



SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER II

Before: Justice Teresa Doherty, Presiding Judge
Justice Richard Lussick
Justice Julia Sebutinde

Registrar: Robin Vincent

Date: 16 June 2005

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-T)

DECISION ON JOINT DEFENCE MOTION ON ADMISSIBILITY OF EXPERT WITNESSES/EXPERT EVIDENCE AND FILING OF NOTICE PURSUANT TO RULE 94bis (B)(i) and (ii), ON RE-FILED DEFENCE REQUEST FOR DISCLOSURE, AND ON THE JOINT DEFENCE MOTION FOR EXCLUSION OF MEDICAL INFORMATION, STATISTICS AND ABSTRACTS PERTAINING TO WITNESSES TF1-081 AND TF1-188

Office of the Prosecutor:
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Kojo Graham

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Mohamed Pa-Momo Fofanah

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Carry Knoops
Abibola E. Manley-Spaine

SPECIAL COURT FOR SIERRA LEONE	
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TRIAL CHAMBER II (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”), composed of Justice Teresa Doherty, presiding, Justice Richard Lussick and Justice Julia Sebutinde;

SEISED of the Joint Defence Motion on Admissibility of Expert Witnesses/Expert Evidence and Filing of Notice pursuant to Rule 94bis (B)(i) and (ii) filed jointly by Defence Counsel for the Accused Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu on 7 March 2005, (“the First Motion”)¹;

AND of the Re-filed Defence Request for Disclosure filed by Defence Counsel for the Accused Alex Tamba Brima on 9 March 2005 (“the Defence Request”)²;

AND of the Confidential Joint Defence Motion for Exclusion of Medical Information, Statistics and Abstracts Pertaining to Witness TF1-018 and Witness TF1-188, filed jointly by Defence Counsel for the Accused Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu on 14 March 2005 (“the Second Motion”)³;

CONSIDERING also the Prosecution Letter to Brima Defence regarding Disclosure in relation to Witness TF1-081 filed on 4 March 2005⁴; the Brima Response to Prosecution’s Letter of 4 March 2005 in Response to Request for Disclosure, filed by Defence Counsel for the Accused Alex Tamba Brima on 4 March 2005⁵; the Prosecution Letter Regarding the Re-filed Defence Request for Disclosure filed on 6 April 2005⁶ and the Prosecution Response to Joint defence Motion on Admissibility of Expert Witnesses/Evidence and Filing of Notice Pursuant to Rule 94bis (B)(i) and (ii) filed on 8 March 2005 (“the Prosecution Response to the First Motion”)⁷; and the oral arguments of the parties heard by consent, in open court on 16 March 2005⁸;

MINDFUL of the provisions of Rule 66, 68, 70 and 94bis of the Rules of Procedure and Evidence of the Special Court (“the Rules”);

HEREBY DECIDES the First Motion, Second Motion and the Defence Request.

I. INTRODUCTION

1. Witness TF1-081 and Witness-188 are both medical doctors who are set to testify some time in the near future as protected witnesses on behalf of the Prosecution in the case of the *Prosecutor v. Alex Tamba Brima et al*⁹. The Prosecution in the said case has disclosed a number of pre-trial statements with regard to each of the said witnesses to the Defence pursuant to Rule 66 of the Rules of Procedure and Evidence of the Special Court. The Defence takes exception to the fact that although the Prosecution has indicated that it does not intend to call these as “experts” but rather as witnesses of fact, their pre-trial statements contain information, statistics and abstracts that amounts to “expert

¹ Document No. SCSL-2004-16-PT-172.

² Document No. SCSL-2004-16-PT-178.

³ Document No. SCSL-2004-16-PT-189.

⁴ Document No. SCSL-2004-16-PT-170.

⁵ Document No. SCSL-2004-16-PT-171.

⁶ Document No. SCSL-2004-16-PT-206.

⁷ Document No. SCSL-2004-16-PT-177.

⁸ Transcript of 16 March 2005.

⁹ Case No. SCSL-2004-16-T.

opinion" and inadmissible hearsay. The Defence is of the view that if these witnesses are permitted to testify on the basis of these statements in their current form, it would prejudice the Defence case as they would not be able to effectively cross-examine these witnesses upon such evidence. Accordingly, the Defence has filed two Motions and a request seeking for appropriate remedies as follows.

II. SUBMISSION OF THE PARTIES

The First and Second Motion and Re-Filed Request

2. In what it has entitled "The Joint Defence Motion on Admissibility of Expert Witness/Expert Evidence and Filing of Notice Pursuant to Rule 94bis (B) (i) and (ii)" (the first Motion), the Defence for each of the three Accused has notified the Trial Chamber of its intention to cross-examine witnesses TF1-081 and TF1-188 as "expert witnesses" pursuant to Rule 94bis (B) (i) and (ii) of the Rules. The Defence further challenges the status of these witnesses as well as the admissibility of their intended evidence.
3. In its Re-Filed Request for Disclosure, the Defence for the Accused Alex Tamba Brima requests the Prosecution to disclose pursuant to Rule 66(A) (iii) of the Rules, the following information that appears to have been used in the preparation of the pre-trial statement of Witness TF1-018, namely, (a) original reports of a project the witness worked on; (b) the reason or reasons for the project coming to an end and (c) details of all funds expended with specific regard to this particular project.
4. In its Second Motion the Defence for each of the three Accused submit that although the Prosecution has indicated that Witnesses TF1-081 and TF1-188 will each testify as a witness of fact and not as an "expert witness", the Defence principally objects to the witnesses giving evidence based upon their disclosed pre-trial statements in their current format on the grounds that:
 - (a) The witness statements "contain several opinions and conclusions as to medical data, information and statistics" that lack any scientific methodology or foundation and are not based on the witness' own knowledge or experience but rather on inadmissible hearsay.
 - (b) If the witnesses are permitted to testify on the basis of the impugned statements "a potential conflict of dual capacity" will arise whereby being witnesses of fact, Witnesses TF1-081 and TF1-188 in fact give expert evidence thereby "trespassing on the province of the Trial Chamber". (The Defence cites the ICTY case of the Prosecutor v. Kordic and Cerkez¹⁰);
 - (c) International criminal law and jurisprudence recognises only two categories of witnesses, namely, "witnesses of fact" and "expert witnesses". If permitted to testify on the basis of the impugned statements, Witnesses TF1-081 and TF1-188 would in fact inappropriately do so as a "hybrid" of the two internationally accepted categories.
5. The Defence seeks to exclude from the evidence-in-chief of Witnesses TF1-081 and TF1-188 the data, information and abstracts contained or referred to in their pre-trial statements, in particular page 6316, 6317-6321 with respect to Witness TF1-081 and pages 6343-6344 with respect to Witness Tf1-188, respectively.

¹⁰ The Prosecutor v. Dario Kordic and Mario Cerkez, Case No. IT-95-14/2-T, Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence, 29 July 1999.

Prosecution Response

6. The Prosecution states that notwithstanding the fact that TF1-081 and TF1-188 are qualified medical doctors, it never intended to call them as expert witnesses as they are expected to testify on factual occurrences they have observed as eyewitnesses, and as such the evidence of TF1-081 is not opinion evidence.
7. On the request by the Defence Counsel of the Accused Alex Tamba Brima, the Prosecution responds by letter and notes that:
- (1) This is not a motion formulated in accordance with Rule 73 and;
 - (2) All relevant materials within the custody or control of the Office of the Prosecutor relating to Witnesses TF1-081 had been disclosed and;
 - (3) Any records relating to the FAWE project, [a medical project] were considered privileged as doctor/client confidentiality;
 - (4) The Defence Counsel for Alex Tamba Brima has not indicated under which provision he requests disclosure in the original application or the reply.
8. The Reply restates the application and does not refute the facts stated in the Prosecution responses nor address the issue of confidentiality.

III. DELIBERATIONS

On the Characterization of Expert Witnesses and the second Motion

9. The Defence submission, whilst making a lucid and comprehensive statement on the possible dichotomy of a witness, with professional or expert knowledge giving evidence as a lay person and “the grey area” where his professional assessment may encroach upon personal observation, loses sight of a fundamental issue.
10. The Prosecution have not yet called the witnesses to attest. They have not commenced to adduce their evidence. Until the witness actually gives sworn evidence, it is not possible to say if his evidence is expert opinion, statements of fact, or a mixture of both. Similarly, the Trial Chamber cannot decide on the admissibility of a document until the relevant evidence is heard and the document is tendered.
11. In the present case since the proposed witnesses have not yet been called, sworn and given evidence, we are of the opinion that to rule on the admissibility of parts of a statement made to the Prosecution and disclosed to the Defence is premature and speculative.

12. In this regard, we further refer to our decision of even date in:

“Decision on Joint Defence Motion Pertaining to Objections to the Nature of the Testimony-in-Chief of Witness TF1-150”.

13. For the foregoing reasons, we consider the motion premature and dismiss it.

On the Disclosure Request by the Defence for Alex Tamba Brima

12. The Defence Counsel for the Accused Brima requested the disclosure of several documents relating to the evidence of Prosecution Witness TF1-081. These are:-

- a. Original medical reports of those treated by FAWE.
- b. The reason or reasons for the project coming to an end in March 2000.
- c. Details of all funds expended with specific regard to this particular project.

13. The disclosure obligations on the Prosecution are provided in Rule 66, (Disclosure of materials by the Prosecutor) and Rule 68 (Disclosure of Exculpatory Evidence). Rule 66(A) (iii) is dependant upon the material, etc, being “in his custody or control which are intended for use by the Prosecutor as evidence ...”

14. The Chamber recalls Rule 70(B) of the Rules which defines matters not subject to disclosure:

(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.

15. We note that the Defence has not disputed the Prosecution submission that it cannot disclose the requested information as it falls into the privilege of confidential communications between doctors and their clients. There is no evidence that the consent of the person or entity providing the initial information has been given. We therefore, conclude that the requested material falls under Rule 70(B) of the Rules, and that the defence is not entitled to receive the requested information.

16. We accept that Prosecution does not have any other documents and therefore the Trial Chamber cannot make any order for disclosure.

17. For the foregoing reasons, the Chamber finds that the request of the Defence for disclosure of documents cannot be granted.

On the Notice of the Defence pursuant to Rule 94bis

18. The Defence gave notice in the above “motion” of its “intention to cross-examine witnesses TF1-081 and TF1-188, should the Prosecution be seeking to call these witnesses as expert witnesses, pursuant to Rule 94bis (B)(i) and (ii)”. Although no relief or ruling is sought from the Trial Chamber, in reply the Prosecution submits:

- (1) there is no motion before the Trial Chamber and
- (2) the witnesses are not being called as experts pursuant to Rule 94bis (B) (i) and (ii).

19. We agree this is not a motion within the provisions of Rule 73 - it merely "files notice" and as such does not require a ruling under Rule 94bis.

20. We further refer to the ruling on the second Motion and the submissions that these witnesses are not experts.


21. For the foregoing reasons the notice is redundant.

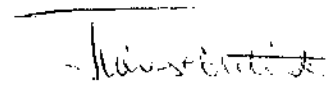
FOR THE ABOVE REASONS, THE TRIAL CHAMBER

Dismisses the Motions and the Request of the Accused Alex Tamba Brima.

Done at Freetown this 16th day of June 2005


Justice Richard Lussick


Justice Teresa Doherty
Presiding Judge


Justice Julia Sebutinde

