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SCSL-04-15-T
(17159-17168)

17159

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

Before: Judge Benjamin Mutanga Itoe, Presiding Judge
Judge Bankole Thompson
Judge Pierre Boutet

Interim Registrar: Mr. Lovemore Munlo

Date filed: 23 January 2006

THE PROSECUTOR

Against

**ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO**

Case No. SCSL – 2004 – 15 – T

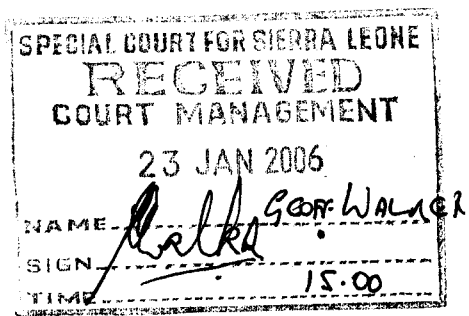
**PROSECUTION RESPONSE TO DEFENCE MOTION REQUESTING THE
EXCLUSION OF PARAGRAPHS 1, 2, 3, 11 AND 14 OF THE ADDITIONAL
INFORMATION PROVIDED BY WITNESS TF1-117 DATED 25th, 26th, 27TH,
AND 28th OCTOBER 2005**

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Introduction

1. This is the prosecution's 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", of 12 January 2006 (the "Motion").

2. The Trial Chamber has previously dealt with this issue in this trial in four earlier written decisions: "Ruling on Oral Application for the Exclusion of 'Additional' Statement for Witness TF1-060" (the "*Ruling on TF1-060*");¹ "Ruling on the Oral Application for the Exclusion of Part of the Testimony of Witness FF1-199" (the "*Ruling on TF1-199*");² "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" (the "*Ruling on TF1-141*");³ and "Ruling On Application For The Exclusion Of Certain Supplemental Statements Of Witness TF1-361 And Witness TF1-122" (the "*Ruling on TF1-361*").⁴

3. The Prosecution says the Motion should be dismissed for the reasons expressed in the Trial Chamber's earlier decisions.

The Law

4. In the *Ruling on TF1-141*, the Trial Chamber said that:

... 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)

¹ *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T (7263-7270), "Ruling on Oral Application for the Exclusion of 'Additional' Statement for Witness TF1-060", 23 July 2004.

² *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T (7271-7276), "Ruling on the Oral Application for the Exclusion of Part of the Testimony of Witness TF1-199", 26 July 2004.

³ *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T (10211-10220), "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.

⁴ *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T (12018-12030), "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122", 1 June 2005.

and (b) statutory rights of the Accused persons on the grounds of disclosing at this stage witness statements containing, as allege, entirely new allegations.⁵

5. In the same decision the Trial Chamber interpreted the purpose and function of Rule 66,⁶ relying on an earlier decision from *Prosecutor v. Norman et al* (the “*Norman Decision*”),⁷ and held 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.⁸

6. Most recently, the Trial Chamber’s decision of the *Ruling on TF1-361* commented on Rule 89, which governs the admissibility of evidence, the *Norman Decision*, and the *Ruling on TF1-041*. The Trial Chamber commented on the appropriate remedy in such cases:

24. As regards the appropriate remedy for the Defence when supplemental statements are found to contain new evidence, this Chamber had earlier held that, as a general rule, the judicially preferred remedy for a breach of disclosure obligations by the Prosecution is an extension of time to enable the Defence to prepare adequately its case rather than the exclusion of the evidence.⁹

7. In both the *Ruling on TF1-141*¹⁰ and the *Ruling on TF1-361*¹¹ the Trial Chamber reviewed the original statements, the supplemental statements, the charges in the Amended Consolidated Indictment, the Prosecution’s Pre-Trial and Supplemental Briefs, and various materials filed by the prosecution in preparation for the trial.

⁵ *Ruling on TF1-141, supra*, at para. 20. See also “*Ruling on TF1-361*”, *supra*, at para. 26.

⁶ *Ruling on TF1-141, supra*, para. 17 and 18.

⁷ *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, “*Decision on Disclosure of Witness Statements and Cross-Examination*”, 16 July 2004, para. 5-7.

⁸ *Ruling on TF1-141, supra*, para. 22.

⁹ *Ruling on TF1-361, supra*, para. 24.

¹⁰ *Ruling on TF1-141, supra*, para. 21.

¹¹ *Ruling on TF1-361, supra*, para. 27.

Proofing Sessions with Witnesses

8. In the ICTY proofing of witnesses “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.”¹²

9. War crimes trials typically cover a long period of time and witnesses may be called upon to testify about multiple events separated in time by years. Proofing is necessary precisely because the interviews may have taken place a long time before the witness testifies and:

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.

...
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.¹³
[underlining added]

10. An example of an instance where a court expressed concern about late disclosure of new information from a proofing session is found in *Blagojevic*. There the prosecution disclosed the final notes from its last proofing sessions to the defence on 16 September 2003, one day before the witness was to testify. As a result the prosecution sought an adjournment (unopposed). In granting the application the Trial Chamber said:

¹² *Prosecutor v. Limaj, Bala, Musliu*, Case No. IT-03-66-T, “Decision on Defence Motion of Prosecution Practice of ‘Proofing Witnesses’” (the “*Limaj Proofing Decision*”), 10 December 2004, p. 2

¹³ *Limaj Proofing Decision*, *supra*, p. 2 and 3.

CONSIDERING that the Defence should not be adversely affected due to the late conclusion of Prosecution proofing sessions and the late disclosure of new information from such sessions; ...

REMINDING the Prosecution that all such proofing sessions of witnesses – particularly witnesses whom it expects to testify at length – should be completed in sufficient time to allow the Defence to consider any new information gathered through such sessions¹⁴ [underlining added]

11. The Trial Chamber recognized that new information, when gathered in proofing sessions, is admissible but it must be disclosed with enough advance notice that the defence has adequate time to consider the new information. The unopposed motion was obviously granted in *Blagojevic*, but the witness went on to testify days later. The disclosure at issue here was given to Sesay at the end of October 2005.¹⁵
12. The defence filed an application and could not find or chose not to cite any authority in support of its position. They also chose to ignore the law established by this tribunal. The prosecution is entitled to conduct proofing sessions and if new information is conveyed, exculpatory or inculpatory, it must be disclosed. If it is relevant it is admissible and where the defence would be unfairly taken by surprise the witness should be stood down.
13. An objection was taken to the use of addendums (another name used for proofing notes at the ICTY) in *Mrksic*.¹⁶ Trial Chamber II made the following observations:

8 It is clearly potentially a difficulty for the Defence if that
 9 notice of any change is given at the last moment. Because of that, this
 10 Chamber would reiterate what it has said in the past to the Office of the
 11 Prosecutor in other trials; that is, that every effort should be made to
 12 identify such changes at a time which enables the Defence to be given
 13 adequate time to investigate and prepare to deal with the change.
 14 There are times when the issues are relatively straightforward and
 15 Defence counsel are able to deal with them almost on the spot without any
 16 difficulty or injustice. There are other times where the change is of

¹⁴ *Prosecutor v. Blagojevic and Jokic*, “Decision On Prosecution’s Unopposed Motion for Two Day Continuance for the Testimony of Momir Nikolic”, 16 September 2003, p. 2

¹⁵ During the October trial session (the Sixth Session) prosecution and defence counsel discussed this matter. Defence counsel indicated that he expected to file a motion and the prosecution advised that it need not be done forthwith and that the prosecution would not call the witness during the 6th Session.

¹⁶ *Prosecutor v. Mrksic Radic Sljivancanin*, Case No. IT-95-13/1-T (Trial Chamber II) (“*Mrksic*”)

17 such significance, perhaps it raises some entirely new version of fact,
18 which does require further investigation. When that occurs, this Chamber
19 certainly holds the view that it would enable a delay, allow a delay in
20 the cross-examination, so that the Defence has time necessary to deal with
21 the change. That can either be by deferring the whole cross-examination
 22 or by deferring cross-examination on that change, whichever is the most
 23 practical as each case occurs.
 24 That is done to ensure that the Defence has been given proper time
 25 to consider a material change and in an appropriate case to investigate

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1 the new story.
 2 By those means, this Chamber will, in this trial, ensure that the
 3 Defence is not unfairly embarrassed by late changes. To avoid that
 4 becoming a constant source of difficulty in the progress of the trial, as
 5 I have indicated, the Prosecution should do what is possible to ensure
 6 that changes are notified in adequate time, and clearly a day or two
 7 before, for serious changes, is unlikely to be an adequate time.
 8 For those reasons, in the assessment of the Chamber, it is to be
 9 anticipated that there may well be further addenda. It has been this
 10 Chamber's experience that they have occurred in every trial they have been
 11 involved in. But by the means indicated, the Chamber will also ensure,
 12 case by case, issue by issue, that the Defence is not improperly
 13 disadvantaged so that the trial will be conducted, in the end, fairly.¹⁷ [underlining
 added]

14. The prosecution is following the established procedure of other international criminal tribunals, it has disclosed the evidence as it is obliged to do, and the defence has failed to show a *prima facie* breach of the prosecutions disclosure obligations under Rule 66(A)(ii) or that there has been a violation of Accused's Article 17(4)(a) and (b) rights.

15. In addition to the law on proofing being settled at the ICTY, so is the law on continuing an investigation after an indictment has been confirmed. In *Halilovic* the defence filed a motion for an order that the Office of the Prosecutor cease all investigation and stop re-interviewing witnesses unless exceptional circumstances exist. The prosecution responded saying "there is nothing in the Rules nor the Statute of the International Tribunal that prevents the Prosecution from continuing its investigations after an indictment is confirmed".¹⁸ The defence motion was denied.¹⁹

¹⁷ *Mrksic, supra*, transcript 8 November 2005, p. 7604-7605.

¹⁸ *Prosecutor v. Halilovic*, Case No. IT-01-48-PT, "Decision on Prosecution's Application for Leave to Disclose Further Material and Defence Renewed Motion to Cease Investigations" ("*Halilovic*"), 20 September 2004, p. 2

¹⁹ *Halilovic, supra*, p. 3.

Allegations in the Motion

16. The information referred to in paragraphs 7 (a) – (e) of the Motion fall within the Prosecution’s case and are part of the factual issues to be proved by the Prosecution for which the Indictment²⁰, the Pre-Trial Brief²¹ and the Supplemental Pre-Trial Brief²² have already provided notice to the defence.

17. The Motion admits that notice of the information referred to in paragraphs 7 (a) – (e) of the Motion had already been given in the Amended Consolidated Indictment, the Pre-Trial Brief and the Supplemental Pre-Trial Brief.²³

18. The Amended Consolidated Indictment, the Pre-Trial Brief and the Supplemental Pre-Trial Brief, all give notice which is more than adequate as to the extent of the accused’s criminality in the acts alleged. These documents give more than enough detail and time to the Defendant to prepare his defence in relation to the matters alleged.

19. In addition to the wider criminal acts for which notice was given, the more specific facts of the Accused’s criminality for which he has also had notice, and which are in tandem with the matters characterised in the Motion as new, are as follows:

- i) Paragraphs 20-23 of the Amended Consolidated Indictment identify the Accused and describe his leadership role within the RUF, in particular the extent of his powers, authority and influence among colleagues and over subordinates;
- ii) Paragraphs 34 and 35 of the Amended Consolidated Indictment show the Accused’s association with other senior RUF and AFRC leaders as well as

²⁰ Amended Consolidated Indictment dated 13 May 2004 – Para. 20, 21, 22, 23, 34, and 35.

²¹ Prosecution’s Pre-Trial Brief dated 27 February 2004 – Para. 43, 99, 100, 144, 145, 146 and 165.

²² Prosecution’s Supplemental Pre-Trial Brief dated 21 April 2004 – Para. 37(g), 38 (j) and 45 (b-c).

²³ Motion, paras. 9 and 10.

Charles Taylor of Liberia and states that he acted in concert with them in the pursuit of the criminal acts alleged;

iii) Paragraphs 99 -100 of the Pre-Trial Brief provide notice of intention to show the link between senior RUF/AFRC leaders and Charles Taylor of Liberia particularly in relation to the supply of arms and ammunition for their operations;

iv) Paragraphs 144-146 of the Pre-Trial Brief further describe the leadership role of the Accused and reinforces the extent of his powers, authority and influence;

v) Paragraph 37 (g) of the Supplemental Pre-Trial Brief gives notice of the Prosecution's intention to prove that senior AFRC/RUF leaders held meetings in Kono and Kailahun Districts after the ECOMOG intervention for purposes forming a command structure to defend Kono District;

vi) Paragraph 38 (j) of the Supplemental Pre-Trial Brief gives notice of intention to prove that the Accused travelled to Liberia with Mosquito after the intervention for the purpose of acquiring arms and ammunition;

vii) Paragraph 45 (b) of the Supplemental Pre-Trial Brief provides notice of the fact that Kailahun was a base used by the AFRC/RUF leadership after the intervention by ECOMOG. It was also their point of contact with Liberia;

viii) Paragraph 45 (c) of the Supplemental Pre-Trial Brief gives notice of the Prosecution's intention to prove that there were meetings of senior AFRC/RUF leaders in Kailahun post the intervention period with a view to establishing a command structure.

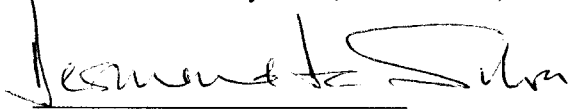
Prosecution's further submissions

20. The prosecution says that the defence has not shown a *prima facie* breach of Rule 66(a)(ii) or Article 17(4)(a) and (b). But if we assume for a moment that the information is new evidence, and not as the prosecution says "...building-blocks ... forming the factual substratum of the charges in the Indictment...",²⁴ it is obvious (particularly when compared to the ICTY where only a few days notice of new evidence is given) that the defence has had and continue to enjoy adequate notice to investigate and defend these allegations.²⁵ The prosecution notes that relevance has not been put in issue and the information complained of is admissible. The defence have had ample time to investigate the information and the law is settled on this point as a result of four prior decisions in this trial, three of those motions having been commenced by this accused.²⁶ In such circumstances the application is frivolous and should not have been brought before the Trial Chamber. The Prosecutor asks the Trial Chamber to impose a remedy under Rule 46(C).²⁷

Conclusion

21. The Trial Chamber's previous decisions make the law clear. The Motion should be dismissed.

Filed on 23 January 2006, at Freetown, Sierra Leone.



Desmond de Silva, Q.C.

²⁴ *Ruling of TF1-361*, at para. 29(v).

²⁵ TF1-117 is scheduled to testify in the up-coming 7th trial session. He is listed as the 2nd witness.

²⁶ *Ruling on TF1-060, supra, Ruling on TF1-141, supra, Ruling on TF1-361, supra.*

²⁷ Rule 46(C) states:

Counsel who bring motions, or conduct other activities, that in the opinion of a Chamber are either frivolous or constitute abuse of process may be sanctioned for those actions as the Chamber may direct. Sanctions may include fines upon counsel; non-payment, in whole or in part, of fees associated with the motion or its costs, or such other sanctions as the Chamber may direct.

Index of Authorities

A. Orders, Decisions and Motions

1. *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T (7263-7270), “Ruling on Oral Application for the Exclusion of ‘Additional’ Statement for Witness TF1-060”, 23 July 2004.
2. *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T (7271-7276), “Ruling on the Oral Application for the Exclusion of Part of the Testimony of Witness TF1-199”, 26 July 2004.
3. *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T (10211-10220), “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.
4. *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T (12018-12030), “Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122”, 1 June 2005.
5. *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, “Decision on Disclosure of Witness Statements and Cross-Examination”, 16 July 2004.
6. *Prosecutor v. Limaj, Bala, Musliu*, Case No. IT-03-66-T, “Decision on Defence Motion of Prosecution Practice of ‘Proofing Witnesses’” (the “*Limaj Proofing Decision*”), 10 December 2004.
7. *Prosecutor v. Blagojevic and Jokic*, “Decision On Prosecution’s Unopposed Motion for Two Day Continuance for the Testimony of Momir Nikolic”, 16 September 2003.
8. *Prosecutor v. Halilovic*, Case No. IT-01-48-PT, “Decision on Prosecution’s Application for Leave to Disclose Further Material and Defence Renewed Motion to Cease Investigations” (“*Halilovic*”), 20 September 2004.

B. Rules of Procedure and Evidence

Rules of Procedure and Evidence of the Special Court, Rules 46(C), 66, 89.

C. Transcript

Prosecutor v. Mrksic Radic Sljivancanin, Case No. IT-95-13/1-T (Trial Chamber II), transcript 8 November 2005, p. 7604-7605.