SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before:	Hon. Justice Pierre Boutet, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Benjamin Mutanga Itoe	
Registrar:	Mr. Lovemore G. Munlo SC	
Date:	15th of June, 2006	
PROSECUTOR	**Against**	**ISSA HASSAN SESAY** **MORRIS KALLON** **AUGUSTINE GBAO** (Case No. SCSL-04-15-T)

Public Document

WRITTEN REASONED RULING ON DEFENCE EVIDENTIARY OBJECTIONS CONCERNING WITNESS TF1-108

Office of the Prosecutor:
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TRIAL CHAMBER I ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson, and Hon. Justice Benjamin Mutanga Itoe;

SEIZED of the objections by Defence Counsel for the First Accused, Issa Sesay, and Defence Counsel for the Second Accused, Morris Kallon, made orally on the 7th of March, 2006 during the testimony at trial of protected Witness TF1-108 ("Defence Objections");

NOTING that on the 8th of March, 2006, this Chamber, having heard the Prosecution, delivered an oral Ruling dismissing the said Defence Objections;

NOTING that the Chamber indicated at that time that a reasoned written Ruling on this matter would be delivered in due course;

PURSUANT to Article 17 of the Statute of the Special Court for Sierra Leone and Rules 54, 66 and 89 of the Rules of Procedure and Evidence of the Court ("Rules");
THE TRIAL CHAMBER HEREBY ISSUES ITS REASONED WRITTEN RULING:

A. The Defence Objections

1. On the 7th of March, 2006, during his examination in chief by the Prosecution, protected Witness TF1-108 testified as follows:

Q. What did you see, Mr Witness? What did you see in New York[1] in the private farm of Issa Sesay? What did you see?

A. Kids used to come that kept guard over us, RUF kids, carrying guns.

Q. Do you know the name of any of them that you saw there?

A. Yes.

Q. Please could you tell to this Court the name that you remember?

A. There was a boy whom they called -- his rebel name was Boys, but his real name was Musa Vandi.

[...]

Q. Who was Musa Vandi?

A. He was Mr Issa's bodyguard. Whenever we were brushing Mr Gbao's farm, there was his bodyguard called Korpomeh. He too used to come to keep guard over us.

Q. Mr Witness, you told us about Musa Vandi. Did you see anyone else you can remember in New York in the private farm of Issa Sesay?

A. Yes. There was a boy whose rebel name was X. His real name was Abdulai Musa.

[...]

Q. Mr Witness, who was Abdulai Musa?

A. He was Mr Issa Sesay's SBU.

Q. Do you remember anyone else?

[...]

A. There was a boy called Moses.

Q. Who was Moses?

A. He too was Mr Issa Sesay's SBU.

Q. Now, Mr Witness, how old were the boys Moses and Abdulai Musa?

A. Abdulai Musa he was not up to ten years. He was between nine and 11 years.

Q. When was that? Which year are you talking about now?

A. 1996. Abdulai Musa. He was very small.

Q. What about Musa Vandi?

A. Musa Vandi was older than Abdulai Musa and Moses.

Q. Are you able to say about how old he was?

A. Musa Vandi, he was between 18 to 20 years.

Q. What about Moses?

A. Moses was, from what I saw, he was -- he was up to 12 years. It was Abdulai who was between nine and ten. He was very small.

[...]

Q. When did you see Moses?

A. The time that I saw him, when he was 12 years old, up to 12 years old, that was in 1996 when I saw him.

Q. Did you see Moses after 1996?

A. Yes.

Q. When?

A. I saw Moses in 1997.

Q. Now, Mr Witness, the three persons you have told us about, did you see them carrying anything when they came to this swamp in New York?

A. Yes.

Q. What did they carry?

A. Those things which they used to have and that is their guns that they used to carry. We would be working and they would be standing behind us with their guns.

Q. Do you know what were they doing there?

A. They were supervising the job. You, the civilian, if you refused to work as you were supposed to do, they would give you a very serious beating.[2]

2. It was at that stage that Defence Counsel for the First Accused objected that there was nothing in the written statements of Witness TF1-108 previously disclosed by the Prosecution concerning Musa Vandi, Moses and Abdulai Musa belonging to the RUF Small Boys Units ("SBUs"), carrying weapons and beating civilians and submitted that the Prosecution was, therefore, in breach of its disclosure obligations pursuant to Rule 66 of the Rules.[3]

3. Counsel for the Second Accused also objected to the evidence that SBUs were beating civilians on the grounds that there were no allegations concerning physical violence in the Kailahun District in the Amended Consolidated Indictment, and submitted that the said evidence was irrelevant and therefore inadmissible.[4]

4. In response to the objection raised by Defence Counsel for the First Accused, the Prosecution submitted that there had been previous disclosure in the written statements of Witness TF1-108 of allegation concerning SBUs carrying weapons. As regards the allegation of SBUs beating civilians, the Prosecution conceded that there had been no prior disclosure in the written statements of Witness TF1-108 of any such allegations, but nevertheless that the evidence was admissible pursuant to the principle of orality as the Witness volunteered it while testifying in court and that the Prosecution was not aware that the witness would give such evidence.[5]

5. As to the objection raised by Counsel for the Second Accused, the Prosecution submitted that the evidence in question was admissible in that it could be relevant under Count 1 – Terrorizing the Civilians Population, and under Count 2 – Collective Punishment, of the Amended Consolidated Indictment or, in the alternative, that the evidence would still be admissible as relevant in demonstrating the widespread and systematic nature of the crimes.[6]

B. Applicable Principles

6. On the issue of the disclosure obligations by the Prosecution, it is abundantly clear from this Court's jurisprudence that the Prosecution has an obligation to continuously disclose witness statements in accordance with Rule 66 of the Rules,[7] and that in order to establish that the Prosecution has breached its disclosure obligations under the said Rule, the Defence must "make a *prima facie* showing of materiality and that the requested evidence is in the custody or control of the Prosecution."[8]

7. In this context, we take this opportunity to reiterate our considered position that it is the role of the Trial Chamber to enforce disclosure obligations in the interest of a fair trial and to ensure that the rights of the Accused, as provided in Article 17(4)(e) of the Statute are respected and that where evidence has not been disclosed or is disclosed so late as to prejudice the fairness of the trial, the Trial Chamber will apply appropriate remedies which may include the exclusion of such evidence.[9]

8. We do, again, emphasize that in the evaluation of the possible novelty of evidence presented during a witness testimony, it may not be possible to include every matter that a witness will testify upon at trial in a witness statement regardless of its nature. It remains our view that, based on the principle of orality, witnesses shall ideally be heard directly in open court. We explicitly stated this in one of our Decisions, in these terms:

While there is a duty for the Prosecution to diligently disclose witness statements that identify matters that witnesses will testify about at trial, thereby providing the Defence with essential information for the preparation of its case, it is foreseeable that witnesses, by the very nature of oral testimony, will expand on matters mentioned in their witness statements, and respond more comprehensively to questions asked at trial.[10]

9. It is trite law that as regards admissibility of evidence, Rule 89(C) vests the Trial Chamber with discretionary power to admit any relevant evidence and to exclude evidence that is not relevant. To this effect, the Appeals Chamber has noted that the Rules favour a flexible approach to the issue of admissibility of evidence, leaving the issue of weight to be determined when assessing probative value of the totality of the evidence.[11] The Appeals Chamber also stressed that whilst the "probative value of particular items in isolation may be minimal, the very fact that they have some relevance means that they must be available" for consideration by the Chamber.[12] Consistent with this view, this Chamber has opined that "individual pieces of evidence that may at first appear to have little probative value may later be of greater probative value when assessed in conjunction with all of the other evidence before the Court."[13] Also, it is noteworthy that, as a matter of law, the Chamber may pursuant to Rule 95 exclude evidence where its admission would bring the administration of justice into disrepute. Thus, under this Rule and in pursuance of its inherent jurisdiction, the Chamber may exclude evidence whose probative value is manifestly outweighed by its prejudicial effect.[14]

C. Evaluation of Merits of the Objections

10. Guided by the foregoing applicable principles, the Chamber has carefully reviewed the written statements of Witness TF1-108 for the limited purpose of evaluating the merit of the objection by Counsel for the First Accused. The Chamber finds that the Proofing Notes dated the 19th, 23rd, 26th of November and 7th of December, 2005, contain allegations of Musa Vandi, Moses and Abdullai Musah being bodyguards of Issa Sesay, these latter two being small boys, at a farm belonging to Issa Sesay. The relevant paragraph is as follows:

Throughout 1997, 1998 and 1999 Gbao Ordered civilians to make a rice farm near a swamp in [New York]. Gbao told us that hits farm was exclusively for the private use of Issa Sesay. [...] I saw many of Issa Sesay's bodyguards coming to [New York] at that time to inspect the work of the civilians. I saw in [New York] Musa Vandi aka Boys who was a senior bodyguard of Issa Sesay. I saw as well Moses and Abdullai Musah who were both small boys and bodyguards of Issa Sesay. I knew them with Issa Sesay during those years.[15]

11. The Chamber, also, finds that in another previous written statement by this Witness TF1-108, i.e. the Proofing Notes dated the 23rd of March, 2005, contain allegations concerning members of the SBUs, throughout Kailahun, all carrying guns. Paragraph 3 reads as follows:

I saw a lot of SBU's (Small Boys Units) they would often be in groups of 10 to 15 children and they all carried guns. I saw them throughout Kailahun, Pendembu and Daru. Issa Sesay, Gbao and Morris Kallon had a number of SBU's. I saw Gbao with SBU's in Kailahun in 1996 and 1997. [...] I saw Sesay with SBU's in 1996, 1997 and 1998 in Kailahun.[16]

12. The Chamber, consequently, finds that the Defence had sufficient notice from the written statements of Witness TF1-108 of allegations concerning the said SBUs carrying arms while at Issa Sesay's farm.

13. The Chamber has, also, reviewed the evidence of Witness TF1-108 adduced at trial and the Amended Consolidated Indictment in relation to the objection by Counsel for the Second Accused. The Chamber finds that allegations of SBUs beating civilians working in the farm may have relevance to Count 13 – Abductions and Forced Labour, of the Amended Consolidated Indictment. In addition, as submitted by the Prosecution, the evidence may also be relevant under Count 1 – Terrorizing the Civilians Population, and Count 2 – Collective Punishment, of the Indictment, as well as under Count 12 – Use of Child Soldiers.

C. Conclusions

14. The Chamber, accordingly, concludes that, in the present circumstances, Counsel for the First Accused has failed to make a *prima facie* showing of any specific breach on the part of the Prosecution of its disclosure obligations pursuant to Rule 66 of the Rules. The Chamber accepts that Witness TF1-108 in his evidence at trial volunteered this information about SBUs beating civilians and therefore finds that the evidence in question is admissible within the principle of orality.

15. As to the objections put forward by Counsel for the Second Accused, the Chamber is satisfied that the evidence in question may be relevant to facts in issue in relation to various Counts in the Amended Consolidated Indictment, and is therefore admissible.

16. We are also of the opinion that the possible prejudicial effect of the admission of the evidence does not outweigh its probative value. We do, however, stress that a final determination of its relevance, reliability and probative value will be made by the Trial Chamber at the appropriate time in light of all of the evidence adduced during the trial by the Prosecution and the Defence;[17]

Based on the aforementioned considerations **THE TRIAL CHAMBER**

OVERRULES the Defence Objections for lack of merit.

Done at Freetown, Sierra Leone, this 15th day of June, 2006

Hon. Justice Benjamin Mutanga Itoe	Hon. Justice Pierre Boutet Presiding Judge Trial Chamber I	Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

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[1] For reasons of witness protection, during the testimony of Witness TF1-108 “New York” as been used as a pseudonym in order to indicate a location in the Kailahun Distinct.
[2] Transcripts, 7 March 2006, p. 113, l. 14 to p. 116, l. 3.
[3] *Id*., 7 March 2006, p. 116. See also *Id*., 8 March 2006, p. 6-13.
[4] *Id*., 7 March 2006, p. 116. See also *Id*., 8 March 2006, p. 13-18.
[5] *Id*., 8 March 2006, p. 2-5.
[6] *Id*., p. 5-6.
[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 (“*Norman* Decision”), paras 22-23. See also, for instance, *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005, para. 19.
[8] *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, “Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules”, 9 July 2004, para. 27.
[9] *Norman* Decision, supra note 7, para. 9. As a general rule, however, the judicially preferred remedy for a breach of disclosure obligations by the Prosecution, if proven, is an extension of time to enable the Defence to prepare adequately rather than the direct exclusion of the evidence concerned. See *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122, 1 June 2005, para. 24. In certain instances, it has to be noted, the Chamber has

also ruled for the exclusion of evidence not properly disclosed by the Prosecution. See *Id.*, Ruling on Disclosure Regarding Witness TF1-195, 4 February 2005, para. 7.
[10] *Norman* Decision, supra note 7, para. 25.
[11] See, for example, *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-AR65, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005, paras 22-24.
[12] *Id.*, para 23. On the issue of flexible approach to the admissibility of evidence, see also *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 34.
[13] *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, 23 May 2005, para. 9.
[14] *Id.*, para. 7.
[15] *Id.*, Confidential Prosecution Witness Statements – Seventh Trial Session, 10 February 2006, Court Management Page No. 17447, para. 8.
[16] *Id.*, Confidential Additional Witness Statements, 19 April 2005, Court Management Page No. 11240, para. 3.
[17] *Prosecutor v. Ndindiliyimana, Bizimungo, Nzuwonemeye and Sagahutu*, Case No. ICTR-00-56-T, Decision on Bizimungo's Motion to Exclude the Testimony of Witness TN, 28 October 2005, para. 7. See also *Prosecutor v. Nyiramasuhuko and Ntahobali*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible'", 2 July 2004, paras 14 and 15.