 30/08/04 p13673-13674	13.09.05 [14.02.05 redacted]	This uncorroborated account from a witness who was unwilling to even admit that he had made a statement the previous date could have been tested through cross-examination of: 071, 078, 012, 015, 304, 197,

	<p>Many ECOMOG were intentionally and unlawfully killed and also had their property looted by Sesay's troops during the December 1998 attack on Kono.</p>	<p>08/11/06 p90 and 09/11/06 p9</p>	<p>Mission Interview 17-18/02/05 p13690</p>	<p>13.09.05</p>	<p>217 and 077.</p> <p>This uncorroborated account could not be tested through cross-examination: 071, 078, 012, 015, 304, 197, 217 and 077.</p>
	<p>There were numerous civilian casualties during the December 1998 attack.</p>	<p>09/11/06 p8-9</p>	<p>Mission Interview 17-18/02/05 p13690</p>	<p>13.09.05</p>	<p>This uncorroborated account could not be tested through cross-examination: 071, 078, 012, 015, 304, 197, 217 and 077.</p>
	<p>Sesay had told TF1-366 to remain close to a senior commander in Kono during 1998.</p>	<p>08/11/06 p28-29</p>	<p>PN 08-16/08/05 p13702</p>	<p>16.08.05 & 13.09.05</p>	<p>This bold and curious statement became part of the Prosecution case after 43 witnesses had been called to testify including: 071, 078 114, 036, 361, 360, 362. All these witnesses could have testified about the truth of this allegation. Each of these witnesses, for one reason or another, had access to, or could have monitored, conversations between Sesay and the senior commander. None of them were questioned about this allegation because it was not known at the</p>

					time they testified.
Sesay gave diamonds to General Opande in exchange for weapons.	10/11/06 p69-70	PN 08-16/08/05 p13710-13711	16.08.05 & 13.09.05		078: witness was involved in the disarmament process and would have been able to comment on this allegation.
TF1-366 sent many reports to Sesay about crimes in Kono: e.g. unlawful killings at 55 and at Tombodu; looting of a bank in Koidu.	08/11/06 p31-32	PN 21/10/05 p16865	21.10.05		036: could have given evidence about the routes through which evidence made its way to SB and therefore test of credibility of the witness's account 071: recall cross-examining on the reporting system in Kono and any knowledge he may have had about 366's reporting to Sesay. Additionally 078, 304, 197, 015, 263, 360, 361 and 362 should have been asked about these allegations. Unfortunately (for the Defence) this opportunity was lost due to the late disclosure.
The RUF and the AFRC exchanged passwords to enable them to act together to attack Freetown.	09/11/06 p27-29	PN 21/10/05 p16866	21.10.05		167: as a senior AFRC commander in Freetown, he would have been in a position to be cross-examined on this allegation.

					Additionally the following witnesses would have known whether this was true or otherwise: 360, 361 and 036 .
361	Charles Taylor had a radio operator at Gbanga called Mother Blessing. There were communications with him from 1993 onwards.	12/07/05 p57-59	PN 18-27/01/05 p10667	23.02.05	139: would have been in a position to speak about CT's involvement with the RUF.
	After discussions between Bockarie, Sesay and Superman, Superman ordered the burning of Koidu town.	12/07/05 p7-8	18-27/01/05 p10681	23.02.05	071, 078: by virtue of their presence in Kono and their relationship to the RUF, these witnesses would have been in a position to give a view on the burning of Kono and any orders related to it
362	Bockarie through Sesay instructed witness to set up a base in Yengema after Kono was taken. The base operated until disarmament. Recruits were from Bunumbu and those captured from Kono. After Bockarie was flushed out, reports were made directly to Sesay. Before then Sesay received information en route to SB.	22/04/05 p14- 18	Statement 27-30/05/04 p10719-10720	09.03.05 [02.07.04 redacted]	071, 078: were likely to be in a position to comment on Yengema training base and the flow of commands to and from it.
	When Sesay was informed that 6 recruits tried to escape from	22/04/05 p22	Statement 27-30/05/04 p10720	09.03.05 [02.07.04 redacted]	078: was in a position to comment on treatment of UN

	Yengema, Sesay ordered witnesses to kill them and then sent his bodyguards to execute them. Bodyguards executed 5 of them. The SBUs were saved by an advisor.				given his position in Kono and his links to the RUF.
	Captured UN were entrusted to the witness. Sesay said they should be under strict detainment, be undressed and not given sufficient food.	22/04/05 p35	Statement 27-30/05/04 p10723-10724	09.03.05 [02.07.04 redacted]	078: was in a position to comment on treatment of UN given his position in Kono and his links to the RUF.
122	Issa Sesay came to Kenema and took the Commissioner of Police DF Konneh and the Chief of Police, CPO Issa, away in a vehicle. He heard that they had been molested.	07/07/06 p74-77	PN 26/05/05 p12137	31.05.05	125: gave evidence earlier in the trial about this incident but as we were not at that stage aware that 122 would also testify about it, it was not possible to cross-examine to compare their accounts.
	Sesay had small boy soldiers living in the compound at Hanga Lane.	07/07/05 p60	PN 26/05/05 p12137	31.05.05	125: gave evidence earlier but this allegation of 122's only came to light after 125 had already given evidence. Recall would be necessary to cross-examine on it.

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PUBLIC ANNEX B:**(Redacted) Evidence and Reasonable Inferences – Moulding of the Case****Clarification versus moulding**

1. The available evidence suggests that the Prosecution had a change of strategy around the third trial session (12th January 2005) when proofing moved from a process of clarification to a process of re-investigation on issues pertinent to the case¹. This process led to numerous allegations, not foreshadowed in witness' earlier statements, being introduced and adduced during the Prosecution case. It is equally clear that when re-interviewed on "issues pertinent to the case"² (previous court testimony, anticipated, future testimony, and the defence case as disclosed through cross-examination) the Prosecution was able to generate many additional allegations, moulded around those pertinent issues.

2. The movement from clarification to moulding can be seen in the increasing number of allegations that entered the case against the Accused through the supplemental statements disclosed during the currency of the trial. It is undeniable (and has not been denied) that the Prosecution used later interviews to correct the failings apparent in original interviews and to seek in those later interviews information about events mentioned in evidence by witnesses who had already testified. The following evidence is a selection to amplify and support the Defence contention.

TF1-371

3. TF1-371 was the last witness to be called in the RUF trial and gave evidence on 20th-24th July and 31st July-2nd August 2006. He was interviewed by the Prosecution on 4th November 2005 (pp. 23705-23760), 29th November 2005 (23761-2), 10th December 2005 (pp. 23763-6), 12th December 2005 (pp. 23767-23770), 24th-25th January 2006 (pp. 23771-23781), 31st January-1st February 2006 (pp. 23782-23794), 17th-19th February 2006 (pp. 23795-23817), 20th April 2006 (pp. 23819-23820), 2nd-5th July 2006 (pp. 24031-2), 12th July 2006 (pp. 24125), and 14th July 2006 (pp. 24146).

¹ *Prosecutor v. Sesay et al*, SCSL-04-15-635, "Prosecution Response to Sesay Defence Application for Leave to Appeal the Decision of 1st August 2006", 23 August 2006, paragraph 7.

² Prosecution Response to Sesay Defence Application for Leave to Appeal the Decision of 1st August 2006, Case No. SCSL-04-15-T, Dated 21st August 2006, at Para. 7.

4. TF1-371's interviews show attempts by the Prosecution to strengthen its case by seeking corroboration of evidence given in previous witness testimony through this new witness or, through the questioning of the witness, directing his testimony by the naming of specific events, places or times:

a. on pages 18-19 of the 4th November 2005 interview with TF1-371 (pp. 23722-3), the witness is speaking of an arms shipment flown into Sierra Leone using the assistance of Charles Taylor in exchange for a 90 carat diamond:

A. [W]e made a kind of a new airstrip in Kono, Yengema Area. The flight arrived there that evening and by the time they left the Alpha jets came in...

Q: So that arms shipment was that Magburaka?

A: Pardon me?

Q: Was it Magburaka?

Mr. Ghadban: Magburaka

A: No, it was not – okay, yeah, yeah. Magburaka, that is the area

Mr Stein:

Q: And that was in October 1997?

A: Yes

b. On page 23798 (17th February 2006), TF1-371 is taken through a list of names of RUF and AFRC who were said to work in Tongo field during the junta period. The list the Prosecution was seeking to confirm was taken directly from pages 58-60 and 66-68 of the testimony of TF1-045 on 18th November 2005.

c. "You heard what happened to Chief Demby?" (pp. 23799, 17th February 2006); referring to the evidence of TF1-054 regarding the killing of Pa Demby at which TF1-371 was said to have been present (pp. 20-36, 30th November 2005).

d. "Meeting in Tankoro police station?" (pp. 23801, 18th February 2006); referring to the evidence of TF1-071 (pp. 46-54, 19th January 2006).

e. "Kunduma in Kono?" (p. 23804, 18th February 2006). This refers to the evidence of TF1-078 (pp. 19-40, 25th October 2005) and TF1-071 (pp. 18, 36-37 & 40-47, 21st January 2005) who refer to Kunduma labour camp in Kono and who made various allegations of crimes committed at that location.

- f. "Did I hear of Kamachende street in Koidu town?" (pp. 23802, 18th February 2006); referring to the evidence of TF1-071 of the massacre at Kamachende street (pp. 47-53, 21st January 2005).
- g. "Have you ever heard of BS Massaquoi?" (pp. 23798, 17th February 2006) which leads the witness to state that he heard that BS Massaquoi was killed by Mosquito and that Issa Sesay was present at the time.
- h. On 10th December 2005, TF1-371 stated that he "may have heard something about the 64 Kamajors killed in Kailahun but is not sure" (implying that he had been asked directly about this event). TF1-371 was again asked about this incident on 18th February 2006 (pp. 23803) and stated that he had heard that Mosquito and Augustine Gbao were present.
- i. In the Interview Notes of 18th February 2006, pp. 23805, TF1-371 is asked about forced labour in a series of locations read out by the Prosecution. The list of locations is drawn from the Additional Information of TF1-108, dated 19th, 23rd, 26th November 2005, and 7th December 2005 (pp. 17447-17452).
- j. "I was not aware of any promotions being given to the Honourables at Masiaka", (pp. 24125, 12th July 2006). This refers to evidence given by George Johnson aka Junior Lion on 19th October 2004 at pages 22-23.

TF1-255

- 5. TF1-255, who gave evidence on 18th-19th July 2006, gave the Prosecution his statement on 31st October 2003 (pp. 23672-3). In that statement, the witness detailed being captured in Chendecom by Captain Richie who said he was an SLA. He was kept with other civilians in a garden for two days. On the third day he was moved to a village where he saw corpses. TF1-255 did not see those people being killed. He did not know who killed them or how they were killed. The witness was then taken to Lunsar where Superman was in charge. There he saw Issa Sesay, who had come from Makeni, playing football with Superman.
- 6. On 24th March 2004 (pp. 23674), TF1-255 confirmed his prior statement and added that when held in the garden, civilians were forced to do labour, which included carrying loads and pounding rice.

7. In the Prosecution's Proofing Note, dated 16th, 17th, and 18th January 2006 (pp. 23675-7), TF1-255 made a number of new allegations which were in no way foreshadowed in earlier statements. In the January 2006 note, TF1-255 alleged (i) the group which captured him "had ... with them many child soldiers, some as young as 9 or 10 years old; (ii) beating of civilians, including the witness, causing injury; (iii) the burning down of the village on the group entering; (iv) the soldiers taking women, including the witness's two daughters, who were raped and used as cooks; (v) the killing of his son by a soldier, as relayed to him by his wife; (vi) the soldiers stating that they had killed the people as they were begging them too much not to kill them; (vii) the soldiers beating a civilian to death; (viii) the torture of another civilian; (ix) the soldiers worked and did things in common with Superman's soldiers and (x) the witness was sent on food-finding missions around Lunsar.

TF1-041

8. The original statement (dated 16th January 2003, pp. 17827-9) was 3 pages long and did not contain any direct allegation of crime against the first accused. The statement outlined the witness' role in the RUF up to the time of the ECOMOG intervention in Freetown. TF1-041 states that he fled from Makeni to Kono with the convoy coming out of Freetown and that ECOMOG forced them into the bush outside Koidu town where he stayed with civilians for a whole year. He was part of the December 1998 recapture of Koidu at which time he realised Koidu had been burnt down but said he did not know who had burnt it. He remained for 2 years in Kono and then moved to Makeni to work with civilians. He said that it was while he was in Makeni that he saw AFRC and RUF going to attack Freetown. He remained in Makeni and gives evidence about the attack on the UNAMSIL, implicating Kallon and Gbao.
9. On 8th February 2004, TF1-041 "confirmed his original statement, and did not want to make any alterations" (pp. 17830).
10. The witness was re-interviewed six times (from the 16th to the 24th May 2005 (pp. 17831-17842), producing a 14-page interview note. The Prosecution admits that this latter process was not a clarification exercise. The proofing notes are labelled as Interview Notes and the notes state that, "over the course of several days ... the witness] was interviewed" (pp. 17831). The available evidence and indeed the substance of the note suggests that the Prosecution intended to re-commence its investigation into TF1-041's evidence and therefore

compensate for the lack of due diligence in the taking of the original statement which had failed to implicate Sesay.

11. In the May 2005 statement, TF1-041 makes a number of new allegations. At the time of the re-interviews 33 witnesses had given evidence before the Trial Chamber, generating a huge amount of factual evidence, which was relevant to the proposed evidence of TF1-041. In May 2005, TF1-041 implicated Sesay in:

- i. forced mining in Tongo and Kono (pp. 17837/17841);
- ii. Operation Pay Yourself in Makeni (pp.17838);
- iii. being part of a convoy to Kono containing abductees (pp.17838);
- iv. Executing civilians in Mena Hills (pp.17842);
- v. being part of a command system to which atrocities in Kono in 1998 were reported (pp. 17939);
- vi. speaking to Kallon in Kono every day after the AFRC/RUF was forced out of Kono by ECOMOG in 1998 (pp. 17840);
- vii. saying that the attack on Kono was part of a larger mission to recapture Freetown (pp. 17841);
- viii. ordering civilians via Kallon, in 1999 and 2000, to be moved from Makeni to be used in Kono for mining (pp. 17841),
- ix. ordering, in 1999 and 2000 via Kallon, that civilians in Makeni be made to undergo training and this could include children who were 10-12 years old (pp. 17841).

12. TF1-041 makes new allegations in relation to the following:

- i. forced mining in Tonkoro under Kennedy on the orders of Morris Kallon; (pp. 17839);
- ii. Superman and Morris Kallon not responding to TF1-041's reports about rape and harassment of civilians (pp. 17839);
- iii. prior to the retaking of Koidu, the AFRC/RUF started burning houses in Koidu on the orders of Morris Kallon (pp. 17839);
- iv. [REDACTED]

13. The Interview Note of TF1-041, TF1-041 also states that "During this time, the witness has no knowledge of any incidents in the Kamanche street area" (pp. 17839) suggesting, as the

Prosecution did with TF1-371, that they were seeking new evidence from TF1-041 to corroborate an allegation made by TF1-071.³

14. In the May 2005 Interview Note, TF1-041 only mentions Peleto as being present at a meeting at Guinea camp outside of Koidu prior to the December 1998 offensive on Koidu led by Mr Sesay (pp. 17840).
15. The witness was re-interviewed on the 9th, 10th, and 13th February 2006 (after 58 witnesses including TF1-366 had testified). New allegations made included:
- i. in addition to mining in Koidu, civilians were also made to carry loads and transport wounded fighters to Kailahun (pp. 18133);
 - ii. civilians were forced to work in the camps that were set up around Koidu. TF1-041 mentions Papanni, Woama, Bukuma and Wenedu. It is worth noting that the latter three camps are mentioned in the evidence of TF1-078 (pp. 18133);
 - iii. in Kono civilians were forced to carry loads to the Guinea border (pp. 18133);
 - iv. in Kono over 400 civilians between the ages of 10-45 years were forced into military training at Camp Lion on the orders of Kallon (pp. 18133);
 - v. a training base was set up in Yengema in Kono after December 1998 (pp. 18133); echoing the evidence given by TF1-362; and
 - vi. after TF1-041 left for Makeni, civilians in Kono were forced to mine (pp. 18133).
16. Moreover, in the 'Additional Information' provided, TF1-041 gives new evidence in relation to the evidence of TF1-366, not foreshadowed in any of his earlier interviews:
- Everyone left around that time [Freetown, February 1998], but Sesay was already out of Freetown because he had gone on patrol to Kono. He went with his bodyguards, including Amara Salia, also called Peleto, who I think had been a senior bodyguard to Sesay. Peleto was a front-line commander at Guinea Highway in Kono and later became the mining commander. All the big commanders like Bockarie, Sesay, Morris Kallon, Superman, Komba Gbundema would send their bodyguards to different places and have their bodyguards report directly to them, sometimes the reports were done in secret, sometimes not. (Pp. 18132)

17. [REDACTED]

³ See para. 4(f) above.

[REDACTED]

18.

[REDACTED]

TF1-117

19. The same re-interviewing and moulding process is clear in the case of TF1-117. TF1-117 was interviewed on 17th January 2003 and 28th February 2004. During these pre-trial interviews the witness did not directly implicate the first accused and made no mention of the UN attacks.
20. The Prosecution re-interviewed the witness on 25th, 27th, and 28th October 2005, and on 28th February 2006. In the October 2005 interview, TF1-117 alleged (i) Mr Sesay was the overall commander at the time of the witness's capture and that Mr Gbao was his field commander; (ii) Mr Sesay and Mr Gbao usually addressed them at the muster parades in Kono; (iii) the witness at an early stage of his capture worked directly for Sesay; (iv) that following the intervention, the witness participated in attacks on Kabala and Karina; (v) there was a

⁴ See proofing notes from October 2005 (pp. 13710).

⁵ 18th November 2005.

meeting in Kailahun following the retreat attended by JPK, Mr Sesay, Mosquito, Mr Gbao, Akim, Bropleh, and Rambo to plan attacks on the government; (vi) following this meeting, TF1-117 participated on attacks on Kabala, Makeni, Tongo and Makeni in which atrocities were committed; and (vii) Mr Gbao, Mr Kallon and Col Digba breached the ceasefire and fired at the UN camp, seizing vehicles and equipment. At this stage TF1-117 did not mention Mr Sesay in his description of the attack on the UN.

21. On 28th February 2006, TF1-117 implicated Mr Sesay in the attack on the UN. He alleged that he was in Mr Sesay's car when they drove to a UN base. There Mr Sesay ordered his men to surround the camp and arrested the men inside, after which the camp was looted. The men were stripped and placed in a vehicle while Mr Sesay, armed with pistols, stood watching. TF1-117 said that the same happened at the second UN location save that Mr Sesay stayed behind at the first location.
22. In particular, TF1-366 gave evidence in relation to the UNAMSIL attacks on 18th November 2005 and it would appear TF1-117 adopted some of this account. It is instructive that both the accounts given by TF1-117 and TF1-366 place Mr Sesay at the scene of the attacks in Makeni whereas the UNAMSIL personnel (TF1-288, TF1-165, TF1-044, and TF1-042 – who had not given evidence at the time of TF1-117's re-interviewing) do not. It is reasonable to infer that the evidence he gave during the course of these interviews was based on the previous testimony (of TF1-366) heard by the Trial Chamber.
23. Moreover, by the 28th February 2006, the Defence – through cross-examination – had disclosed a large part of its case on this issue, namely that Mr Sesay had not been present during the attacks in Makeni but had arrived later from Kono. The only reasonable inference is that this evidence, arising as it did in an incremental way, was specifically sought and adduced to rebut this specific defence.

TF1-367

24. TF1-367 was interviewed on 20th August 2004 (21006-9). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

25. On 11th, 14th, 21st, and 22nd February 2006 (pp. 21010-13), the Prosecution subjected TF1-367 to a "proofing" exercise. [REDACTED]

[REDACTED].⁶

26. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]:

[REDACTED]
[REDACTED].⁷

27. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

TF1-108

28. TF1-108 was interviewed by the Prosecution on 30th March 2003 (pp. 10755-677), 4th February 2004 (pp. 10768-9), 23rd March 2005 (pp. 11240-2), 19th, 23rd, 26th November 2005,

⁶ [REDACTED]
⁷ [REDACTED]
⁸ [REDACTED]

and 7th December 2005. In his first statement, TF1-108 spoke about civilians being forced to transport arms and ammunition. He also spoke about Gbao giving the civilians quotas of palm oil, rice, coffee or cocoa but did not specify a date or a location. On pp. 10763, TF1-108 makes passing reference to working on an RUF farm near Sandiatu but provides no dates. No further information was provided in the Interview Notes of February 2004.

29. In the March 2005 Proofing Note, TF1-108 states, in relation to forced labour, that (i) 1992-2000, civilians were forced to farm for the RUF (no locations given); (ii) from 1997-2000, Fayia Musa was in charge of farming and reported to Gbao, Bockarie and Mr Sesay; and (iii) in 1997-8 Gbao ordered civilians to carry loads for the RUF between Kailahun and Pendembu.
30. In the November and December 2005 proofing notes (17447-17452), TF1-108 made the following allegations: (i) in 1997-1998, there were two government farms in Ngeima where 300 civilians were forced to work without pay; (ii) from 1996-1998, Gbao ordered civilians to deliver 2 drums of palm oil twice a year, 6 bushels of cocoa once a year and to hunt 590 bush animals per year (TF1-108 states that the meat was for top commanders including Issa Sesay); (iii) between 1996-1998, Gbao often ordered the women to go fishing for the RUF; (iv) between the same dates, civilians were given seedlings and asked to produce 15 bushels of rice for upland farming and 30 bushels for swamp farming; (v) in 1997-1999, Gbao ordered the making of a private rice farm for Issa Sesay; (vi) that Sesay's bodyguards, which included small boys, would come to inspect the work of civilians on the farm; (vii) throughout 1996-1998, women from Dodo Kotuma were forced to fish for Issa Sesay and were guarded by Sesay's bodyguards; (viii) there was forced mining in 1998 in Ngeima; (ix) civilians from Ngeima were captured and forced to be fighters; (x) some of these civilians were below 10 years old; and (xi) in February 1998, 4 civilians from Monfidor were captured trying to cross the Liberian border and were taken to Kailahun town and had their throats cut in a public execution.
31. The same reasonable inferences arise. Witness TF1-108 did not suddenly recall this evidence and produce it spontaneously. It arose through a deliberate policy of re- investigation on issues "pertinent" to the case. Clarification it is not. And the proposition that it was conducted without reference to the Prosecution and the Defence case as it had unfolded in court is not speculation.

TF1-330

32. TF1-330 gave evidence on 14th-17th March 2006 and was interviewed by the Prosecution on 27th March 2003 (pp. 17454-8), 4th February 2004 (pp. 17459), and 1st-20th December 2005 (pp. 17460-3).
33. His first interview alleged forced labour on the part of the RUF in Kailahun district and stated that civilians were made to farm, carry loads and harvest coffee and cocoa and palm oil. He stated that this continued until 2 years before, which was estimated to be 2000. He stated that Issa Sesay made them make a big farm by force and that when Sesay needed labour, Sesay would tell the G-5 who would tell Chief Ensah. Civilians were not paid and could be beaten if they refused.
34. In the Additional Information of December 2005 (pp. 17460-17463), TF1-330 made allegations of (i) forced farming at an RUF farm between Pendembu and Kailahun town from 1996 to 1999; (ii) in 1997-1999, civilians were forced to produce 2 drums of palm oil, 10 bushels of cocoa beans per year for the RUF and women would be taken by soldiers to fish once a week in March and April 1997-1999; (iii) between 1997-1999, civilians of Luawa chiefdom made a rice farm for Issa Sesay in Ngeima and built a storage facility at the back of Sesay's relatives house; (iv) between 1997-1999, civilians were forced to brush and clean the roads and buildings in and around Kailahun town; (v) 1997-1998, civilians were forced to do diamond mining at Ngeiima and (vi) between 1994 and 1996, a girl from Bandajuma Sine was abducted by Issa Sesay and made his wife.
35. The proposition that the new evidence could reasonably be called clarification stretches the notion. It is new evidence which creates new liabilities and potentially attracts long sentences of imprisonment. It is re-interviewing to compensate for a lack of due diligence in the initial investigation. It is new factual allegations created intentionally with previous evidence and Defence disclosure firmly at the front of the Prosecution's collective mind.

TF1-168

36. TF1-168 gave evidence on 31st March 2006 and 3rd-4th April 2006. His initial interview with the Prosecution spanned 175 pages and was carried out on 11th April 2003. In this interview, there is no mention of Amara 'Peleto' Salia or of the subject of Mr Sesay's bodyguards.

37. In the Additional Information resulting from the “proofing” of the witness by the Prosecution on 14th, 21st and 4th February 2006, TF1-168 states that Amara Peleto was one of the senior bodyguards to Mr Sesay and that Mr Sesay sent him on mission to arrest people or take people’s possessions. This again lends credence to the theory put forward in evidence by TF1-366 of the important role of bodyguards played in the conflict. [REDACTED]

TF1-031

38. TF1-031 testified on 17th March 2006 and was interviewed by the Prosecution on 19th January 2003 (pp. 17892-5), 10th April 2004 (pp. 17896), 21st February 2006 (pp. 18137), and 15th March 2006. In the witness’ first interview, she described an attack on Karina and events at Mandaha, where the witness was subsequently taken. The first three statements contained allegations of pillage (looting and burning), physical violence (beatings), and sexual violence (rape and sexual slavery). In the April 2004 interview notes, the witness confirmed that she did not actually see women raped but heard them screaming and that she did not see any women with pregnancies. She stated that he saw Abu, Woyo, and 55 in Karina (but corrected that to Mandaha in her March 2006 interview).
39. In the Additional Information provided by the Prosecution on 21st February 2006, TF1-031 expanded her allegations to include (i) amputations by ‘rebels’ in Manyayi and Kambia and (ii) rebels killing a man and capturing his wife.
40. In the Additional Information given on 17th March 2006, TF1-031 alleged that the rebels who attacked Karina “belonged to the group of Foday Sankoh”. This new implication cannot be coincidence but the result of a deliberate policy that involves re-interviewing witnesses on issues seeking corroborative evidence to implicate the RUF accused.

TF1-114

41. TF1-114 gave evidence on 28th-29th April 2005. In his statements of 26th and 28th March 2003, and 4th February 2004, the witness’ expected evidence centred on events in Kailahun district between 1998 and 2000. In a proofing note dated 13th April 2004, disclosed to the Defence on 18th April 2004, TF1-114 made the following new allegations: (i) that the witness saw corpses, the capture of civilians and looting and burning of houses in Koidu after the

1998 intervention and that Issa Sesay was the most senior commander present at the time; and (ii) that in September 1998, TF1-114 witnessed Issa Sesay shoot Foday Kallon for trading with ECOMOG. Neither of these allegations was present in witness statements taken prior to 26th April 2004.

42. The only reasonable inference arising is that by April 2005 the Prosecution's re-interviewing process had commenced in earnest and the Prosecution was actively seeking new corroborative evidence. It could not be clarification since there had been no previous mention of Foday Kallon in the witness' previous witness statements.

TF1-125 & TF1-122

43. This is another blatant example of the Prosecution actively seeking to corroborate existing evidence and moulding their re-investigation around it. The Defence was given notice on 6th April 2005 that TF1-125 would testify to [REDACTED], through the disclosure of a Proofing Note arising from further interviews with the witness on 22nd March and 4th April 2005 (pp. 11244-5). This allegation had not appeared in any previous disclosure of 30th January 2003 (pp. 10902-6) or 23rd February 2004 (pp. 10907). TF1-125 testified on 12th-16th May 2005.
44. On the 31st May 2005 the Defence was given notice that TF1-122 would also testify to this alleged incident. This was disclosed to the Defence in a Proofing Note, dated the 26th May 2005 (pp. 12137-8). This incident had not been mentioned in TF1-122's previous statements of 30th January 2003 (pp. 10920-22), 13th January 2004 (p. 10923), 25th November 2004 (pp. 10924-8), or 15th March 2005 (pp. 10929-31).
45. It is reasonable to infer that the Prosecution had deliberately sought corroborative evidence from TF1-122. It is reasonable to infer that when they questioned TF1-122 they did not ignore the evidence of TF1-125. On the contrary logic and commonsense dictates that TF1-125's recent court testimony was the basis upon which the so-called proofing of TF1-122 was sought and produced. There is no other logical explanation. It was not clarification because there was no mention of the alleged incident in the earlier statements.

TF1-361

46. TF1-361 made an initial 12-page original statement (dated 11th June 2004, pp. 10023-34) and, on being re-interviewed by the Prosecution, proceeded to make 6 separate Supplemental Statements and Proofing Notes: 18th, 19th, 21st, 24th, 25th, 26th and 27th January 2005, pp. 10667-10702; 15th February 2005, 16th February 2005, 18th February 2005, 11th, 14th April 2005, and 10th July 2005.
47. In his initial statement of June 2005, the following statements are made in relation to Mr Sesay: (i) Sesay was present in Makeni at the time of the retreat from Freetown in February 1998 (pp. 10025); (ii) Sesay travelled with the convoy to Koidu and continued on to Kailahun with JPK (pp. 10026); (iii) Sesay was present in Buedu when Superman had a private meeting with Mosquito (pp. 10027); (iv) a radio message was received from Mosquito informing the witness's group that Sesay and Kallon had taken Kono and were advancing on Makeni and later that Sesay had advanced to Magburaka (pp. 10030-1); (v) Sesay's group combined with the witness's group to take the Makeni barracks at which point Sesay was 2nd in command under Mosquito (pp. 10031); and (vi) in March/April 1999, TF1-361 saw Sesay execute six men who had pretended to be RUF and who had gone from village to village stealing and intimidating people (pp. 10033).
48. In the 36-page Proofing Note of January 2005, TF1-361 made the following new allegations: (i) Sesay frequently went to Liberia; (ii) Sesay ordered Kallon to clear the route to Gbarnga; (iii) Sesay was in charge of the radio control station after Mosquito left the RUF; (iv) when Sankoh was arrested, Sesay took over as interim leader; (v) the hierarchy of orders was that Mosquito would instruct Sesay and Sesay would pass the order on to the frontline commanders; (vi) the signalling commander would report to the person in charge: either Sankoh, Mosquito or Sesay; (vii) Mosquito and Sesay would be present when the radio opened at 7am; (viii) there was an in-fight between Sesay and Superman at Benguema and Mosquito stated that Superman was subordinate to Sesay; (ix) Sesay was based in Freetown but would visit Kenema, Kono and Kailahun; (x) Gbao was Security Commander and advised Sesay and Mosquito; (xi) during the retreat, Sesay ordered Superman in Makeni to lead the convoy to Kono; (xii) Sesay looted vehicles in Makeni as part of Operation Pay Yourself; (xiii) Sesay left Kono for Kailahun after a week in Kono; (xiv) Sesay undressed JPK's wife and used her as a wife; (xv) Sesay was Deputy Field Commander under Mosquito and Superman was Battle Group commander; (xvi) Sesay was present at the meeting between

Superman and Mosquito in Buedu; (xvii) Sesay was wicked to civilians and his own men; (xviii) Sesay said he lost diamonds while in Liberia and was sent to Pendembu as a punishment; (xix) Sesay provided Superman with ammunition to go to Koinadugu with; (xx) Mosquito instructed Sesay to attack Koidu and then Makeni town while Superman's group was to attack Tekko barracks; (xxi) Sesay and Superman jointly attacked Makeni and Sesay was the overall commander and made RUF Rambo Battle Group Commander over Superman; (xxii) Sesay ordered Bai Bureh to capture Kamakwie, which he did; (xxiii) Sesay ordered Superman to take over Lunsar; (xxiv) TF1-361 was arrested by Sesay and taken with a driver to Sesay's house where Sesay shot the driver and had the witness flogged; (xxv) Sesay instructed Superman and Rambo to attack Waterloo to secure the retreating SLAs, Short Bai Bureh to attack Mile 91 and Tall Bai Bureh and Komba Gbudema to attack Kambia; (xxvi) Sesay and Mosquito were communicating with Gullit after SAJ's death; (xxvii) Sesay ordered Rambo to proceed to Jui to meet Gullit's receiving team but Rambo was not received; (xxviii) Sesay ordered Rambo to loot the SLAs' belongings at Waterloo as they retreated from Freetown; (xxix) when witness would visit Sesay in Makeni, Sesay would give Gbudema ammunition as Gbudema was operational commander; (xxx) Superman went to Makeni to attack Rambo and Sesay and Sesay fled while Rambo was killed; (xxxi) Sesay was appointed interim leader after Sankoh's arrest; (xxxii) Sesay went to Liberia during disarmament and returned with Sheku Fofona and a plan to attack Palmer; and (xxxiii) Sesay executed 7 men accused of stealing fertiliser.

49. These interviews took place after the Prosecution case had been ongoing for 7 months and when they undoubtedly understood which direction they wanted their case to go. The fact of the production of 36 new pages of evidence and re-interviews over a period of 10 days makes a mockery of any suggestion that this was a process of clarification of the original 12-page statement. The evidence produced during these re-interviews was clearly obtained by design and reflected evidence across a huge range of subjects. It is reasonable to infer that Prosecuting Counsel sought corroborative evidence and other evidence to mould their case as it was unfolding in court and as it was unfolding through their ongoing investigation. The alternative inference, that the Prosecution made no reference to any of their previously obtained evidence or their case as it had unfolded in court, is neither logical nor reasonable.



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Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the *Confidential* Case File.

Case Name: The Prosecutor – v- Sesay, Kallon & Gbao
Case Number: SCSL-2004-15-T
Document Index Number: 765
Document Date 24 April 2007
Filing Date: 24 April 2007
Number of Pages:12 Page Numbers: 27756-27770
Document Type:-**Confidential Document**

- Affidavit
- Indictment
- Correspondence
- Order
- Motion**

Document Title: **Defence Motion Seeking A Stay Of
The Indictment And Dismissal Of
All Supplemental Charges (Prosecution's
Abuse Of Process And/Or Failure To
Investigate Diligently)
And Supplement**

Name of Officer:

Thomas P K George

Signed

A handwritten signature in black ink, appearing to read 'Thomas P K George', written over a horizontal line.