SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before:	Hon. Justice Benjamin Mutanga Itoe, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet
Registrar:	Robin Vincent
Date:	3rd of February, 2005

PROSECUTOR	Against	ISSA HASSAN SESAY MORRIS KALLON AUGUSTINE GBAO (Case No.SCSL-04-15-T)

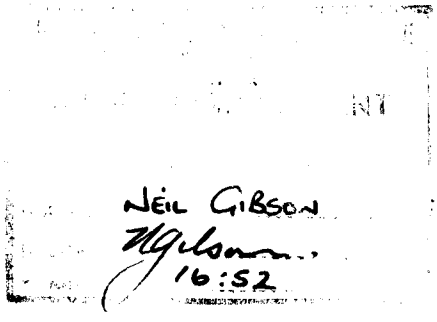
RULING ON ORAL APPLICATION FOR THE EXCLUSION OF STATEMENTS OF WITNESS TF1-141 DATED RESPECTIVELY 9TH OF OCTOBER, 2004, 19TH AND 20TH OF OCTOBER, 2004, AND 10TH OF JANUARY, 2005.

Office of the Prosecutor:
Luc Coté
Lesley Taylor
Peter Harrison

Defence Counsel for Issa Hassan Sesay
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Shekou Touray
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao:
Andreas O'Shea
John Cammegh



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

SEIZED of an oral application by the Defence Counsel for Issa Hassan Sesay, and Augustine Gbao ("the Defence") and their supporting grounds and submissions during the trial proceedings on the 18th of January, 2005 for the exclusion of evidentiary material contained in the statements of Witness TF1-141.

MINDFUL of the Prosecution's Response to the said Application, and the Defence Reply thereto;[1]

CONSIDERING the Oral Ruling of the Chamber dated the 18th of January, 2005 on this application;

CONSIDERING Rule 66(A)(ii) of the Rules of Procedure and Evidence ("Rules"), Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and the Order of this Chamber to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial on the 1st of April, 2004 ("Order for Disclosure");

AFTER DELIBERATION

HEREBY ISSUES THIS UNANIMOUS RULING:

1. During the course of the trial of this case on the 18th of January, 2005, learned Counsel for the First Accused and Third Accused sought from this Court an order to exclude statements made by Witness TF1-141 on the 9th of October, 2004, the 19th and the 20th of October, 2004, and the 10th of January, 2005 respectively.

2. Mr. Jordash, for the First Accused, contended that the additional pieces of evidence embodied in the aforementioned statements ought to have been disclosed pursuant to Rule 66 by the 26th of April, 2004, the date set by the Trial Chamber for service on the Defence of the Prosecution evidence.[2] He submitted that any evidence to be served after that date would be subject to the Prosecution showing good cause pursuant to the provisions of said Rule 66.

[1] Transcript of Trial Proceedings, 18 January 2005, p. 52ff.
[2] See Order for Disclosure, p. 6.

3. Citing the Ruling of this Trial Chamber in this case dated the 23rd of July, 2004,[3] Counsel submitted further that in essence the ruling was that any new statement alleging entirely new facts would fall into the category of additional witness statements, and that in respect of the application which was the subject of that Ruling, the Trial Chamber decided that the evidence whose exclusion was sought was in fact supplemental. Mr. Jordash, however, argued that the evidence in the instant application is different from that sought to be excluded in that application and can be categorised as entirely new.

4. Specifically referring to paragraph 9 of the said Ruling, Mr. Jordash recalled that the Trial Chamber set out what the Defence needs to show to prove a breach of Rule 66, and that the Chamber observed thus:

> "It is evident that the premise underlying the disclosure obligations is that the parties should act *bona fides* at all times. There is authority from the evolving jurisprudence of the international criminal tribunals that any allegation by the Defence as to a violation of the disclosure rules by the Prosecution should be substantiated with *prima facie* proof of such a violation."[4]

5. Citing further paragraph 11 of the Chamber's Ruling, and our reasoning in applying the criteria or procedure set out in the case of *Prosecutor v. Bagosora,*[5] Learned Counsel for the First Accused, Mr Jordash, argued strenuously that upon an analysis of the sort done in *Bagosora*, the Defence has shown that the evidence in the statements in question is clearly new and additional, and that the Prosecution ought to have shown some good cause. The Defence submitted that the evidence should be excluded for having failed to meet that requirement.

6. In addition, Counsel submitted that the *prima facie* proof required by the Defence in an application of this nature is embodied in a Table distributed in Court during his oral submissions, containing columns and illustrations of the alleged new evidence. Mr. Jordash further contended that from the Prosecution's Compliance Report, the evidence of TF1-141 would relate to Counts 1-13. He proposed, by way of a methodology for understanding how the alleged new evidence has altered the witness' statement as proposed in the statement of the 31st of January, 2003, that TF1-141 would have given direct evidence of the killing of a man called Fonti Kanu attributed to Sam

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[3] *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060, 23 July 2004 ("Ruling of the 23rd of July, 2004")

[4] Id., para. 9.

[5] *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DP, 18 November 2003 ("*Bagosora* Decision").

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Bockarie with the First Accused being present and, using Mr. Jordash's own words, "so arguably participating in some way such as by encouragement,"[6] and that would have been direct evidence implicating First Accused as regards counts 3-5.

7. Continuing, Mr. Jordash noted that the evidence would also have related to the assaulting of Johnny Paul Koroma's wife, and that there would have been direct evidence supportive of counts 10-11 implicating First Accused in respect of the charges of physical violence. He forcefully argued that as the evidence shifts towards the 23rd of February, 2003, there is again a repetition of the allegation against First Accused but now as that of him killing Fonti Kanu, as charged in counts 3-5. Learned Counsel also referred to an allegation of First Accused giving an order for "Operation Spare No Soul" which, again, in his submission, would have been direct evidence of physical violence in respect of counts 10 and 11. He also referred to the evidence of TF1-141 up till the 24th of February, 2003 especially the portion indicating that he "cannot say anything indirectly about Mr. Sesay".

8. Mr. Jordash then proceeded to highlight certain other pieces of evidence which, in his submission, amount to new pieces of evidence and which, for ease of reference, are set out here below:

i. allegation in the statement of the 9th of October 2003 of an attack by First Accused in Makeni using small boys;
ii. an attack in Koidu and Mile 91 by First Accused using small boys;
iii. allegation in the statement of the 19th and the 20th of October, 2004 that First Accused was at the Bunubu training grounds (giving orders) where, according to TF1-141, he was first captured by rebels;
iv. allegation in the statement of the 10th of January, 2005 that the First Accused was in Koidu Town when he TF1-141 was first captured and that he had his own group of small boys;
v. allegation in the statement of the 10th of January, 2005 that First Accused was based in Koidu town, and his boys would take women and stay with them in their houses, that is, evidence of abductions supporting count 13;
vi. a new allegation that First Accused came before the witness' group attacking Daru, and that he went to Quiva where he shot a small boy who was his security because he did not show him respect;

[6] Transcript, *supra* note 1, p. 55.

vii. that First Accused, from the statement of the 10th of January, 2005, ordered the burning of Koidu Town.

9. Counsel finally submitted that all the evidence contained in the statements of TF1-141 could not be properly characterised as congruent in material respects with the original statement, and that such a finding would give the Prosecution a *carte blanche* to effectively serve witness statements covering a large area of Sierra Leone, with little indication of evidence of direct participation in events. Consequently, Mr. Jordash contended that any interpretation of Rule 66 which allows the Prosecution to serve the bulk of their case in relation to any witness, only, in the case of the October disclosure, barely three months ago, but in the case of the disclosure on the 10th of January, 2005 barely a week ago, must in effect be a breach of Article 17 of the Statute. Finally, Learned Counsel urged that the proper remedy is not an adjournment but the exclusion of the evidence in question.

10. Counsel for the Second Accused indicated that his Defence team had no similar application to make.

11. Counsel for the Third Accused, Mr. O'Shea indicated that as regards the application on behalf of the First Accused, he had nothing to add to the forceful and persuasive arguments of Mr. Jordash, but that he had quite a different application though he was associating himself with Mr. Jordash's submissions on the law. Articulating his position, Mr. O'Shea referred to the portion of the statement of TF1-141 made on the 10th of January, 2005, implicating, as Counsel contends, the Third Accused for the first time by describing him as a G5. Counsel argued that this reference was highly significant in that there had been no prior references by the witness to Third Accused, and that the allegation puts Third Accused in a position, as Counsel put it, where "he becomes a direct participant in the mistreatment of the civilians in Kailahun according to the witness".[7]

12. In support of his arguments, Mr. O'Shea stated that he was relying on the right to a fair trial as provided for in Article 17(4)(a) of the Statute. He further indicated that he was relying on the right to adequate time and facilities for the Defence to prepare their case as provided for in Article 17(4)(b) of the Statute. In Counsel's view, those two provisions must be given not a plain but purposive meaning consistent with Article 31 of the Vienna Convention and that in this regard, there has been a violation by the Prosecution of Rule 66(A)(i) in that the new statement of the witness effectively confronts the Defence with a new witness.

[7] *Id.*, page 71.

13. Continuing, Mr. O'Shea put forward what, in the Chamber's view, seems to be a mixed package of submissions incorporating various Articles and Rules (some specific, others not quite specific). Counsel submitted that Article 67(D) that which provides for the continuing disclosure obligation requires that reasonable efforts will be made to adduce the essentials of a witness' testimony at an early stage. Counsel then relied on various statutory provisions and the ruling of this Chamber on joinder in order to assert that the Chamber must take into consideration the position of each Accused as if he were being tried separately in assessing whether supplemental statements are new evidence. With regard to Witness TF1-141, Mr. O'Shea submitted that the Prosecution would not have chosen to call him as a witness without knowledge of the supplemental statement or, if they had called him, then the Court would have excluded the supplemental statement as it was the first to mention the Accused Gbao.[8]

14. Concluding, Learned Counsel for the Third Accused invited the Court to be mindful of the fact that their defence team is operating without instructions which, in his submission, imposes some obligation on the Court to act with extreme caution in the context of the exercise of the Prosecution's disclosure obligations. However, even though Counsel later admitted and apologised for what he described as an administrative error as regards the service upon his team of the supplemental statement of the witness dated the 9th of October, 2004 which, allegedly, for the first time implicated the Third Accused, Mr. O'Shea submitted that the Prosecution may well have acted without due diligence in this matter.

15. The Prosecution responded to the applications urging the Chamber to reconcile the principle of disclosure and the principle of orality. Quoting para. 25 of the Decision in *Prosecutor v. Norman et al.*,[9] the Prosecution submits that due to the very nature of the oral testimony a witness can expand on matters mentioned in a previously disclosed written statement. Therefore, the proper and traditional remedy for the Defence in these circumstances is to highlight any discrepancy between the witness' testimony and the statements during cross-examination rather than seeking exclusion of the supplemental statements. As an alternative remedy, the Prosecution submitted that the Chamber could order the Prosecution not to lead any evidence with respect to the statement of the 10th of January, 2005.

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[8] *Id.*, p. 72, l. 11ff.

[9] *Prosecutor v. Norman, Fofana and Kondewa*, Case No SCSL-04-14-T, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004 ("*Norman* Decision").

16. The Defence Application confronts us again with the judicial task of determining the proper interpretation of Rule 66(A)(ii) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone on the issue of the statutory obligation of disclosure of witness statements to the Defence, and, in this instance the three statements made by TF1-141 embodying, in the Defence submission, not only entirely new allegations, but also confronting them with a new witness testifying to new facts.

17. We have recently, in two of our key Decisions on the issue,[10] expounded on the true and proper interpretation of Rule 66, the rationale behind the statutory framework for disclosure obligations, and the principle to be applied in determining issues of this nature. Firstly, in *Prosecutor v. Norman et al*; as to the true and proper interpretation of Rule 66, the Chamber stated that:

> "As a matter of statutory interpretation, it is the Chamber's opinion that Rule 66 requires, *inter alia*, that the Prosecution disclose to the Defence copies of the statements of all witnesses which it intends to call to testify and all evidence to be presented pursuant to Rule 92*bis*, within 30 days of the initial appearance of the Accused. In addition, the Prosecution is required to continuously disclose to the Defence, the statements of all additional Prosecution witnesses it intends to call, not later than 60 days before the date of trial, or otherwise ordered by the Trial Chamber, upon good cause being shown by the Prosecution."[11]

18. Explaining the rationale behind Rule 66 and enunciating the applicable principle we observed as follows:

> "It is evident that the premise underlying the disclosure obligations is that the parties should act *bona fides* at all times. There is authority from the evolving jurisprudence of the International Criminal Tribunals that any allegation by the Defence as to a violation of the disclosure rules by the Prosecution should be substantiated with *prima facie* proof of such a violation."[12]

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[10] See Ruling of the 23rd of July, 2004 and *Norman* Decision. See also *Prosecutor v. Brima, Kamara and Kanu*, Case No SCSL-04-16-PT, Kanu – Decision on Motions for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Statements. See also Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, paras 21-22. See also Ruling on the Oral Application of the Exclusion of Part of the Testimony of Witness TF1-199, 26 July 2004, para. 7

[11] *Norman* Decision, para 5.

[12] *Id.*, para 7.

19. Secondly, as regards the Ruling of the 23rd of July, 2004, consistent with the aforementioned statement of the law, we adopted and applied the reasoning in the case of the *Prosecutor v. Bagosora*[13] to the effect that in determining whether to exclude additional or supplemental statements of prosecution witnesses within the framework of prosecutorial disclosure obligations, a comparative evaluation should be undertaken designed to ascertain (i) whether the alleged additional statement is new in relation to the original statement, (ii) whether there is any notice to the Defence of the event the witness will testify to in the Indictment or Pre-Trial Brief of the Prosecution, and (iii) the extent to which the evidentiary material alters the incriminating quality of the evidence of which the Defence already had notice. In adopting this reasoning, we were underscoring the judicial function of the Chamber to ensure "that the parties act *bona fides* at all times."[14]

20. Consistent with the above case-law, and guided by the reasoning in the said cases and the principles enunciated therein, the key question for determination by the Chamber in disposing of the issue raised is whether the Defence has demonstrated or substantiated with *prima facie* proof that the Prosecution is in breach of its disclosure obligations under Rule 66(A)(ii) and that it is in violation of Article 17(4) (a) and (b) statutory rights of the Accused persons on the grounds of disclosing at this stage witness statements containing, as alleged, entirely new allegations.

21. In order to determine if there has been such a breach, as alleged, and an attendant violation of Article 17(4) (a) and (b) of the Statute, the Chamber has carefully reviewed the original statements dated the 31st of January 2003, the 23rd of February 2003 and the 24th of February 2004, respectively, of witness TF1-141 alongside the respective statements dated the 9th of October, 2004, the 19th and the 20th of October, 2004, and the 19th of January, 2005, as well as the charges in the Amended Consolidated Indictment, the Prosecution's Pre-Trial[15] and Supplemental Briefs,[16] and the various materials filed by the Prosecution in preparation for the commencement of the trial.[17]

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[13] See *Bagosora* Decision, para. 6; See also *Id.*, Decision on Admissibility of Evidence of Witness DBQ, 18 November 2003. See also *Id.*, Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA, 5 December 2003.

[14] See *Norman* Decision, para 7.

[15] Prosecution Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (Under Rules 54 and 73bis) of 13 February 2004, 1 March 2004.

[16] Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 30 March 2004 as Amended by Order to Extend the Time for Filing of the Prosecution Supplemental Pre-Trial Brief of 2 April 2004, 21 April 2004.

[17] Materials Filed Pursuant to "Order to Prosecution to Produce Witness List and Witness Summaries", 12 July 2004; Prosecution Chart Indicating Documentary and Testimonial Evidence by Paragraph of Consolidated Indictment Pursuant to Trial Chamber Order Dated 1 April 2004; Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April, 2004, 26 April 2004. The Chamber notes that the Compliance Report contained therein appears erroneously refering to a single statement for

22. Accordingly, we find as follows:

(i) That the allegations in the disputed statements are germane to the general allegations as set out at pages 2-8 of the Amended Consolidated Indictment and also the charges as specified and particularised in Counts 1-18 thereof;

(ii) That the allegations in the said statements are germane to the basic factual allegations as specified and particularised in the Amended Consolidated Indictment and at pages 8-22 of the Prosecution's Pre-Trial Brief and pages 6-94 of the Prosecution's Supplemental Pre-Trial Brief;

(iii) That the disputed statements cannot be characterised as entirely new statements having regard to their contents in relation to the original statements of the witness which were disclosed to the Defence;

(iv) That the aforesaid statements are "congruent in material respects with matters deposed to in the entire original statements"[18] about the various roles and alleged criminal activities of the Accused persons during the hostilities in Sierra Leone forming the general subject-matter of the Amended Consolidated Indictment;

(v) That the allegations embodied in the respective statements, taken singly or cumulatively, are not new evidence but rather separate and constituent different episodic events or, as it were, building-blocks constituting an integral part of, and connected with, the same *res gestae* forming the factual substratum of the charges in the Indictment;

(vi) That by reason of our findings in (i), (ii), (iii), (iv), and (v) above the disputed statements of Witness TF1-141 do not constitute statements that could be considered to be of the nature of, or similar or akin to, statements of additional witness statements within the meaning and contemplation of Rule 66(A)(ii).

23. At this stage we reiterate, in reply to the submission of Mr Jordash on our Ruling dated the 23rd of July, 2004, from which he made extensive citations, that we held that the evidence sought to be excluded in that instance was in fact supplemental and not new, and that our reasoning in that instance left no room for any implication that we were giving "supplemental" a fixed meaning in the context of an antonym of the word "new". Our reference to "supplemental" was by definition,

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witness TF1-141, dated the 6th of April, 2003, disclosed at that point in time to the defence. In addition, the Updated Compliance Report filed on the 10th of January, 2005 does not refer to the supplemental statement dated the 9th of October 2004.

merely to characterise the witness's second statement in relation to the original statement. Nothing in our Ruling suggests that we were using those terms as contradictory or mutually exclusive.

24. As a matter of law, this Chamber would like to reassert, as we did in our Ruling on the admissibility of the statement of prosecution witness TF1-060, that Rule 66 does, in explicit legislative language, impose upon the Prosecution, the obligation to continuously disclose to the Defence, copies of all statements of all witnesses who they intend to call and which include new developments in the investigation in the form of "will-say" statements, interview notes, or in any other forms, obtained from a witness at any time prior to the witness giving evidence at the trial. To interpret Rule 66 otherwise would be contrary to the legislative intent and to thwart its purpose of full and complete disclosure as evidenced by its ordinary and plain meaning.

25. Predicated upon the foregoing considerations and our specific findings, the Chamber is of the opinion that the Defence has failed to demonstrate or substantiate by *prima facie* proof the allegations of breach by the Prosecution of Rule 66(A)(ii) of the Rules, Article 17(4) of the Statute, and the Chamber's Order for Disclosure.

26. Accordingly, the application for the exclusion or suppression of the evidence contained in the three supplemental statements of TF1-141 which are the subject-matter of the application is denied, on the understanding however, that the Defence reserves its right to cross-examine this witness on all issues raised including those that feature in the statements.

Done at Freetown, Sierra Leone, this 3rd day of February, 2005

Hon. Justice Pierre Boutet | Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, Trial Chamber I | Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

[18] See Ruling of the 23rd of July, 2004, para. 14(iii).