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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: Mr. Herman von Hebel

Date: 6th of December 2007

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

Public Document

DECISION ON 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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TRIAL CHAMBER I ("Trial Chamber") 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 the 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 the 24th of May 2007 ("Motion");

NOTING the Response to the Motion filed by the Office of the Prosecutor ("Prosecution") on the 1st of May 2007 and the Reply thereto filed by the Defence on the 7th of May 2007 ("Reply");

HAVING RECEIVED the Notice in Relation to Prosecution Response to First Accused's Motion Dated 24 April 2007 filed by the Prosecution on the 7th of May 2007 ("Notice") and the Errata to 7th May 2007 Reply filed by the Defence on the 8th of May 2007 ("Errata");

PURSUANT to Articles 17 of the Statute of the Special Court ("Statute") and Rule 26*bis* of the Rules of Procedure and Evidence ("Rules");

HEREBY ISSUE THE FOLLOWING DECISION:

I. SUBMISSIONS OF THE PARTIES

1. The Motion

1. The Defence submits that the Prosecution has manipulated the process of Court by re-interviewing witnesses during proofing with a view to moulding their testimony around evidence already adduced. The Defence further submits that this abuse of process has made a fair trial of the Accused impossible and requests a stay of the Indictment. Further, or in the alternative, the Defence contends that all additional factual allegations made against the Accused since the Indictment should be dismissed.

2. The Defence accepts also that the proofing of witnesses is acceptable, but asserts that it is unacceptable to mould the case during the trial according to how the evidence unfolds. The Defence contends that the Prosecution has flouted the prohibition on moulding the case as it

unfolds in the way it proofs its witnesses: by re-interviewing them based on in-court testimony and by seeking information to mould around evidence already adduced.[1]

3. The Defence alleges that the Prosecution has admitted that its process of proofing is designed 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. The Defence further asserts that there is little difference between the process admitted by the Prosecution and that commonly known as training or coaching of witnesses; that 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 even of an honest witness.[2] The Defence argues that both international and domestic jurisprudence forbids such conduct if it leads to an ever-expanding case against the Accused. The Defence invites the Chamber to infer from the Prosecution admission and from its rolling disclosure programme that the Prosecution has actively sought to obtain new evidence to be moulded around its case as it has unfolded.

4. The Defence contends that the admission of incriminating evidence without sufficient notice obliges the Chamber to recall witnesses for cross-examination if opportunities have been lost. However, the Defence asserts that recall of witnesses for cross-examination has to be considered in the light of Article 17 and Rule 26*bis*. The Defence takes the view that the number and range of witnesses required to be recalled would be far in excess of those which would have been called had not the impugned evidence in the *Gbao* Decision on the Admissibility of Portions of the Evidence of TF1-371 been excluded.[3] As such, the consequential adjournment would be significantly longer and the breaches of Article 17 and Rule 26*bis* would be "more heinous."[4] 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 the case. This submission relies on the fact that the charges were created late and that the Defence is

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[1] Motion, paras 10-12.
[2] *Ibid.*, paras 13-16.
[3] *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, 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.
[4] Motion, paras 20-23.

effectively unable to test them.[5] The Defence requests that the Prosecution answer the allegations made in relation to the moulding of evidence and explain its rolling disclosure programme. In the event that the Prosecution is unwilling or unable to refute the allegations, the Chamber is invited to draw strong inference against the Prosecution. The Defence asks that as a result of the Prosecution abuse of process the indictment be stayed.[6] The Defence requests that, further or in the alternative, all charges arising from the Prosecution's rolling disclosure programme be dismissed.[7]

5. Annex A to the Motion is a Recall List containing details of allegations made by Prosecution witnesses in the course of their testimony, the dates on which they were made, the dates of the statements containing the relevant allegations, the dates on which the relevant allegations were disclosed and the witnesses who would have to been sought to be recalled, and the reasons for the recall.[8]

6. Annex B to the Motion gives details of how the Defence believes that the Prosecution has moulded its evidence to suit its unfolding case.[9]

2. The Response

7. The Prosecution contends that the jurisprudence of both the Chamber and the *ad hoc* Tribunals recognises that the practice of proofing is acceptable, even desirable. The Prosecution takes the view that in proofing witnesses it is entitled to cover not only issues dealt with in the witnesses' previous statements, but also issues that are pertinent to the case.[10] There is nothing which prevents the Prosecution from obtaining new evidence during proofing, provided that in doing so it does not breach any of its professional duties, such as the duty not to coach witnesses.[11] The Prosecution denies any breach of professional standards, and asserts that proofing witnesses on matters going beyond the scope of their previous statements - or even completely re-

[5] Motion, para 24.
[6] *Ibid.*, paras 25-26.
[7] *Ibid.*, para 27.
[8] *Ibid.*, Annex A.
[9] *Ibid.*, Annex B.
[10] Response, para 2.
[11] *Ibid.*, para 8.

interviewing them - does not constitute coaching, training or tampering with witnesses.[12] The Prosecution submits that none of the material accompanying the Motion establishes or suggests that the Prosecution conducts proofing in such a way as to provide cues as to the evidence required of a witness. The Prosecution asserts that proofing sessions are intended only to identify accurately, before the witness testifies, all matters relevant to the case that are within the witness' knowledge and that the Defence cites no evidence of any conduct by the Prosecution in proofing that could be regarded as improper, and all allegations of impropriety are based on conjecture.

8. The Prosecution accepts that it will not necessarily be entitled to lead and rely on all new evidence of a witness that emerges for the first time during proofing and that disclosure of new information to the Defence at the stage of proofing may cause prejudice. The Prosecution notes that where such prejudice is occasioned, recourse can be had to the Trial Chamber for redress in the form of extensions of time for preparation or cross-examination, exclusion from evidence of information emerging during proofing, or recall of witnesses. No applications for extension of time or recall of witnesses were ever made by the Defence, and applications for exclusion of evidence were dismissed by the Trial Chamber on their own merits. The Prosecution argues further that if the Defence had wanted an adjournment in relation to supplemental statements or if it had wanted to re-cross-examine witnesses, it should have brought specific motions to this effect at the time that the relevant witness testified. Its request for relief has therefore not been brought in a timely manner.[13]

9. The Prosecution submits that the Defence has previously raised the arguments which it raises in the Motion only to have them rejected by the Chamber.[14] The Prosecution argues further that the Motion does not add anything of substance to the arguments raised in the previous motions.[15]

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[12] *Ibid.*, para 10.
[13] *Ibid.*, paras 18-22.
[14] *Ibid.*, para 2.
[15] *Ibid.*

3. The Reply

10. The Defence contends that the Prosecution has avoided addressing in its Response what to the Defence is the real issue: the extent of the unfairness that has resulted from the Prosecution proofing practices, lawful or otherwise, and whether it can be remedied.[16] The Defence argues that it is not proofing in general which is an abuse of process, but rather the manner in which the Prosecution proofs its witnesses, in particular its continued moulding of its case and its rolling disclosure of evidence obtained as a result.[17]

11. The Defence submits that the Prosecution's argument that the Defence failed to pursue the remedies of recall or exclusion in a timely manner is flawed for three reasons. First, as a result of the new factual bases for convictions created during the course of the Prosecution case, the earliest time that the resulting unfairness could have been raised was at the end of the Prosecution case. Second, the Prosecution has failed to identify any prejudice because the impossibility of a remedy now is the same as it was at the end of the Prosecution case. Third, as argued in the Defence Motion, only some of the prejudice to the Defence's case would be remedied by the recall of witnesses.[18] The recall of 36 of the most crucial witnesses would result in difficulties which would be insurmountable and which would include providing the Prosecution with further opportunities to mould the evidence.[19] The Defence argues further that as a result of inconsistencies in the Chamber's jurisprudence on the issue of the exclusion of supplemental evidence the Defence Motion has been raised within a reasonable time.[20]

II. APPLICABLE LAW

1. The Doctrine of Abuse of Process

12. The Chamber recalls that the doctrine of abuse of process was considered by the Appeals Chamber of the ICTR in *Barayagwiza v. Prosecutor*, wherein it was noted that "Judges may decline

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[16] Reply, para 4 and Errata, para 1.
[17] Reply, para 3.
[18] *Ibid.*, para 7.
[19] *Ibid.*, para 7.
[20] *Ibid.*, paras 11-12 and 14-16.

to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the [A]ccused's rights would prove detrimental to the court's integrity".[21]

2. Proofing of Witnesses

13. In so far as the law on witness proofing is concerned, this Chamber has sought guidance from its own previous decisions and those of the ICTY, the ICTR and the ICC. In this regard, the Chamber has, in the Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, approved the practice of proofing witnesses.[22] The Chamber held that "proofing witnesses prior to their testimony in court is a legitimate practice that serves the interest of justice. This is especially so given the particular circumstances of many of the witnesses in this trial who are testifying about traumatic events in an environment that can be entirely foreign and intimidating for them."[23]

14. Likewise, the Chamber notes that in *Prosecutor v. Limaj, Bala and Musliu*,[24] a Trial Chamber of the ICTY dismissed a defence motion challenging the prosecution practice of proofing witnesses before trial. Observing that witness proofing is "a widespread practice in jurisdictions where there is an adversary procedure," that Chamber noted the benefits bestowed by proofing on the "due functioning of the judicial process."[25] Specifically, the Chamber held that reviewing a witness' evidence prior to testimony can be a useful practice, as it assists (a) in providing a "detailed review [of relevant and irrelevant facts] in light of the precise charge to be tried", (b) in aiding "the process of human recollection", (c) in "enabling the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial", and (d) in identifying differences in recollections and allowing 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.[26] By contrast, we

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[21] *Barayagwiza v. Prosecutor*, ICTR-97-19, Decision of the Appeals Chamber, 3 November 1999, para 74.
[22] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005.
[23] *Ibid.*, para 33.
[24] *Prosecutor v. Limaj, Bala and Musliu*, IT-03-66-T, Decision on Defence Motion on Prosecution Practice of Proofing Witnesses, Trial Chamber, 31 August 2004, page 2.
[25] *Ibid.*
[26] *Ibid.*

note that in *Prosecutor v. Dyilo*,[27] the Pre-Trial Chamber of the ICC decided to ban the practice of reviewing a witness' evidence prior to testimony, though in our view it should be emphasised that this Decision was firmly grounded on considerations unique to the ICC, such as an undertaking by the Prosecution to comply with the Code of Conduct of the Bar of England and Wales. Reflecting the unsettled state of the jurisprudence this Chamber notes that the *Dyilo* Decision was distinguished by an ICTY Trial Chamber in *Prosecutor v. Milutinovic, Sainovic, Ojdanic, Pavkovic, Lazarevic and Lukic,*[28] which followed the earlier *Limaj* Decision and once again upheld the practice of proofing witnesses. We note further that the ICTR has also distinguished the *Dyilo* Decision, and in *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, an ICTR Trial Chamber endorsed witness proofing. A challenge to this endorsement was dismissed by the Appeals Chamber of that Tribunal[29]

15. While the Chamber is therefore satisfied that the practice of proofing of witnesses is legitimate, the Chamber takes the view that the practice of coaching witnesses is wholly inconsistent with the Rules and that "no evidence shall be admissible if obtained by methods which could subsequently cast a substantial doubt on the evaluation of its reliability or if its admission could seriously damage the integrity of the proceedings."[30]

3. "Moulding the Evidence"

16. By its use of the phrase "moulding the evidence", the Defence refers to the continued issuance of what it sees as entirely new charges against the Accused in the form, not of amendments to the Indictment, but of witness statements disclosed on a rolling basis. We note,

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[27] *Prosecutor v. Dyilo*, ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006.

[28] *Prosecutor v. Milutinovic, Sainovic, Ojdanic, Pavkovic, Lazarevic and Lukic*, IT-05-87-T, Decision on Ojdanic Motion to Prohibit Witness Proofing, Trial Chamber, 12 December 2006, paras 10-16

[29] *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, ICTR-98-44-T, Decision on Defence Motions to Prohibit Witness Proofing, Trial Chamber, 15 December 2006, para 15; *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007.

[30] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible, 1 August 2006, para 17.

generally, that there exists jurisprudence from both the Special Court and the ICTY to the effect that such practices may amount to pleading by ambush.[31]

17. It is the Chamber's view, however, that where additional allegations disclosed in the course of the trial fall within the rubric of the Indictment, this does not amount to ambush. In this regard, it is noteworthy that this Chamber has, in a series of previous decisions relating to Defence challenges to the admissibility of portions of testimonies of Prosecution witnesses since the beginning of the trial, developed and consistently applied the test that supplemental statements of witnesses can only be characterized and deemed to be new allegations where they do not form part of (or are not connected with) the *res gestae* forming the factual substratum of the Indictment.[32]

4. Inquiry by the Chamber into Prosecution Practices

18. In its Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible, this Chamber set down the criteria that must be met before the Trial Chamber would consider inquiring into the general integrity of the practice of the Prosecution in taking statements from witnesses. The Chamber held that "any

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[31] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003, para 33. See also *Prosecution v. Kupreskic, Kupreskic, Kupreskic, Josipovic, Papic and Santic*, Case No. IT-95-16-A, Appeal Judgment, 23 October 2001, para 92 and *Prosecution v. Brdanin and Talic*, Case No. IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para 11.

[32] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060, 23 July 2004, paras 11-12. The Chamber adopted and applied the reasoning of an ICTR Trial Chamber in *Prosecutor v Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, Decision on the Admissibility of Evidence of Witness DP, 18 November 2003, paras 5-6, 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 evidentiary material alters the incriminating quality of the evidence of which the Defence already had notice. The Chamber then considered the Defence submissions in the light of these criteria to ascertain whether the Defence had adduced *prima facie* proof of a breach of disclosure obligations by the Prosecution and determined that there had been no such violation. This reasoning has been followed on a number of subsequent occasions by the Trial Chamber: *Prosecutor v. Sesay, Kallon and Gbao*, 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, 3 February 2005, paras 19-22; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122, 1 June 2005, paras 21-29; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, 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, paras 11-14; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Defence Motion for the Exclusion of Certain Portions of Supplemental Statements of Witness TF1-117, 27 February 2006, paras 9-11.

direct challenge to the general integrity of the statement-taking 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."[33] This is true of the witness proofing process just as it is true of the statement-taking process. We opine that abuse of process is a very serious allegation and that the Party alleging abuse or impropriety must make a *prima facie* showing of foul play, either deliberate or negligent, on the part of the opposing Party.

III. DELIBERATIONS

19. We note that the crux of the Defence argument is that the Prosecution's proofing practice, its rolling disclosure programme and the information contained in the Annexes to the Motion point to foul play and abuse of process on the part of the Prosecution, and that the Accused has been prejudiced to such a degree that a fair trial has become impossible. The preliminary issue now facing the Chamber is whether the Defence has made a *prima facie* showing of foul play, either deliberate or negligent, on the part of the Prosecution.

20. We are satisfied from the jurisprudence both of this Chamber and of other Tribunals that the practice of witness proofing is legitimate as a matter of law, while the coaching of witnesses, by contrast, is not legitimate and inconsistent with the principle of fundamental fairness. After careful consideration of the Motion and its Annexes, in particular Annex B, the Chamber finds insufficient evidence from which it can reasonably infer that the Prosecution has crossed the line between witness proofing and witness coaching.

21. The Chamber accordingly rejects the Defence argument that the Prosecution has been impermissibly "moulding the evidence". As noted above, this is not the first time that allegations of "moulding evidence" have come before this Chamber; on each previous occasion such allegations were made, we based our decision on whether the impugned portions of testimony constituted new evidence or were merely part of the *res gestae* forming the factual substratum of the Indictment.[34] We think it important to emphasise that there is nothing *per se* improper about

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[33] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible, 1 August 2006, para 17.

[34] In the Chamber's 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 the majority excluded a portion of the witness'

disclosing new material as a result of a witness proofing session so long as any additional allegations disclosed fall within the rubric of the Indictment. The Chamber also emphasises that the Prosecution's act of disclosing new material to the Defence as a result of a proofing session does not mean the Trial Chamber will allow the evidence to be led or that it will ultimately give weight to the testimony in its final assessment of the case.[35]

22. Based on the foregoing, the Chamber finds that the Defence has failed to make a *prima facie* showing of foul play, either deliberate or negligent, on the part of the Prosecution. Accordingly, we decline to inquire further into the Prosecution practices in relation to the proofing of witnesses.

IV. DISPOSITION

FOR THESE REASONS the Motion is dismissed in its entirety.

Done at Freetown, Sierra Leone, this 6th day of December 2007.

Hon. Justice Pierre Boutet

Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I

Hon. Justice Bankole Thompson

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evidence with reference to "the doctrine of fundamental fairness; see *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, 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, para 15. The Chamber concluded that the "doctrine of fundamental fairness" would require the recall for cross-examination of another witness, but that such a recall would be inconsistent with Article 17 of the Statute and Rule 26*bis* of the Rules.

[35] See *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, para 12.