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SCSL-04-15-T

(24786 - 24792)

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

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 27 July 2006

**THE PROSECUTOR**

**Against**

**Issa Hassan Sesay  
Morris Kallon  
Augustine Gbao**

Case No. SCSL-04-15-T

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**PUBLIC**  
**PROSECUTION REPLY TO THE JOINT RESPONSE TO THE PROSECUTION  
MOTION TO ADMIT INTO EVIDENCE A DOCUMENT REFERRED TO IN CROSS-  
EXAMINATION**

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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

SPECIAL COURT FOR SIERRA LEONE  
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## I. INTRODUCTION

1. On 11 July 2006 the Prosecution filed its “Prosecution Motion to Admit Into Evidence a Document Referred to in Cross-Examination”<sup>1</sup> (the “Motion”), asking the Trial Chamber to admit into evidence the report of the UNAMSIL Headquarters Board of Inquiry 00/19 (the “Report”). The “Defence Joint Response” (the “Joint Response”)<sup>2</sup> states that the Prosecution breached its disclosure obligation by failing to disclose the Report at an earlier date. This is incorrect.
2. The Report was received by the Prosecution pursuant to Rule 70, in particular Rule 70(B), which states:

(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.<sup>3</sup>

<sup>1</sup> *Prosecutor v. Sesay Kallon Gbao*, SCSL-04-15-T-594, “Prosecution Motion to Admit Into Evidence a Document Referred to in Cross-Examination”, 11 July 2006.

<sup>2</sup> *Prosecutor v. Sesay Kallon Gbao*, SCSL-04-15-T-607, “Joint Defence Response to Prosecution Motion to Admit Into Evidence a Documents Referred to in Cross-Examination”, 21 July 2006.

<sup>3</sup> In its entirety Rule 70 reads as follows:

**Rule 70: Matters not Subject to Disclosure**

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. The consent shall be in writing.

(D) If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.

(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to limitations contained in Sub-Rules (C) and (D).

(F) Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber's power to exclude evidence under Rule 95.

3. The Prosecutor sought consent to disclose the document and that consent was given by letter dated 9 May 2006. Attached as Appendix A is a copy of the consent letter from the United Nations.
4. The Report could not be disclosed prior to obtaining the consent of the UN, and upon receiving such consent the Report was promptly disclosed to the accused on 17 May 2006. There has been no breach of Rule 66 or Rule 68.

## II. APPLICATION OF RULE 89(C)

5. The Defence chose to cross-examine a witness about the Report. The Trial Chamber is composed of professional judges who can assess what weight, if any, should be given to any piece of evidence. Rule 89 (C) is broadly worded: "A Chamber may admit any relevant evidence." This version of the Rule is more broadly worded than the corresponding Rule of the ICTY and ICTR, which states: "A Chamber may admit any relevant evidence which it deems to have probative value."<sup>4</sup> The Prosecution says that by virtue of the accused questioning a witness about the Report, the Report itself is relevant evidence which the Trial Chamber is entitled to review in its entirety to appreciate the full context of the evidence.
6. The Joint Response refers to annexes to the Report. Pursuant to its ongoing disclosure obligations, the Prosecution delivered the Report and a voluminous package of annexes. The annexes amount to over 350 pages. No reference was made to any specific annex during cross-examination, and they were not made relevant by the cross-examination. For this reason the Prosecution did not seek to have them admitted along with the Report. All of the annexes were disclosed to the Defence at the time that the Report was disclosed on 17 May 2006.
7. The Defence suggests that had the Prosecution re-examined the witness on the document in court, then the Defence would have had the opportunity to re-cross-examine the

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<sup>4</sup> *Rules of Procedure and Evidence of the Special Court of Sierra Leone*, as amended 13 May 2006, Rule 89(C).

witness on the Report.<sup>5</sup> There is no right to re-cross-examine and the Defence would not have been permitted to do so. Rule 85 (B) states that:

(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine him in chief, but a Judge may at any stage put any question to the witness.

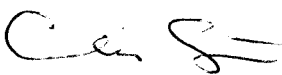
8. Similarly, there can be no question of re-calling the witness as the very document in question was raised only during the cross-examination of the witness.
9. The two authorities relied on in the Joint Response are based upon rules of evidence that were more narrowly drafted than Rule 89 (C). Questions of reliability, authenticity or probative value are not part of the assessment undertaken by the court when determining admissibility under Rule 89 (C).
10. The Trial Chamber's mandate to determine the truth is not assisted when the evidence is left incomplete. Specific questioning took place about a document, and the document should become an exhibit in the trial so that the Trial Chamber can assess it in its full context.

## II. CONCLUSION

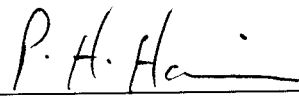
13. The Prosecution says that the Report should be admitted into evidence pursuant to Rule 89 (C) and asks that the Motion be granted.

Filed in Freetown, on 27 July 2006

For the Prosecution,



Christopher Staker  
Acting Prosecutor



Peter Harrison

<sup>5</sup> *Prosecutor v. Sesay Kallon Gbao*, SCSL-04-15-T-607, "Joint Defence Response to Prosecution Motion to Admit Into Evidence a Documents Referred to in Cross-Examination", 21 July 2006, para. 2.

## Index of Authorities

### A. Rules of Procedure and Evidence

1. Rules of Procedure and Evidence of the Special Court, Rules 85, 89, as amended 13 May 2006.

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**Appendix A of the Reply**

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UNITED NATIONS  NATIONS UNIES

POSTAL ADDRESS: ADRESSEPOSTALE UNITED NATIONS, N.Y. 10017  
CABLE ADDRESS: ADRESSETELEGRAPHIQUE UNATIONS NEWYORK

REFERENCC:

9 May 2006

Dear Mr. de Silva,

I wish to refer to your letter dated 18 April 2006 to Mr. Guehenno in which you request that two UNAMSIL Headquarters Board of Inquiry Reports (BOI 00/019 and BOI 00/022), previously provided to you under Rule 70 (B) of the Special Court's Rules of Procedure and Evidence, be released from their confidentiality restrictions so that they can be used as evidence before the Special Court in relation to the testimony of two former Military Observers who are testifying on behalf of the Prosecution in the case of *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* ("the RUF trial").

The United Nations has reviewed the above-mentioned BOIs and we would like to inform you that we have no objection to their release from their confidentiality restrictions so that they can be used as evidence in the above-mentioned trial.

Yours sincerely,



Nicolas Michel  
Under-Secretary-General for Legal Affairs  
The Legal Counsel

Mr. Desmond de Silva, Q.C.  
Prosecutor  
Special Court for Sierra Leone  
Freetown

cc: Mr. Jean-Marie Guehenno