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SCSL-04-15-T  
(18557-18562)

18557

**THE SPECIAL COURT FOR SIERRA LEONE**

**BEFORE:**

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

Registrar: Mr. Lovemore Green Munlo, SC

Date filed: 3<sup>rd</sup> May 2006

**The Prosecutor**

-v-

**Issa Hassan Sesay**

**Case No: SCSL – 04 – 15 – T**

**Public**

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**DEFENCE MOTION TO REQUEST THE TRIAL CHAMBER TO RULE  
THAT THE PROSECUTION'S MOULDING OF THE EVIDENCE IS  
IMPERMISSIBLE AND A  
BREACH OF ARTICLE 17 OF THE STATUTE OF THE SPECIAL COURT**

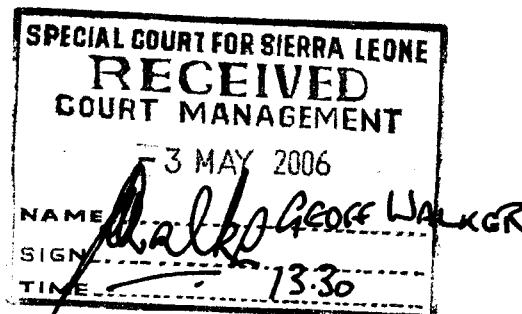
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**Office of the Prosecutor**

Desmond De Silva QC  
Christopher Staker  
James C Johnson  
Peter Harrison

**Defence**

Wayne Jordash  
Sareta Ashraph  
Chantal Refahi



**Moulding of the case (“Trial by Ambush”)**

1. It is submitted that the Prosecution have continued to investigate by re-interviewing their existing witnesses. The overriding objective of these investigations has been to “mould” their case to suit the evidence as it unfolds. The continuous investigation has taken place during so-called proofing sessions before the witnesses are called to testify before Trial Chamber I. The re-interviewing has involved the deliberate pursuit of more factual allegations designed to bolster their case.
2. The Defence allege that this improper practice involves a three stage course of conduct;

**Stage 1**

- a) The first stage involves the analysis of the success (or otherwise) of the Defence challenge to its evidence and in particular the effectiveness of cross-examination.

**Stage 2**

- b) The second stage involves the re-interviewing of any remaining witnesses to obtain supplementary factual allegations.

**Stage 3**

- c) The third stage involves the production of “additional information” (so – called proofing notes) which correspond to the objectives of the re-interviewing process.

**Submissions on the improper practice**

3. Whilst it is acceptable to investigate throughout the trial and to “proof” witnesses<sup>1</sup> it is, as noted by Trial Chamber I in the present case, unacceptable

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<sup>1</sup> *Prosecutor v. Limaj, Bala, Musliu*, IT-03-66-T, “Decision on Defence Motion of Prosecution Practice of Proofing Witnesses”, Trial Chamber, 10<sup>th</sup> December 2004, pp.2.

to mould the case during the trial according to how the evidence unfolds.<sup>2</sup> Proofing ought to be clarification of evidence. It is not a practice, which is designed to allow the moulding of the factual allegations throughout the course of the prosecution case.

4. The improper practice has allowed the Prosecution to continuously bolster their factual case to fit the evidence as it unfolds<sup>3</sup>.
5. In a number of Decisions following the various Defence Applications for the Exclusion of Evidence,<sup>4</sup> the Trial Chamber has ruled (to the effect) that factual allegations are admissible whenever they are disclosed, provided they fall within the broad parameters of the Indictment (as assessed through the temporal, geographical and subject matter of the counts). However the Trial Chamber has not ruled that the “moulding” of the evidence is permissible. Conversely, as noted in paragraph 3 above, the Trial Chamber has specifically prohibited the practice.
6. In three separate pleadings the Defence have raised this allegation.<sup>5</sup> The Prosecution have refused on three separate occasions to address it. The Prosecution have scrupulously avoided either admitting or denying the

<sup>2</sup> *Prosecutor v. Sesay*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment; 13<sup>th</sup> October 2003, Para. 33 & Supra. Para. 11 & *Prosecutor v. Kupreskic*, Appeal Judgement, Case No. IT-95-16-A, 23<sup>rd</sup> October 2001, Para. 82; <sup>2</sup> *Prosecutor v. Brdanin and Talic*, IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26<sup>th</sup> June 2001, Para. 11.

<sup>3</sup> The Prosecution’s continued transfer of witnesses between the so-called back up and core list has exacerbated the impact of the improper process. Ultimately the two processes have been used to and are obtaining the optimal presentation of the factual case, not though fair means but through the moulding of the factual allegations according to their assessment of which counts require additional support.

<sup>4</sup> See for example *Prosecutor v. Sesay*, SCSL-04-15-T, Ruling on Oral Application for the Exclusion of “Additional” Statement for Witness TF1-060, 23<sup>rd</sup> July 2004 (7263 – 7270); Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122 (12018-12030), 1<sup>st</sup> June 2005; Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 Dated Respectively 9<sup>th</sup> October 2004, 19<sup>th</sup> and 20<sup>th</sup> of October 2004 and 10<sup>th</sup> January 2005 (10211-10220), 3<sup>rd</sup> February 2005.

<sup>5</sup> See Defence Motion Requesting the Exclusion of Paragraphs 1,2,3,11 and 14 of the Additional Information Provided by Witness TF1-117, Dated 25<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup> and 28<sup>th</sup> October 2005, (17128 – 17137) Defence Motion Requesting the Exclusion of Evidence (as Indicated in Annex A) arising from the Additional Information Provided by Witness TF1-168 (14<sup>th</sup>, 21<sup>st</sup> January and 4<sup>th</sup> February 2006), TF1-165 (6<sup>th/7th</sup> 2006) and TF1-041 (9<sup>th</sup>, 10<sup>th</sup>, 13<sup>th</sup> February 2006, 23<sup>rd</sup> February 2006)(18142-18157), page 1, Para. 1) and *Prosecutor v. Sesay, Kallon, Gbao*, SCSL – 2004-15-T-518, “Public Sesay Defence Response to Prosecution Request for Leave to Call Additional Witnesses and for Order for Protective Measures pursuant to Rules 69 and 73 bis(E)”, 20<sup>th</sup> March 2006, Para. 8 & 9.

allegation. It has sought to disguise its prohibited conduct by circumventing the substance of the allegation. This is illustrated in the following Prosecution Response,<sup>6</sup>

“In paragraph 8-9 of the Sesay Response, the Defence seizes the opportunity to repeat its ongoing allegation that the Prosecution is engaged in an “improper practice” of moulding its case as the evidence unfolds and states that the Prosecution has refused on two separate occasions to admit or deny the allegation. The Defence goes on to make the groundless assumption that the Prosecution intends to then call the additional witness at the end of the Prosecution case to plug the gaps in the case... The Prosecution is not seeking any improper tactical advantage.”

7. Clearly the Prosecution cannot justifiably complain about the repetitiveness of the allegation whilst simultaneously and repeatedly refusing to address the substance of it. Notwithstanding the complaint that the Defence have seized another opportunity to repeat the allegation, the Prosecution fail – for the third time – to admit or deny it. The Defence have no wish to be repetitive but Counsel for the Defence has a duty to raise allegations, which it considers to be inimical to a fair trial. The Prosecution have a corresponding duty to either deny or admit the substance of the allegation.
  
8. It is submitted that this abject failure to address this serious allegation of impropriety is inconsistent with the Prosecution’s putative role as Ministers of Justice. As noted by the President of the Special Court, His Lordship Raja Fernando, “In *Prosecutor v. Barayagwiza* Judge Shahabuddeen said of prosecuting counsel that they “ought to bear themselves rather in the character of ministers of justice assisting the administration of justice”. This statement applies to prosecuting Counsel but it provides some insight into the role of the Prosecution in the ad hoc tribunals”.<sup>7</sup>

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<sup>6</sup> Prosecution Reply to Defence Responses to Request for Leave to Call Additional Witness and For Order for Protective Measures Pursuant to Rules 69 and 73 bis (E), 27<sup>th</sup> March 2006 (18416-18427), Para. 10.


<sup>7</sup> *Prosecutor v. Barayagwiza*, ICTR-97-19-A, Separate Opinion of Judge Shahabuddeen, 31 March 2000 at 68.

9. The Prosecution thus have an irrevocable duty to respond to allegations which suggest that they have behaved improperly or which allege practices which have been explicitly prohibited by Trial Chamber I.<sup>8</sup>
10. It is difficult to conceive how a Prosecutor could engage knowingly and systematically in a procedure, which has been prohibited by the Trial Chamber, whilst acting in good faith. It is submitted that this, if proven or admitted, would *prima facie* be evidence of bad faith. Moreover any ongoing attempt to obfuscate this conduct, by failing to admit or deny allegations of impropriety, would be powerful evidence of bad faith.

### **Request**

11. In light of the Trial Chamber's explicit prohibition (as regards the practice of the moulding of evidence during the trial), the Defence respectfully submit that:
- (a) The Prosecution owe a duty to the Defence, the Court and the administration of justice, to either refute or admit the explicit allegation that they are engaged in a practice of moulding their evidence to suit the defence challenge as the evidence unfolds (see paragraph 1 above for the procedure alleged) and,
- (b) The Trial Chamber should rule on whether it considers the practice – if admitted or found proven – to be permissible.

Dated 3<sup>rd</sup> May 2006



Wayne Jordash  
Sareta Ashraph  
Chantal Refahi

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<sup>8</sup> See footnote 2.

**Book of Authorities**

*Prosecutor v. Limaj, Bala, Musliu*, IT-03-66-T, “Decision on Defence Motion of Prosecution Practice of Proofing Witnesses”, Trial Chamber, 10th December 2004 (available on ICTY website)

*Prosecutor v. Sesay*, SCSL-2003-05-PT-080, “Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment”; 13th October 2003 (1602-1619)

*Prosecutor v. Kupreskic*, Appeal Judgement, Case No. IT-95-16-A, 23rd October 2001 (available on ICTY website)

*Prosecutor v. Brdanin and Talic*, IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26th June 2001 (available on ICTY website)

*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-461, “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”, 12 January 2006 (17128 – 17137)

*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-493, “Defence Motion Requesting the Exclusion of Evidence (as Indicated in Annex A) arising from the Additional Information Provided by Witness TF1-168 (14th, 21st January and 4th February 2006), TF1-165 (6th/7th 2006) and TF1-041 (9th, 10th, 13th February 2006), 23rd February 2006 (18142-18157)

*Prosecutor v. Sesay, Kallon, Gbao*, SCSL – 2004-15-T-518, “Public Sesay Defence Response to Prosecution Request for Leave to Call Additional Witnesses and for Order for Protective Measures pursuant to Rules 69 and 73 bis(E)”, 20th March 2006

*Prosecutor v Sesay, Kallon, Gbao* SCSL-04-15-T-523, Prosecution Reply to Defence Responses to Request for Leave to Call Additional Witness and For Order for Protective Measures Pursuant to Rules 69 and 73 bis (E), 27th March 2006 (18416-18427)

*Prosecutor v. Barayagwiza*, ICTR-97-19-A, Separate Opinion of Judge Shahabuddeen, 31 March 2000 (available on ICTR website).

*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T- 211, Ruling on Oral Application for the Exclusion of “Additional” Statement for Witness TF1-060, 23rd July 2004 (7263 – 7270)

*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-396, Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122 (12018-12030), 1st June 2005

*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-314, 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).