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SCSL-04-15-T
(23995 - 24004)

# THE SPECIAL COURT FOR SIERRA LEONE

**BEFORE:**

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

**Registrar:** **Mr. Lovemore Green Munlo, SC**

**Date filed:** **29th June 2006**

**The Prosecutor**

**-v-**

**Issa Hassan Sesay**

**Case No: SCSL – 04 – 15 – T**

**PUBLIC**

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## MOTION FOR A RULING THAT THE DEFENCE HAS BEEN DENIED CROSS-EXAMINATION OPPORTUNITIES

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**Office of the Prosecutor**
Christopher Staker
Peter Harrison
Shyamala Alegendra

**Defence**
Wayne Jordash
Sareta Ashraph

**Defence Counsel for Kallon;** Shekou Touray and Charles Taku
**Defence Counsel for Gbao;** Andreas O'Shea and John Cammegh

## Introduction

1. During the course of the present trial proceedings[1] Trial Chamber I has ruled on the admissibility of over a hundred supplementary factual allegations disclosed throughout the Prosecution case. The rulings, rejecting the Defence assertions of lack of notice, have permitted the Prosecution to continuously disclose factual allegations throughout the course of the Prosecution case, provided that the additional factual allegations are relevant to, and fall within, the temporal and subject matter of the Indictment.

2. Trial Chamber I has ruled that:
   (a) The Defence has sufficient notice of all factual allegations embodied in the supplemental evidence (disclosed in court by witnesses or through so-called proofing notes or additional information notes), provided that the allegations are germane to the general and basic factual allegations as set out in the Amended Consolidated Indictment, and the charges specified are particularised in Counts 1-18 thereof and the Prosecution's Pre-trial Brief;[2]

   (b) That all the supplemental allegations contained in the supplemental statements (disclosed in and out of court) "taken singularly 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;"[3]

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[1] See, for example, *Prosecutor* v. *Sesay et al.*, "Ruling on Oral Application for the Exclusion of 'Additional' Statement for Witness TF1-060," 23rd July 2004 ("TF1-060 Ruling") (7263-7270); *Prosecutor* v. *Sesay et al.*, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122," 1st June 2005 ("TF1-361 and TF1-122 Ruling") (12018-12030); *Prosecutor* v. *Sesay et al.*, "Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 Dated Respectively 9th October 2004, 19th and 20th of October 2004 and 10th January 2005," 3rd February 2005 ("TF1-141 Ruling") (10211-10220).

[2] See, for example, "TF1-361 and TF1-122 Ruling," at Para. 29.

[3] For example: "TF1-141 Ruling," at Para. 22(v); *Prosecutor* v. *Sesay et al.*, "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," 27th February 2006 ("TF1-113, TF1-108, TF1-330, TF1-041

(c) That by reason of the findings in (a) – (b) the supplemental statements relied upon by the Prosecution do not enhance the incriminating quality of the evidence of which the Defence already has notice;[4]

(d) That "the obligation of disclosure by the Prosecution of the evidence in its custody which it intends to introduce to establish material facts of the charge; and the allegations contained in the indictment does differ from, and should not be confused with its obligation to state the material facts constituting the charges against the accused persons in the indictment and as to the form and contents of the indictment;"[5]

(e) That the Defence, by reason of the aforementioned findings, did have notice that the witness would testify in respect of the allegations and is estopped from asserting the contrary;[6] and

(f) That all applications for exclusion or suppression of supplemental evidence are denied on the understanding, however, that the Defence "reserves its right to cross-examine the witness (es) on all issues raised including those in the supplemental statement"[7] and/or that, "for the purpose of further safeguarding the rights of the Accused as provided for in Article 17(4)(a) and 17(4)(b) of the Statute [the Trial Chamber] would be prepared to grant 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" (emphasis added).[8]

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and TF1-288 Decision") (18166-18171), at Para. 11; "TF1-060 Ruling;" "TF1-361 and TF1-122 Decision;" "TF1-141 Ruling."

[4] See, for example, "TF1-361 and TF1-122 Ruling," at Para. 29; "TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288 Decision," at Para. 9.

[5] *Prosecutor* v. *Sesay et al.*, "Decision on the Defence Motion requesting the Exclusion of Evidence arising from the Supplemental Statements of Witnesses TF1-168, TF1-165, and TF1-041," 20th March 2006 ("TF1-168, TF1-165, and TF1-041 Decision") (18389-18395), at Para. 11.

[6] For example: "TF1-361 and Witness TF1-122 Ruling," at Para. 17.

[7] See, for example, "TF1-141 Ruling," at Para. 26; "TF1-361 and TF1-122 Ruling," at Para. 33.

[8] "TF1-168, TF1-165, and TF1-041 Decision," at Para. 11.

**Summary of Defence Request**

3. The present Motion does not seek to circumvent the aforementioned rulings but seeks clarification from the Trial Chamber, through a ruling or statement of principle, that the Defence is entitled to have the opportunity to cross-examine *all* relevant witnesses on all the supplementary factual allegations arising from any witness. It is the Defence contention that the Defence has been prejudiced because it has not been able to cross-examine earlier witnesses on allegations made by later witnesses. The disclosure of factual allegations throughout the Prosecution case has denied the Defence of numerous opportunities for testing large swathes of evidence by challenging the later allegations through cross-examination of earlier witnesses.

4. In short, the Defence seeks a ruling in principle that one of the *options and strategies* envisaged by the Trial Chamber, in light of the continuous disclosure of supplemental factual allegations, is the recall of all Prosecution witnesses who might reasonably be able to testify about the later allegations, to enable comprehensive challenges to be made to all factual allegations made by later witnesses.

5. The ruling is requested as an acknowledgement that the rolling disclosure program of the Prosecution has, in many instances, deprived the Defence of cross-examination opportunities. It is accepted however that the aforementioned rulings from Trial Chamber I (see Para. 2 above) might be intended to imply that the Defence has been provided with sufficient notice of all matters so that no prejudice (of the type claimed in this Motion) could conceivably arise.

**Submissions**

6. At the ICTY, it has been held that it is implicit in the Rules of Procedure and Evidence "that there should be a point where accusation ends and answering the allegations begins. The onus of proof of the guilt of the accused rests on the Prosecution throughout the case. This is exemplified in the presumption of innocence, which the accused enjoy by virtue of Article 21(3) of the Statute. It is therefore, consistent with justice not to interfere with the Defendant answering the allegations made by continuing with further accusations."[9]

7. In *Prosecutor v. Sesay et al*, the Prosecution has been permitted to keep disclosing factual accusations as long as they, taken singularly or cumulatively, are 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. This expression or test is not to be found in any of the jurisprudence from any of the ad hoc tribunals; neither the ICTY nor the ICTR have employed the term "substratum of the charges" nor have charges been considered to be divisible into separate and constituent parts, namely stratum and substratum.

8. The jurisprudence from these Tribunals therefore provides no assistance as to what Trial Chamber I had in mind when ruling that it would be prepared to grant 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 (see Para. 2(e) above).

9. In the various Defence Motions seeking an end to the Prosecution's ongoing disclosure program the Defence has continuously argued that the prejudice which it suffers is multi-various and broad ranging. Trial Chamber I has rejected all

[9] *Prosecutor* v. *Delalic*, IT-96-21, "Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case," 1st May 1997 ("*Delalic* Decision"), Para. 20.

assertions of prejudice, except to suggest that it would be prepared to grant an adjournment of the evidence to "examine the various options and strategies open to the Defence" in relation to those supplemental statements (see Para. 2(e) above). The only remedy made explicit by the Trial Chamber in its various rulings has been the adjournment of evidence to allow the Defence time for further investigations into the supplemental allegations.

10. It is however submitted that the rolling disclosure program authorised by Trial Chamber has significantly impacted upon the Accused's ability to cross-examine effectively *and* comprehensively. In other words, it has not been possible to achieve comprehensive cross-examination on supplementary factual allegations disclosed after witnesses, who reasonably might have been able to answer questions about them, have completed their evidence.[10]

11. The Defence intends no disrespect by this assertion nor does it seek to go behind the rulings, that "the Defence did have notice that the witness would testify in respect of the allegations and is estopped from asserting the contrary" (see Para. 2(e)" but the Defence submits that fairness, pursuant to Article 17 of the Statute of the Special Court ("The Statute"), dictates that the "various options and strategies open to the Defence in relation to those supplemental statements" (See Para. 2(f) above) must include the recall of all the Prosecution witnesses who might reasonably have given evidence pertinent to specific factual allegations contained in supplemental statements (oral or written) disclosed after the completion of the particular witness testimony before the Trial Chamber.

12. The Defence therefore seeks a ruling from the Trial Chamber that the principles enunciated by the Trial Chamber in the aforementioned rulings envisage that the Defence ought to be afforded, through recall of the Prosecution witnesses, an opportunity to cross-examine all witnesses who might reasonably have been

[10] The Defence does not resile from its earlier submissions alleging wider prejudice but respects the Trial Chamber's rulings and does not seek to go behind the various decisions which have rejected all claims of lack of notice.

expected to give evidence about supplemental factual allegations disclosed after the completion of their testimony before the Trial Chamber I.

**Merits**

13. The object of cross-examination is two-fold: first to elicit information concerning facts in issue, or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted, and secondly, to cast doubt upon the accuracy of the evidence-in-chief given against such party.[11] It is submitted that this wide ranging objective cannot be comprehensively achieved in light of the ongoing and piecemeal disclosure of the factual allegations in this case (irrespective of whether they form episodic blocks of the substratum of the charges) without the Defence being afforded an opportunity to cross-examine earlier witnesses about allegations which have been disclosed in subsequent allegations.

14. The merits of this assertion are apparent from the following example concerning witnesses TF1-122 and TF1-125. The Prosecution's ongoing disclosure program consisted of the disclosure of various "statements" (including so-called proofing notes) from witnesses TF1-122 and TF1-125. On the 6th April 2005 the Defence was given notice for the first time that TF1-125 (or any witness) would testify to an alleged arrest and assault of the Commissioner and Chief of Police of Kenema by Mr Sesay. This notice was provided through the disclosure of a so-called proofing note arising from additional interviews with the witness on 22nd March and 4th April 2005. Between 12th and 16th May 2005, witness TF1-125 gave evidence and was cross-examined about these supplemental allegations.

15. On 31st May 2005 the Defence was given notice, for the first time that TF1-122 would also testify to this alleged incident. This was disclosed to the Defence in a so-called proofing note, dated 26th May 2005, arising from further interviews with

[11] "*Delalic* Decision," at Para. 22.

the witness on 26th May 2005. It follows that the Defence was unaware at the time of the cross-examination of TF1-125 that witness TF1-122 would (or could) testify as to these specific allegations.

16. The Defence therefore could not have cross-examined witness TF1-125 on the specific allegations which were given by TF1-122 when he later testified in Trial Chamber I on 7th-8th July 2005. The Defence would have wanted to cross-examine TF1-125 to ensure that any differences between his account and the anticipated account of TF1-122 could have been comprehensively explored and established.

17. This was an opportunity lost through dint of the Prosecution's rolling disclosure program and the type of scenario exemplified in relation to witnesses TF1-122 and TF1-125 has been replicated in relation to other witnesses on many7 occasions throughout the Prosecution case.

**Request**

18. It would take many hours to outline all the lost opportunities which the Defence submits has resulted from the Prosecution's rolling disclosure program. The Defence respectfully requests that the Trial Chamber rule, notwithstanding the earlier rulings that the Defence did have notice that the witness would testify in respect of the allegations and is estopped from asserting the contrary, that the Defence has been denied this type of opportunity which in principle might, in part, be remedied by the recall of witnesses. Thereafter the Defence could outline the lost opportunities which would then support an application for the recall of specific witnesses.

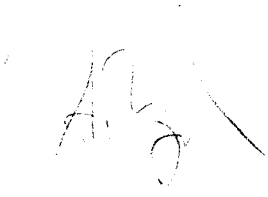
19. The Defence reiterates that it does not intend any disrespect to the Trial Chamber but seeks to have clarified whether the various rulings (see Para. 2 above) are in fact intended to convey the Trial Chamber's view that the only potential prejudice is the loss of an opportunity to investigate (and therefore the only available "remedy" available was an adjournment of the evidence). Alternatively whether,

as is the Defence view, that other prejudice accrues, such as that exemplified by the example concerning TF1-122 and TF1-125.

20. The Defence respectfully request that, if it is the Trial Chamber's view that recall be a remedy available to the Defence - arising *specifically* from a lack of notice provided by the Prosecution's ongoing disclosure program - an expedited timetable be outlined obligating the Defence to identify the witnesses which it would seek to have recalled and the reasons for that request.

21. In addition, the Defence, in light of the Prosecution's intended completion of their case at the end of the current trial schedule, seeks an expedited procedure, both in relation to the exchange of the current pleadings (and any subsequent related pleadings), to ensure that the issues raised in this Motion are adjudicated upon before the close of the Prosecution case (at the end of this Trial session (4th August 2006)).

Dated 29th June 2006



Wayne Jordash
Sareta Ashraph

## Book of Authorities

*Prosecutor v. Sesay et al.*, "Ruling on Oral Application for the Exclusion of 'Additional' Statement for Witness TF1-060," 23rd July 2004 (7263-7270).

*Prosecutor v. Sesay et al.*, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122," 1st June 2005, (12018-12030).

*Prosecutor v. Sesay et al.*, "Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 Dated Respectively 9th October 2004, 19th and 20th of October 2004 and 10th January 2005," 3rd February 2005 (10211-10220).

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*Prosecutor v. Delalic*, IT-96-21, "Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo," 1 May 1997.