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SCSL-04-15-T  
(24033 - 24041)

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

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 10 July 2006

**THE PROSECUTOR**

**Against**

**Issa Hassan Sesay**  
**Morris Kallon**  
**Augustine Gbao**

Case No. SCSL-04-15-T

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**PUBLIC**

**PROSECUTION RESPONSE TO SESAY MOTION FOR A RULING THAT THE  
DEFENCE HAS BEEN DENIED CROSS-EXAMINATION OPPORTUNITIES**

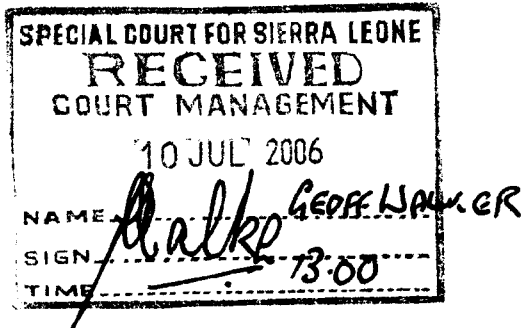
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## I. INTRODUCTION

1. The Prosecution files this Response to the “Motion for a Ruling that the Defence has been Denied Cross-Examination Opportunities” filed on behalf of the First Accused on 29 June 2006 (“**Motion**”).<sup>1</sup>
2. In its Motion, the Defence seeks 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”,<sup>2</sup> i.e. that the Defence is entitled to recall Prosecution witnesses who have already testified so that they may be cross-examined with respect to factual allegations that were disclosed subsequent to their testimony.
3. The Prosecution submits that the Motion should be dismissed on the ground that the relief it requests is abstract and hypothetical, and on the ground that the broad and general nature of the arguments contained in the Motion do not establish a proper basis for granting any relief.

## II. ARGUMENT

4. The Defence for Sesay has on numerous previous occasions filed motions seeking the exclusion of certain supplementary statements obtained from Prosecution witnesses during proofing, on the ground that they contain material going beyond their original witness statements. The decisions of the Trial Chamber on these Defence motions have articulated and applied principles for determining the admissibility of supplementary statements of Prosecution witnesses obtained during proofing. In application of these principles, the Trial Chamber has on various occasions rejected Defence motions seeking the exclusion of material contained in such supplemental statements of witnesses on the ground that such material constituted new evidence.<sup>3</sup>

<sup>1</sup> *Prosecutor v. Sesay Kallon Gbao*, SCSL-04-15-T-588, “Motion for a Ruling that the Defence has been Denied Cross-Examination Opportunities”, 29 June 2006 (“**Motion**”).

<sup>2</sup> Motion, para. 3, emphasis in the original.

<sup>3</sup> See, for instance, *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-211, “Ruling on Oral Application for the Exclusion of ‘Additional’ Statements for Witnesses TF1-060”, 23 July 2004, rejecting a Defence complaint that a supplemental statement taken from a witness during proofing “cannot, in law, be considered as an addition to or clarification of, the original statement previously disclosed by the Prosecution ... but ... it is in essence a new statement from the witness alleging entirely new facts”, at para. 3; SCSL-04-15-T-314, “Ruling on Oral Application for the Exclusion of Statements of Witnesses TF1-141 Dated Respectively 9<sup>th</sup> October 2004, 19<sup>th</sup> and 20<sup>th</sup> October 2004 and 10<sup>th</sup> January 2005”, 3 February 2005, rejecting a Defence complaint that a supplemental statement taken

5. The Motion states clearly that it does not seek to circumvent these rulings.<sup>4</sup> However, the Motion argues that as a result of these decisions, the Defence has suffered prejudice because “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 latter allegations through cross-examination of earlier witnesses”.<sup>5</sup>
6. If the requested “ruling of principle” is made by Trial Chamber, the Defence requests an expedited timetable obligating it to identify the witnesses it would seek to have recalled and the reasons for that request.<sup>6</sup> It is unclear whether the Motion intends that the Defence would have the right, following the “ruling of principle”, to recall whichever witnesses it chooses, or whether the Motion concedes that the Defence would still have to establish good cause in relation to each of the individual witnesses that it seeks to have recalled.
7. The Motion appears to suggest that there are special rules that apply to the recalling of witnesses in circumstances where the Defence claims that this is necessary due to the fact that it was only after the witness testified that the Prosecution disclosed to the Defence a supplemental statement of another witness containing facts that the Defence would have liked to have put to the earlier witness in cross-examination. The Prosecution submits that there are no special rules relating to the recalling of witnesses in such circumstances. The Prosecution submits that a party seeking to have a witness recalled must establish good cause.<sup>7</sup> The question whether good cause has been established is one that can only

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from a witnesses during proofing “could not be characterised as congruent in material respects with the original statement”, at para. 9; SCSL-04-15-T-396, “Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and TF1-122”, 1 June 2005, rejecting a Defence complaint that supplemental statements taken from witnesses during proofing “contain[ed] wholly new allegations against Issa Sesay which did not form part of these witnesses’ respective original statements”, at para. 3; SCSL-04-15-T-496, “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, rejecting a Defence complaint that supplemental statements taken from witnesses during proofing “ought to be characterised as new evidence”, at para. 3.

<sup>4</sup> Motion, para. 3.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid., para. 20.

<sup>7</sup> See *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, “Decision on the Prosecution Motion to Recall Witness Nyanjwa”, Trial Chamber, 29 September 2004, para. 6 (footnotes omitted); *Prosecutor v. Simba*, ICTR-01-76-T, “Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination”, Trial Chamber, 28 October 2004, para. 5; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, “Decision on the Defence Motion to Recall Prosecution Witness OAB for Cross-Examination”, Trial Chamber, 19 September 2005, para. 2. See also *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, “Decision on the Defence Motion for the Re-Examination of Witness DE”, Trial Chamber, 19 August 1998, para. 14.

be determined on a case-by-case basis, in relation to each individual witness, based on all of the circumstances pertaining in relation to that witness.

8. The Prosecution submits in particular that the recall of witnesses for *further cross-examination* is particularly exceptional. In the ICTR case of *Bagosora*,<sup>8</sup> the defence filed a motion before the Trial Chamber to recall a prosecution witness for cross-examination who had made additional statements to the prosecution *after* his testimony. These statements had been disclosed to the defence and the defence wished to cross-examine on contradictions between the statements and the testimony, as well as new allegations against the accused Nsengiyumva, which, in the view of the defence, showed that the witness had given false testimony. The Trial Chamber reiterated the standard for recalling a witness as being one of demonstrating good cause:

A party seeking to recall a witness must demonstrate good cause, which previous jurisprudence has defined as a substantial reason amounting in law to a legal excuse for failing to perform a required act. In assessing good cause, the Chamber must carefully consider the purpose of the proposed testimony as well as the party's justification for not offering such evidence when the witness originally testified. The right to be tried with[out] undue delay as well as concerns of judicial economy demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature.<sup>9</sup>

9. The Trial Chamber then elaborated upon the principles to be applied as follows:

The Defence may draw the Chamber's attention to inconsistencies between testimony of witnesses before this Chamber and any declarations obtained subsequently. If prejudice can be shown from its inability to put these inconsistencies to the witness, the Defence may submit motions for their recall; if there is no need for the witness's explanation of the inconsistency, because the inconsistency is minor or its nature is self-evident, then the witness will not be recalled.<sup>10</sup>

10. In reaching its conclusion that the defence motion should be denied, the Trial Chamber analysed whether, on the basis of the facts set out by the defence, further cross-examination was necessary to clarify inconsistencies. The new allegations were found not to constitute evidence against the accused and therefore did not prejudice him. The

<sup>8</sup> *Prosecutor v Bagosora et al.*, ICTR-98-41-T, "Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination", 19 September 2005.

<sup>9</sup> *Ibid.*, para. 2, referring to *Prosecutor v Bagosora et al.*, "Decision on the Prosecution Motion to Recall Witness Nyanjwa", 29 September 2004, para. 6 and *Prosecutor v Kayishema and Ruzindana*, "Decision on the Defence Motion for the Re-examination of Defence Witness DE", August 1998, para. 14.

<sup>10</sup> *Ibid.*, para. 3, referring to *Prosecutor v Bagosora et al.*, "Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of prosecution Witnesses", 16 December 2003, para. 8.

Trial Chamber noted that its conclusion was in conformity with the right to a fair trial and the right of the accused to examine witnesses testifying against him, as well as the case law.

11. In a previous decision in the same case, the Trial Chamber had indicated that the good cause test to be applied where a party sought to recall a witness was similar to that applicable to applications to add witnesses or to call rebuttal evidence.<sup>11</sup> In that instance, the prosecution sought to recall one of its own witnesses and the application was denied on the basis that the proposed supplementary evidence did not materially or significantly advance an aspect of the prosecution's case. The evidence was found to be cumulative as it did not respond to any new defence evidence but simply confirmed and re-emphasized aspects of the witness's previous conclusions.
12. In the *Kajelijeli* case,<sup>12</sup> the ICTR Trial Chamber allowed a defence request to recall a prosecution witness. However, this was in circumstances where, after the witness had testified before the ICTR, the defence obtained statements made by the witness to the Rwandan authorities prior to his testimony. The Chamber accepted that although the witness had been fully examined, he should be recalled to answer questions on the alleged discrepancies between the prior statements and his testimony before the Tribunal in order to test his credibility. Notably the prosecution was permitted to ask additional questions in re-examination.
13. The present Motion is concerned with the circumstance where the Prosecution has disclosed to the Defence, after a witness has testified, a supplemental statement of another witness containing facts that the Defence would have liked to have put to the earlier witness in cross-examination. The fact that such a circumstance pertains may be relevant in determining whether there is good cause for permitting the Defence to recall the witness. However, this circumstance alone cannot necessarily be sufficient to establish good cause. In determining whether good cause exists for recalling the witness, the Trial Chamber would also need to consider all other relevant factors, such as whether the additional matters that the Defence wishes to put to this witness are material and

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<sup>11</sup> *Prosecutor v Bagosora et al.*, ICTR-98-41-T, "Decision on the Prosecution Motion to Recall Witness Nyanjwa", 29 September 2004, footnote 4.

<sup>12</sup> *Prosecutor v Kajelijeli*, ICTR-98-44A-T, "Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness Gao", 2 November 2001.

probative, whether any inconsistencies that the Defence wishes to put to the witness are minor or self-evident, the nature of the prejudice to the Defence if the witness were not recalled, and whether the additional matters that the Defence wishes to put to the witness are matters which were already known to the Defence, or ought to have been known to the Defence, at the time that the witness first testified. A further question would be whether the Defence acted with due diligence in seeking to apply to have the witness recalled. In this respect it is submitted that there is an obligation on counsel to raise issues in a timely manner.<sup>13</sup>

14. A decision of the Trial Chamber to recall a witness could therefore only be made on the basis of a motion setting out all of the relevant circumstances in relation to each of the witnesses sought to be recalled. The Trial Chamber cannot, and cannot be expected to, grant relief in the abstract. The Motion in this instance should be dismissed on the basis that it fails to make a request upon which relief can be granted, is too general or speculative to constitute a proper request for relief, and does not raise specific issues upon which it is appropriate for the Trial Chamber to make determinations.<sup>14</sup> It would of course be open to the Defence to raise specific issues if and/or when they arise during the course of the proceedings.<sup>15</sup>
15. The only witness identified in Motion as one of the witnesses that the Defence seeks to recall is Witness TF1-125. However, the Motion is not framed as an application to recall Witness TF1-125 and the scenario in relation to witnesses TF1-122 and TF1-125 that is presented by the Defence appears to be intended only to be illustrative. The Prosecution reserves its right to respond fully to any eventual motion in relation to specific witnesses that is framed and argued as a motion to recall witnesses.

### III. CONCLUSION

16. For these reasons the Prosecution submits that the Motion should be dismissed.

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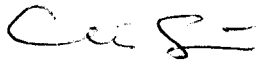
<sup>13</sup> See *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, “Judgement”, Trial Chamber, 21 May 1999, para. 64.

<sup>14</sup> *Prosecutor v Milosevic*, IT-02-54-T, “Order on Admission of Documents (Including Exhibits of Witnesses Kosta Mihajlovic and Cedomir Popov) and Decision on Prosecution Motion Regarding Exhibits and Other Practicalities During the Defence Case”, 7 February 2005.

<sup>15</sup> *Ibid.*

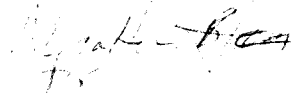
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10 July 2006

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Peter Harrison

Index of Authorities

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(<http://69.94.11.53/ENGLISH/cases/KayRuz/judgement/index.htm>).



*Prosecutor v Milosevic*, IT-02-54-T, “Order on Admission of Documents (Including Exhibits of Witnesses Kosta Mihajlovic and Cedomir Popov) and Decision on Prosecution Motion Regarding Exhibits and Other Practicalities During the Defence Case”, 7 February 2005 (<http://www.un.org/icty/milosevic/trialc/order-e/050207.htm>).