SCSL-04-15-T
(28143-28162)

775)

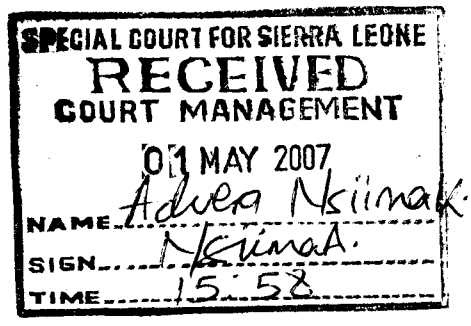
28143

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

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

Acting Registrar: Mr. Herman von Hebel

Date filed: 1 May 2007



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

Case No. SCSL-04-15-T

PUBLIC

PROSECUTION RESPONSE TO FIRST ACCUSED'S MOTION DATED 24 APRIL 2007

Office of the Prosecutor:
Mr. Christopher Staker
Mr. Peter Harrison

Defense Counsel for Issa Hassan Sesay
Mr. Wayne Jordash
Ms. Sareta Ashraph

Defense Counsel for Morris Kallon
Mr. Shekou Touray
Mr. Charles Taku
Mr. Melron Nicol-Wilson

Defense Counsel for Augustine Gbao
Mr. Andreas O'Shea
Mr. John Cammegh

I. INTRODUCTION

1. The Prosecution files this response to the motion entitled "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)" (the "**Motion**"), filed on behalf of the Accused Issa Hassan Sesay ("**Accused**") on 24 April 2007.[1]
2. The Motion is the latest in a series of motions in which the Defence for the Accused ("**Defence**") has in a variety of ways complained of what it perceives to be an improper practice on the part of the Prosecution in connection with the proofing of Prosecution witnesses and the use of new, additional or supplemental evidence which emerges for the first time during proofing.[2] All of these motions have been rejected by decisions of the Trial Chamber,[3] and leave to appeal against three of these decisions has been denied.[4]
3. The present Motion adds nothing of substance to the arguments in the previous Defence motions. In response to the present Motion, the Prosecution could be content to rely on its various responses to the earlier Defence motions.[5] The Prosecution submits that the Motion is an attempt to relitigate, yet again, arguments which have been raised by the Defence more than once in the past and which have already been adjudicated upon by the Trial Chamber. The Trial Chamber has already said that its previous case law on this issue is "clear and unambiguous and does not need to be further clarified by this Chamber".[6]
4. Indeed, not only has the Defence repeatedly sought to relitigate arguments that have already been rejected by the Trial Chamber, it has also sought more far-reaching relief in its successive attempts. Earlier Defence motions sought to exclude some or all of the

---

[1] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-765, "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", filed on behalf of the Accused Issa Hassan Sesay, 24 April 2007 ("Motion").

[2] 12 January 2006 Motion, 18 January 2005 Oral Application, 10 March 2005 Motion, 21 June 2005 Motion, 12 December 2005 Motion, 10 February 2006 Motion, 23 February 2006 Motion, 3 May 2006 Motion, 29 June 2006 Motion, 20 March 2006 Sesay Defence Response. **See Index of Authorities for full citations of all authorities cited in this Response.**

[3] 3 February 2005 Ruling, 1 June 2005 Ruling, 26 October 2005 Decision, 18 May 2006 Decision, 15 June 2006 Ruling, 27 February 2006 Decisions, 20 March 2006 Decision, 1 August 2006 Decision, 3 August 2006 Decision, 2 February 2007 Decision, 10 November 2006 Decision.

[4] 10 November 2006 Decision, 28 April 2005 Decision, 2 February 2007 Decision.

[5] 16 February 2005 Response, 4 April 2005 Response, 1 July 2005 Response, 15 December 2005 Response, 23 January 2006 Response, 17 February 2006 Response, 28 February 2006 Response, 15 May 2006 Response, 10 July 2006 Response, 21 August 2006 Response, 1 September 2006 Response.

[6] 3 August 2006 Decision, p. 4.

evidence contained in specified statements obtained from Prosecution witnesses in proofing.[7] A subsequent Defence motion sought a finding that the Prosecution's proofing practices constituted an impermissible "moulding of the evidence" in breach of Article 17 of the Statute.[8] The present Motion, relying on the same arguments, now seeks a stay of the indictment on grounds of abuse of process.

5. It has been held to be an abuse of process for a party to proceedings before the Court to relitigate endlessly an issue already adjudicated upon.[9] The Prosecution also submits that it is improper for counsel to make allegations of serious impropriety on the part of opposing counsel without proper justification and supporting evidence. The Motion is worded in extremely strong language for which there is no proper justification in view of the Trial Chamber's rulings on all of the previous Defence motions.

6. For these reasons, and the reasons given below, the Prosecution submits that the Motion should be rejected.

II. ARGUMENT

(A) The permissibility of proofing Prosecution witnesses

7. The permissibility of proofing witnesses has been accepted by this Trial Chamber,[10] by Trial Chambers of the International Criminal Tribunal for the Former Yugoslavia ("**ICTY**")[11] and the International Criminal Tribunal for Rwanda ("**ICTR**"),[12] in a previous Defence motion,[13] and even in the present Defence Motion.[14] Indeed, case law of this Trial Chamber, the ICTY and the ICTR indicates that the proofing of witnesses before they testify is not only permissible, but may also be desirable.[15]

---

[7] See 10 March 2005 Motion, 12 January 2006 Motion, 23 February 2006 Motion.

[8] 3 May 2006 Motion.

[9] *Prosecutor v. Ndayambaje*, Decision on Joseph Kanyabashi's Motions for Modification of his Witness List [etc.], Joint Case No. ICTR-98-42-T, Trial Chamber, 21 March 2007, para. 33.

[10] 27 October 2005 Decision, para. 33; 1 August 2006 Decision, para. 13.

[11] E.g., *Prosecutor v. Limaj*, IT-03-66-T, "Decision on Defence Motion of Prosecution Practice of Proofing Witnesses", Trial Chamber, 10 December 2004, *Prosecutor v. Milutinovic et al.*, IT-05-87-T, "Decision Decision on Ojdanic motion to prohibit witness proofing", Trial Chamber, 12 December 2006.

[12] E.g., *Prosecutor v. Karemera*, ICTR-98-44-T, "Decision on Defence Motions to Prohibit Witness Proofing", Trial Chamber, 15 December 2006.

[13] 3 May 2006 Motion, para. 3.

[14] Motion, para. 10.

[15] 27 October 2005 Decision, para. 33 ("The Chamber finds that proofing witnesses prior to their testimony in court is a legitimate practice that serves the interest of justice"); 1 August 2006 Decision, para. 13; *Karemera* Decision, para. 10, and *Milutinovic* Decision, para. 10 (stating that proofing "not only poses no undue prejudice, but is also a useful and permissible practice"), *Milutinovic* Decision, para. 16 (quoted with approval in *Karemera* Decision, para. 14) ("discussions between a party and a potential witness regarding his/her evidence can, in fact, enhance the

8. In its responses to earlier Defence motions, the Prosecution clearly stated its position that it is entitled, in proofing witnesses, to cover not only issues that are dealt with in the witness's previous statements, but also other issues that may be within the witness's knowledge and which are pertinent to the case.[16] It is implicit in the Trial Chamber's decisions rejecting the earlier Defence motions that the Trial Chamber saw nothing improper in this. The case law of the ICTY and ICTR supports this position.[17] The Motion itself concedes that the Prosecution is entitled to continue to investigate its case during the course of trial.[18] In the course of such continuing investigations, the Prosecution must be entitled to obtain relevant information from any person, including from Prosecution witnesses who have not yet testified. Whether the Prosecution will be entitled to ***use*** new, supplementary or additional evidence obtained from witnesses in proofing is a separate question, which is dealt with in (B) below. However, there is no prohibition on the Prosecution ***obtaining*** new evidence from witnesses in proofing, provided that in so doing the Prosecution does not breach any of its professional duties, such as the duty not to coach witnesses.

---

fairness and the expeditiousness of the trial"). See also *Milutinovic* Decision, footnote 7, quoting from the transcript in *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-PT, in which the Presiding Judge encouraged the Prosecution to proof witnesses before they testify.

[16] 15 May 2006 Response, para. 16; 21 August 2006 Response, para. 7.

[17] *Prosecutor v. Bagosora et al.*, "Decision on Admissibility of Witness DBQ", Trial Chamber, 18 November 2003, para 29, quoted in *Karemera* Decision, para. 11 ("[...] witness statements from witnesses who saw and experienced events over many months which may be of interest to this Tribunal, may not be complete. ***Some witnesses only answered questions put to them by investigators whose focus may have been on persons other than the accused rather than volunteering all the information of which they are aware***" (emphasis added)); *Karemera* Decision, para. 11 ("Although it is not acceptable for the Prosecution to mould its case against the Accused in the course of the trial, ***it must be admitted that a witness may recall and add details to his or her prior statements***" (emphasis added)); *Limaj* Decision, p. 2 ("It must be remembered that when a witness is proofed, this is directed to identifying ***fully*** the facts known to the witness ***that are relevant to the charges in the actual Indictment***. While there have been earlier interviews there was no Indictment at that time. ***Matters thought relevant and irrelevant during investigation, are likely to require detailed review in light of the precise charges to be tried, and in light of the form of the case which Prosecuting counsel has decided to pursue in support of the charges, and because of differences of professional perception between Prosecuting counsel and earlier investigators***" (emphasis added)); *Karemera* Decision, para. 17 (and see also *Milutinovic* Decision, para. 20) ("The practice of reviewing a witness' evidence prior to testimony is consistent with the specificities of the proceedings before the *ad hoc* Tribunals and may contribute to a proper administration of justice in different circumstances: crimes charged in the indictment occurred many years ago and, in many cases, witness interviews took place a long time ago; ***matters that were relevant during the course of the investigations may need to be reviewed in light of the case the Prosecution intends to present***; there might be differences of perception between the Prosecution investigator and Counsel who is going to lead the witness' evidence in court; the duration of the proceedings and the time elapsed between prior testimonies may require further interviews with a witness before he or she testifies and ***reduce the effect of surprise to the Defence in cases where the witness recollects elements that were not previously disclosed***." (emphasis added)).

[18] Motion, para. 10. See also the earlier 3 May 2006 Motion, para. 3.

9. In its response to one of the previous Defence Motions, the Prosecution invited the Defence to clarify whether the Defence was seeking to imply that the Prosecution was coaching witnesses or seeking to influence their testimony.[19] The Defence described this invitation by the Prosecution as "mischievous".[20] Yet the present Motion now makes that very allegation, suggesting that there is "little, if any difference" between the Prosecution's practice of proofing witnesses and the coaching of witnesses.[21]

10. It is accepted as fundamental that a witness "should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said",[22] and that the coaching of witnesses is impermissible.[23] Quoting a decision of the English Court of Appeal, the Motion raises the concern that proofing may lead a witness "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".[24] A similar argument was made in the *Limaj* case, in which the Defence raised a concern that in proofing, "leading questions may be put to the witness by Prosecution counsel before evidence is given", that proofing was in essence a "re-interview" of the witness, and that the practice could be said to be "coaching, rather than proofing".[25] The Trial Chamber however said that:

> The other concerns raised by the Defence are really inherent in the established and accepted proofing procedure. There are clear standards of professional conduct which apply to Prosecuting counsel when proofing witnesses. What has been submitted does not persuade the Chamber that there is reason to consider that these are not being observed, or that there is such a risk that they may not be, as to warrant some intervention by the Chamber.[26]

11. The concerns expressed by the Defence, and the answer provided by the Trial Chamber in the *Limaj* Decision, apply equally to the situation where a witness is proofed in relation to matters expressly contained in his or her previous statements, as well as to the situation where a witness is proofed in relation to matters not contained in previous statements. In either case there are standards of professional conduct which apply to Prosecution counsel when proofing witnesses, and the Prosecution denies any breach of those standards. As the quotes in footnote 17 above clearly indicate, and contrary to what the Motion

---

[19] 15 May 2006 Response, para. 15.
[20] 18 May 2006 Reply, para. 13.
[21] Motion, para. 15.
[22] *R v. Momodou* [2005] EWCA Crim 177, para. 61.
[23] *Karemera* Decision, para. 12; *Milutinovic* Decision, para. 17.
[24] Motion, para. 15, quoting R v. *Momodou* [2005] EWCA Crim 177, para. 61.
[25] *Limaj* Decision, p. 1.
[26] *Limaj* Decision, p. 3.

suggests, proofing witnesses as to matters going beyond the scope of their previous statements, or even a complete re-interview of a witness, does not constitute coaching, training or tampering with a witness. The Prosecution submits that the material in Confidential Annex C to the Motion do not establish or suggest that the Prosecution has conducted proofing in such a way as to "provide cues as to the evidence required" of a witness.[27]

12. Much of the present Motion consists of repetitive, general and hyperbolic language. The real substance of the Defence complaint, which is stated in paragraphs 11 and 14 of the Motion, is that the Prosecution is allegedly engaged in an ongoing assessment and analysis of the evidence in the case, and that it is in proofing "actively seeking to obtain new evidence to be moulded around the case as it has unfolded during the previous court hearings".[28] The Motion itself claims that this same allegation has been made by the Defence on four previous occasions.[29] It has never been upheld by the Trial Chamber.
13. The Motion claims that on each of the past occasions, the allegation has been "obfuscated" by the Prosecution, and that the Prosecution has sought to "conceal" its improper conduct.[30] Yet at the same time, the Motion acknowledges that the Prosecution has in the past clearly stated its position that proofing may cover issues within the witness's knowledge that are not contained in the witness's previous statement.[31] The Prosecution has previously expressly denied any improper conduct.[32] The Prosecution denies that its practice is to undertake proofing with the specific aim of "actively seeking to obtain new evidence" according to its ongoing assessment of the evidence in the case. Proofing sessions are intended to identify accurately, before the witness testifies, all matters relevant to the case that are within the witness's knowledge.
14. The Defence asked numerous witnesses in cross-examination about what transpired in their proofing by the Prosecution,[33] and the Defence had every opportunity to do so.[34]

---

[27] Motion, para. 16.
[28] Motion, para. 14.
[29] Motion, para. 14.
[30] Motion, paras. 1, 3
[31] Motion, paras. 13-15.
[32] See 21 August 2006 Response, para. 12.
[33] See, e.g., Transcript, 9 March 2006, pp. 48; Transcript, 30 March 2006, pp. 47-48; Transcript, 23 June 2006, pp. 15-17 (CLOSED SESSION); Transcript, 10 July 2006, pp. 97-99 (CLOSED SESSION).
[34] In February 2006, the Trial Chamber rejected a Prosecution motion questioning whether it was permissible for the Defence to cross-examine witnesses about what transpired in their proofing by the Prosecution, and held that the

However, the Motion cites no evidence of any conduct by the Prosecution in proofing that could be regarded as improper. The description in the Motion of how the Prosecution "must have" conducted proofing[35] is based on conjecture. The Prosecution submits that the Defence has not established the existence, or possible existence, of any improper conduct on the part of the Prosecution.[36]

(B) The use of new, additional or supplementary evidence emerging in proofing

15. It is accepted that the Prosecution will not necessarily be entitled to lead and rely on all new evidence of a witness that emerged for the first time during the proofing of a witness. The decisions of the Trial Chamber on the previous Defence motions have articulated and applied principles for determining the admissibility of supplementary statements of Prosecution witnesses obtained during proofing.[37] It is unnecessary to repeat them here.
16. It is also accepted that disclosure of new information to the Defence at the stage of proofing can in some circumstances cause prejudice to the Defence. Where this occurs, it is open to the Defence to apply to the Trial Chamber for appropriate relief, and any such application will be considered by the Trial Chamber on its individual merits. If any prejudice to the Defence is established, the remedy that the Trial Chamber will grant to the Defence will depend on the circumstances of the particular case.[38]
17. One possible remedy is to grant the Defence an extension of time (for instance, by postponing the calling of the witness in question, or to postpone the cross-examination of the witness), to enable the Defence to prepare in the light of the new information that emerged in proofing.[39] Indeed, in its 20 March 2006 Decision, the Trial Chamber expressly stated that it

---

Defence was free to do so: "Written Reasoned Ruling on Objection by the Prosecution to Questioning by the Defence on Pre-Testimony Meetings between Witness and Prosecution", 27 February 2006.

[35] Motion, para. 14.

[36] And, as a Trial Chamber of the ICTR has observed, "... allegations of tampering with witnesses ... are serious allegations and making them without any evidence to support or justify them is discourteous at the very least": *Karemera* Decision, para. 25.

[37] See, in particular, 3 February 2005 Decision, para. 19; 1 June 2005 Ruling, paras. 22-23, 28, 29; 27 February 2006 Decision, para. 9; 20 March 2006 Decision, para. 10. Contrary to what the Motion suggests (in paras. 2 and 3), the Prosecution submits that the Trial Chamber has not departed from what the Defence says is its own earlier case law with respect to "moulding the case".

[38] See, e.g., 1 June 2005 Decision, para. 25; *Limaj* Decision, p. 3 ("Late notice is an issue which may require measures to overcome resulting difficulties to the Defence. That will depend on the circumstances. Any example raised will be considered on its merits."); *Karemera* Decision, para. 20; *Milutinovic* Decision, para. 21.

[39] See See, e.g., 1 June 2005 Decision, para. 24; *Karemera* Decision, para. 20; *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Evidence of Witness DP, ICTR-98-41-T, Trial Chamber, 18 November 2003, esp. para.

> "would be prepared to grant an application, if it were made and premised on reasonable and legally acceptable grounds, for an adjournment so as to enable the Defence to examine the various options and strategies open to the Defence in relation to those supplemental statements".[40]

However, the Defence never made any such applications.

18. A second possible remedy is to exclude the new information that emerged in proofing from being admitted as evidence.[41] Although described as an exceptional remedy,[42] this remedy was for instance granted on application to the Third Accused in this case in the Trial Chamber's Decision of 2 August 2006.[43] In the case of the First Accused, the Defence made a number of such applications, which were rejected by the Trial Chamber on their own individual merits.[44] Had the Defence made any further applications of this nature, they would also have been considered by the Trial Chamber on their own individual merits, but no other such applications were made.

19. A third possible remedy, where good cause is shown, is to have previous Prosecution witnesses recalled to enable them to be cross-examined on the new information that emerged during the proofing of a later witness.[45] The Prosecution expressly acknowledged the possibility of this remedy in its 10 July 2006 Response,[46] and indeed, the present Motion in fact claims that "Some of the resulting unfairness could have been cured by the recall of witnesses to allow cross-examination on the supplementary factual allegations/charges".[47]

20. However, the Defence never made any such application during the course of the Prosecution case, apart from filing its 29 June 2006 Motion, seeking an abstract "ruling or statement of principle" that the Defence was entitled to recall Prosecution witnesses who had already testified for cross-examination on subsequently disclosed factual allegations.

5: "The Chamber has set out the principles applicable to the admission of testimony disclosed in will-say statements in its recent Decision on Admissibility of Evidence of Witness DBQ. That Decision sets out a two-step approach. First, is the disclosed evidence actually new? Second, if the evidence is new, what period of notice is required in order to give the Defence adequate time to prepare?" (Footnote omitted.) In the latter instance, an adjournment of 2 days was granted.

40 20 March 2006 Decision, para. 12.

41 See *Karemera* Decision, para. 20.

42 1 August 2006 Decision, para. 15.

43 2 August 2006 Gbao Decision.

44 27 February 2006 Decisions, 20 March 2006 Decision, 1 June 2005 Ruling, 3 February 2005 Ruling.

45 E.g., 2 August 2006 Gbao Decision, para. 23.

46 10 July 2006 Response, paras. 13-14.

47 Motion, para. 5.

The apparent justification for filing this motion was that the Defence considered it unclear whether seeking to recall previous Prosecution witnesses was an option available to the Defence in the light of the Trial Chamber's previous decisions.

21. In its 10 July 2006 Response to that Motion, the Prosecution argued that the Trial Chamber could not rule upon this question in the abstract, and that "A decision of the Trial Chamber to recall a witness could ... only be made on the basis of a motion setting out all of the relevant circumstances in relation to each of the witnesses sought to be recalled".[48] In its 3 August 2006 Decision, the Trial Chamber rejected the Defence motion, finding that the Trial Chamber's previous decisions were "clear and unambiguous", that "the recall of a witness for cross-examination remains a discretionary matter for the Court", and that the 29 June 2006 Motion did "not directly specify any issue or relief concerning possible prejudice suffered by the Defence in relation to any particular factual allegation or any particular witness who testified before this court".[49]

22. The 29 June 2006 Motion was only filed very late in the Prosecution case, just over a month before the Prosecution case closed. The present Motion, which only now for the first time sets out in detail the witnesses that the Defence claims it would need to recall, was filed ***nearly 9 months after*** the close of the Prosecution case, and even now, the present Motion does not in fact seek to recall any witnesses. Rather, it simply argues that because of the number of witnesses that the Defence considers that it would need to have recalled, this could not be done in the present circumstances without violating the right of the Accused to be tried without undue delay.[50]

23. The Prosecution submits that there is an obligation on the Defence to raise issues in a timely manner.[51] It is inappropriate to bring a motion to recall Prosecution witnesses (which the present Motion does not do even now) or a motion to exclude the evidence of Prosecution witnesses (which the present Motion seeks as an alternative remedy) some 9 months after the closing of the Prosecution case. The present Motion claims that there are

---

[48] Para. 14.
[49] P. 4.
[50] Motion, paras. 5, 22-23.
[51] See *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, "Judgement", Trial Chamber, 21 May 1999, para. 64.

some 36 witnesses[52] that the Defence considers would need to be recalled to be cross-examined on matters that were only subsequently disclosed to the Defence. In relation to two of those witnesses, the Trial Chamber has already rejected Defence Motions to exclude the evidence of those witnesses contained in statements taken during proofing.[53] Had the Defence brought motions during the Prosecution case in respect of the other witnesses which the Defence now claims it would need to recall, they could have been determined on their merits at the time. It cannot be assumed that any or all such motions would have been granted. However, if some or all of the applications had been granted, it may have been possible for the relevant witnesses to have been recalled prior to the close of the Prosecution case.

24. The Prosecution submits that it is impermissible for the Defence, during the course of the Prosecution case, to refrain from making applications to exclude certain evidence of witnesses or to recall certain witnesses for further cross-examination, and then to claim 9 months after the close of the Prosecution case that a failure to exclude that testimony of those witnesses or to recall those witnesses for further cross-examination would amount to an abuse of process. The Prosecution submits that in the circumstances there has been no abuse of process, and that the failure of the Defence to bring such applications during the course of the Prosecution case could only be found to be a denial of the fair trial rights of the Accused if it is established that the Accused has had ineffective assistance of counsel. The Prosecution denies that the Accused has had ineffective assistance of counsel.

III. CONCLUSION

25. The Prosecution therefore submits that the Motion should be rejected.

Done in Freetown,

1 May 2007

For the Prosecution,

Christopher Staker
Deputy Prosecutor

Peter Harrison
Senior Trial Attorney

[52] See Public Annex A to the Motion, referring to witnesses 012, 015, 035, 036, 125, 139, 041, 042, 044, 045, 060, 167, 071, 077, 078, 093, 113, 114, 117, 129, 141, 167, 172, 184, 195, 197, 217, 263, 304, 314, 334, 336, 360, 361, 362, 366.

[53] 3 February 2005 Decision (Witness 141); 27 February 2006 Decision (Witness 041).

28153

Index of Authorities

Motions

1. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-332, "Application for the Exclusion of Statements of Witness TF1-361, Dated Respectively 18th, 19th 21st, 24th 25th, 26th, 27th January and 15th and 18th February 2005 and The Supplemental Statement of TF1-122, Dated 25th November 2004", 10 March 2005 ("**10 March 2005 Motion**").

2. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-404, "Joint Defence Motion Requesting Conformity of Procedural Practice for taking Witness Statements", 21 June 2005 ("**21 June 2005 Motion**").

3. Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-456, "Notice of Motion by Morris Kallon pursuant to Rules 54 and 66(2) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone For an Order Directing The Prosecutor to Effect Reasonable Consistent Disclosures", 12 December 2005 ("**12 December 2005 Motion**").

4. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-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", 12 January 2006 ("**12 January 2006 Motion**").

5. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-475, "Defence Motion Requesting The Exclusion of Evidence (As indicated in Annex A) Arising From The Additional Information Provided By Witness TF1-113, TF1-108, TF1-330, TF1-041 and TF1-228", 10 February 2006 ("**10 February 2006 Motion**").

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

7. Prosecutor v Sesay, Kallon, Gbao, SCSL-04-15-T-765, "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", filed on behalf of the Accused Issa Hassan Sesay, 24 April 2007("**24 April 2007 Motion**").

8. *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-541, "Defence Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court", 3 May 2006 ("**3 May 2006 Motion**").

9. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-588, "Motion for a Ruling that the Defence Has Been Denied Cross-Examination Opportunities", 29 June 2006 ("**29 June 2006 Motion**").

1. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-321, "Consolidated Response to Application For Leave To Appeal Ruling On Oral Application For The Exclusion of Statements of TF1-141 By Sesay and Application For Leave To Appeal Ruling Following Oral Application Regarding Witness Statements of TF1-141 By Gbao", 16 February 2005 ("**16 February 2005 Response**").

2. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-338, "Confidential Response to Sesay Defence Application For The Exclusion of Statements of Witness TF1-361 and Witness TF1-122", 4 April 2005 ("**4 April 2005 Response**").

3. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-410, "Prosecution Response to Joint Defence Motion Requesting Conformity of Procedural Practice For Taking Witness Statements", 1 July 2005 ("**1 July 2005 Response**").

4. Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-635, "Prosecution Response To Sesay Defence Application for Leave to Appeal The Decision of 1 August 2006", 21 August 2006 ("**21 August 2006 Response**").

5. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-459, "Prosecution Response to Notice of Morris Kallon Pursuant to Rules 54 and 66(2) of The Rules of Procedure and Evidence of The Special Court for Sierra Leone For An Order Directing the Prosecutor To Effect Reasonably Consistent Disclosures", 15 December 2005 ("**15 December 2005 Response**").

6. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-466, "Prosecution Response to the 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", 23 January 2006 ("**23 January 2006 Response**").

7. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-483, "Prosecution Response To The Defence Motion Requesting The Exclusion of Additional Evidence of Witness TF1-113, TF1-108, TF1-330, TF1-041, TF1-288", 17 February 2006 ("**17 February 2006 Response**").

8. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-499, "Prosecution Response To Defence Motion Requesting The Exclusion of Evidence Arising From The Additional Information Provided By Witness TF1-168, TF1-165 and TF1-041", 28 February 2006 (**28 February 2006 Response**").

9. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-518, 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) ("**20 March 2006 Sesay Defence Response**").

10. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-553, "Prosecution Response to First Accused's Motion Dated 3 May 2006", 15 May 2006 ("**15 May 2006 Response**").

11. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-554, "Defence Reply to Prosecution Response to Motion to Request The Trial Chamber to Rule That The Prosecution Moulding of The Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court", 18 May 2006 ("18 May 2006 Reply").

12. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-593, "Prosecution Response to Sesay Motion For A Ruling That The Defence Has Been Denied Cross-examination Opportunities", 10 July 2006 ("**10 July 2006 Response**").

13. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-638, "Prosecution Response to Sesay Defence Application for Leave to Appeal The Decision of 3 August 2006", 1 September 2006 ("**1 September 2006 Response**").

SCSL Decisions, Rulings and Judgements

1. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-314, "Ruling on Oral Application for the Exclusion of Statements of Witnesses TF1-141 Dated Respectively 9th October 2004, 19th and 20th October 2004 and 10th January 2005", 3 February 2005 ("**3 February 2005 Ruling**")

2. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-357, "Decision on Defence Applications For Leave To Appeal Ruling on The 3rd Of February 2005 On The Exclusion Of Statements of Witness TF1-141", 28 April 2005 ("**28 April 2005 Decision**").

3. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and TF1-122", 1 June 2005, ("**1 June 2005 Ruling**").

4. Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-436, SCSL-04-15-T-436, "Decision on the Gbao and Sesay Joint Application For the Exclusion of the Testimony of Witness TF1-141", 27 October 2005 ("**27 October 2005 Decision"**).

5. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-495, "Decision on the Defence Motion for the Exclusion of Certain Portions of Supplemental Statements of Witness TF1-117", 27 February 2006 ("**27 February 2006 Decision**").

6. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-496, "Decision on the Defence Motion for the Exclusion of Evidence Arising From the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288", 27 February 2006 ("**27 February 2006 Decision**").

7. *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-519, "Decision on Defence Motion Requesting the Exclusion of Evidence arising from the Supplemental Statements of Witnesses TF1-168, TF1-165 and TF1-041", 20 March 2006 ("**20 March 2006 Decision**").

8. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-555, "Decision on Defence Motion For an Order Directing the Prosecution To Effect Reasonably Consistent Disclosure", 18 May 2006 ("**18 May 2006 Decision**").

9. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-578, "Written Reasoned Ruling On Defence Evidentiary Objections Concerning Witness TF1-108", 15 June 2006, ("**15 June 2006 Ruling**").

10. *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-616, "Decision on The Defence Motion To Request The Trial Chamber Rule That The Defence Moulding of Evidence is Impermissible,"1 August 2006 ("**1 August 2006 Decision**").

11. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-623, "Written Reasons on Majority Decision on Oral Objection By Counsel for the Third Accused Augustine Gbao to the Admissibility to the Portions of the Evidence of Witness TF1-371 Together with Separate Concurring Reasons And Separate Dissenting Reasons", 2 August 2006 ("**2 August 2006 Gbao Decision**").

12. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-663, "Decision on Defence Application For Leave To Appeal The Decision on Motion For a Clarification That The Defence Has Been Denied Cross-Examination Opportunities", 10 November 2006 ("**10 November 2006 Decision**")

13. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-703, "Decision on Application For Leave to Appeal the Decision on Defence Motion for A Ruling That The Decision on Defence Motion for A Ruling That The Prosecution Moulding of Evidence is Impermissible", 2 February 2007 ("**2 February 2007 Decision**").

SCSL Trial Transcripts

1. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Transcript 18 January 2005 ("**18 January 2005 Oral Application**").

2. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Transcript, 9 March 2006

3. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Transcript, 30 March 2006

4. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Transcript, 23 June 2006

5. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Transcript, 10 July 2006

ICTY and ICTR Decisions, Rulings and Judgements

1. *Prosecutor v. Brđanin and Talić*, IT-99-36, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001 ("**26 June 2001 Decision**"). http://www.un.org/icty/brdjanin/trialc/decision-e/10626FI215879.htm

2. *Prosecutor v. Limaj*, IT-03-66-T, "Decision on Defence Motion of Prosecution Practice of Proofing Witnesses", Trial Chamber, 10 December 2004 (attached) ("***Limaj* Decision**").

3. *Prosecutor v. Ndayambaje*, Decision on Joseph Kanyabashi's Motions for Modification of his Witness List [etc.], Joint Case No. ICTR-98-42-T, Trial Chamber, 21 March 2007. http://69.94.11.53/ENGLISH/cases/Nyira/decisions/070321.pdf.

4. *Prosecutor v. Milutinovic et al.*, IT-05-87-T, "Decision Decision on Ojdanic motion to prohibit witness proofing", Trial Chamber, 12 December 2006 ("***Milutinovic* Decision**"). http://www.un.org/icty/milutino87/trialc/decision-e/061212.pdf

5. *Prosecutor v. Karemera*, ICTR-98-44-T, "Decision on Defence Motions to Prohibit Witness Proofing", Trial Chamber, 15 December 2006 ("***Karemera* Decision**"); http://69.94.11.53/ENGLISH/cases/Karemera/decisions/151206b.pdf.

6. *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, "Judgement", Trial Chamber, 21 May 1999. http://69.94.11.53/ENGLISH/cases/KayRuz/judgement/index.htm

Other case law

1. *R v. Momodou* [2005] EWCA Crim 177 http://www.bailii.org/ew/cases/EWCA/Crim/2005/177.html

IT-03-66-T
D3041-D3037
10 DECEMBER 2004

~~3041~~ AT
28158

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-03-66-T

Date: 10 December 2004

Original: English

TRIAL CHAMBER II

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

Registrar: **Mr. Hans Holthuis**

Order of: **10 December 2004**

PROSECUTOR

v.

Fatmir LIMAJ
Haradin BALA
Isak MUSLIU

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

The Office of the Prosecutor:

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

Counsel for the Accused:

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

The Chamber will not make orders such as those sought.

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

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

7715.
3037
28162

For these reasons the motion is dismissed.

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

Judge Parker
Presiding

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

[Seal of the Tribunal]