



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

**MINDFUL OF** the objections made by Court Appointed Counsel for the Second Accused ("Counsel for Fofana") in the course of the proceedings of the 5<sup>th</sup> of October, 2006 ("Objection"), moving The Chamber to rule as impermissible, cross-examination aimed at eliciting evidence incriminating the Second Accused from a witness called by the Third Accused;<sup>1</sup>

**CONSIDERING** the Office of the Prosecutor's (the "Prosecution") oral responses to the Objection, made on the same day;<sup>2</sup>

**NOTING** the further oral submissions made by Counsel for Fofana, the further oral responses of the Prosecution, and the reply to these further submissions made by Counsel for Fofana on the 6<sup>th</sup> of October, 2006;<sup>3</sup>

**MINDFUL OF** The Chamber's Oral Decision on the Objection delivered in Court on the 6<sup>th</sup> of October, 2006, wherein The Chamber stated as follows:

Having heard arguments on both sides on the objection of the permissibility of the Prosecution's line of cross-examination and at eliciting evidence involving the Second Accused from the first witness for the Third Accused purportedly to contradict the Defence theory, and having grave doubts as to the fairness of the said line of cross-examination, we rule that it is impermissible. A written reasoned decision will be published in due course.<sup>4</sup>

**PURSUANT TO** Rules 82(A), 89(B) and 90(F) of the Rules;

**THE TRIAL CHAMBER ISSUES THE FOLLOWING WRITTEN REASONS FOR DENYING THE OBJECTION:**

### I. BACKGROUND

1. On the 5<sup>th</sup> of October, 2006, following the usual procedure adopted by The Chamber with respect to the order of examination of non-common witnesses, The Chamber inquired from Court Appointed Counsel for the First Accused at the close of the examination-in-chief of the first witness for the Third Accused, whether they wished to cross-examine the witness. Counsel for Norman declined.<sup>5</sup> The Chamber then inquired from Counsel for Fofana whether he wished to cross-examine the witness. Counsel for Fofana stated that they had been "spared the need to ask [the] witness any questions."<sup>6</sup> The Prosecution was then instructed to begin its cross-examination.<sup>7</sup>

2. During the course of this cross-examination, Counsel for Fofana objected to two separate

<sup>1</sup> Transcript of the 5<sup>th</sup> of October, 2006, p. 84, l. 4 - 10 and p. 89, l. 5 - 17.

<sup>2</sup> Transcript of the 5<sup>th</sup> of October, 2006, p. 84, l. 12 - 13, 15 - 27, and p. 89, l. 20 - 29; p. 90, l. 1.

<sup>3</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 2 - 47.

<sup>4</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 47, l. 20 - 27.

<sup>5</sup> Transcript of the 5<sup>th</sup> of October, 2006, p. 67, l. 4 - 6.

<sup>6</sup> Transcript of the 5<sup>th</sup> of October, 2006, p. 67, l. 7 - 9.

<sup>7</sup> Transcript of the 5<sup>th</sup> of October, 2006, p. 67, l. 10.

questions posed by the Prosecution which were intended to elicit information relating to the Second Accused.<sup>8</sup> In the first instance, the Prosecution asked: "And the Second Accused, Moinina Fofana, was responsible for that store; is that correct?"<sup>9</sup> Counsel for Fofana objected that:

[I]t is fair to say that there was no evidence in relation to the Second Accused during this witness's testimony in chief, and no issues were explored with this witness on behalf of the Second Accused in cross-examination. In these circumstances, I would submit that it is not appropriate for my learned friend for the Prosecution to seek to elicit from this witness evidence in relation to the second accused....<sup>10</sup>

3. In response to this first objection, The Chamber allowed the Prosecution to continue the line of questioning. However, the Presiding Judge noted:

[The Chamber] assure[s] the Court that the Bench is quite vigilant in its sensitivity to the fact that any evidence emanating from witnesses called on behalf of one accused person, and which may have a potential of incriminating another accused person would, in fact, be examined at the appropriate time with utmost circumspection, having regard to the fact that each of these accused persons here is facing not just a trial as alleged multiple offenders, but also that they are being tried separately, and the guarantees [of Rule 82(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("the Rules")] will be applied.<sup>11</sup>

4. Shortly thereafter, the Prosecution put the following question to the witness: "Are you aware that, at one time, he [Moinina Fofana] settled a major conflict between the kamajors from Bumpe Chiefdom?" Counsel for Fofana objected once again:

Your Honours, he's already answered the question he's not aware of that. I've already voiced my concerns about a witness for the third accused being used to explore issues in relation to the second accused. Given the indication of Your Honours, I'm not sure its appropriate for my leaned friend to continue to explore additional matters with this witness in relation to the Second Accused, especially given that counsel for the Second Accused will not have an opportunity to re-examine this witness or cross-examine this witness after the exploration by my learned friend for the Prosecution, and certain issues are being raised for the first time through this cross-examination which could, and I emphasize could, impact upon the Second Accused, and he will not have an opportunity, through his counsel, to explores those issues hereafter.<sup>12</sup>

5. As the second objection was made shortly before the close of proceedings, the Presiding Judge held that it would be appropriate to rule on the Objection the following morning, on the 6<sup>th</sup> of October, 2006.<sup>13</sup> When the trial resumed, The Chamber invited Counsel for Fofana and the Prosecution to summarize their positions and to make any additional submissions they felt would be useful.<sup>14</sup>

<sup>8</sup> Transcript of the 5<sup>th</sup> of October, 2006, p. 84, l. 4 - 10 and p. 89, l. 5 - 17.

<sup>9</sup> Transcript of the 5<sup>th</sup> of October, 2006, p. 83, l. 29 - p. 84, l. 1.

<sup>10</sup> Transcript of the 5<sup>th</sup> of October, 2006, p. 84, l. 4 - 10.

<sup>11</sup> Transcript of the 5<sup>th</sup> of October, 2006, p. 84, l. 4-17.

<sup>12</sup> Transcript of the 5<sup>th</sup> of October, 2006, p. 84, l. 25 - p. 85, l. 4.

<sup>13</sup> Transcript of the 5<sup>th</sup> of October, 2006, p. 93, l. 14 - 16.

<sup>14</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 2, l. 12 - 16.

## II. SUBMISSIONS

6. Counsel for Fofana put forward seven arguments in support of the Objection. First, Counsel for Fofana submitted that allowing the Prosecution to elicit, during cross-examination, evidence pertaining to an accused who has not called the witness in question violates Articles 17(4)(b) of the Statute of the Special Court for Sierra Leone ("the Statute"). He argued that as the Accused against whom the Prosecution seeks the evidence in question would not have had notice of the areas to be addressed by the Prosecution, they were thereby denied the adequate time and facilities guaranteed by Article 17(4)(b) in that Counsel "are unable to take, for example, instructions from the accused; [and] they are not able to carry out investigations in relation to that evidence."<sup>15</sup>

7. The second and third arguments submitted by Counsel for Fofana relate to violations of Article 17(4)(e). Counsel for Fofana argued that permitting the Prosecution to continue with the impugned line of cross-examination violated the Second Accused's right to examine witnesses against him since, by the time the Prosecution begin cross-examining a witness, the Second Accused "is effectively denied the right ... to examine that witness, or the witness against him, as he would have done, had the witness been called by the Prosecution, and the Defence been in a position to cross-examine him accordingly."<sup>16</sup> Counsel for Fofana further submitted that allowing the impugned line of cross-examination would result in a violation of the Second Accused's guarantee of the right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him.<sup>17</sup> He further contended that by the time the Prosecution elicited evidence against the Second Accused during cross-examination, the Second Accused would not be "in a position to carry out investigations and to potentially bring witnesses to Court to rebut and undermine the evidence of that witness, and the credibility of that witness."<sup>18</sup>

8. Fourth, Counsel for Fofana submitted that since the obligation to disclose exculpatory evidence set out in Rule 68(B) of the Rules applies only to the Prosecution, allowing the Prosecution to elicit, during cross-examination, evidence pertaining to an accused who has not called the witness in question creates the possibility that there may exist, in the possession of the co-Accused who has called the witness, evidence that is exculpatory with respect to their client, but which has not been disclosed in the absence of an obligation on co-Accused analogous to that set out in Rule 68(B).<sup>19</sup>

9. The fifth argument advanced by Counsel for Fofana is that the impugned line of cross-examination violated Rule 82(A) of the Rules, since the Prosecution would be unable to elicit evidence relating to the Second Accused from witnesses called by the Third Accused if the Second Accused were being tried alone.<sup>20</sup>

10. Counsel for Fofana's sixth argument in support of the Objection is that the Prosecution failed, in violation of Rule 68(B), to disclose potentially exculpatory evidence in their possession.<sup>21</sup>

<sup>15</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 3, l. 17 - p. 4, l. 1 - 25.

<sup>16</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 5, l. 7 - 25.

<sup>17</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 7, l. 3 - 7.

<sup>18</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 7, l. 20 - 23.

<sup>19</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 8, l. 8 - p. 9, l. 3.

<sup>20</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 9, l. 23 - p. 11, l. 13.

<sup>21</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 14, l. 18 - 26.

11. Finally, Counsel for Fofana submitted that allowing the admission of evidence against an accused, "which an accused has not had an opportunity to investigate and/or challenge" may bring the administration of justice into disrepute, in a violation of Rule 95 of the Rules, or may interfere with a fair determination of the matter, in violation of Rule 89(B) of the Rules.<sup>22</sup>

12. In response to submissions of Counsel for Fofana, the Prosecution submitted that the subject matter of the question to which Counsel for Fofana raised the Objection is "all too familiar to the Defence of the [S]econd [A]ccused."<sup>23</sup> Furthermore, the Prosecution contended that:

[T]he purpose of that question was to set out the theory of the Prosecution in a joint criminal enterprise, as it effects the [S]econd [A]ccused [... and that] it is the Prosecution's position that we are entitled to do so in cross-examination, not only to contradict the evidence of a witness and not only to impeach the witness by way of discrediting him.<sup>24</sup>

13. The Prosecution also submitted that "the issue of breach of Article 17 does not arise at all" and that re-cross-examination would be the appropriate remedy for any errors on the part of the Prosecution with respect to the disclosure of exculpatory evidence.<sup>25</sup> The Prosecution further submitted that evidence elicited during cross-examination which pertains to an accused who has not called the witness should be admitted, and that it is up to The Chamber to determine the probative value to be attributed to that information.<sup>26</sup>

14. During the course of its oral submissions on the 6<sup>th</sup> of October, 2006, the Prosecution stated that the purpose of the impugned line of cross-examination was to "contradict the theory of the Defence case" with respect to the Second Accused.<sup>27</sup> The Prosecution stated further that if the evidence elicited from the witness called by the Third Accused in cross-examination was incriminating with respect to the Second Accused that the Prosecution would seek to rely on that information to establish the alleged criminal liability of the Second Accused.<sup>28</sup>

### III. APPLICABLE LAW

15. The relevant law governing the Objection is embodied in Rules 82(A), 89(B), and 90(F) of the Rules, which provide as follows:

**Rule 82(A):**

In joint trials, each accused shall be accorded the same rights as if he were being tried separately.

**Rule 89 (B):**

In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence

<sup>22</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 22, l. 15 - 19; p. 23 l. 8 - 13.

<sup>23</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 24, l. 16 - 17.

<sup>24</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 25, l. 18 - 24.

<sup>25</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 29, l. 3 - 5; p. 30, l. 7 - 10.

<sup>26</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 36, l. 21 - 24.

<sup>27</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 34, l. 6 - 13.

<sup>28</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 34, l. 26 - p. 35, l. 24.

which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

**Rule 90(F):**

The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

- i. Make the interrogation and presentation effective for the ascertainment of truth; and
- ii. Avoid the wasting of time.

#### IV. DELIBERATIONS

16. As a preliminary matter, The Chamber reiterates that the Prosecution's obligation to disclose exculpatory evidence is not relevant to the present Objection<sup>29</sup> and notes that the issues relating to Counsel for Fofana's submissions on the Prosecution's alleged failure to disclose potentially exculpatory evidence are under consideration in a pending motion.<sup>30</sup>

17. The Chamber notes that unlike the Rules of Procedure and Evidence for the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") the Special Court's Rules do not include a rule that explicitly defines the scope of cross-examination.<sup>31</sup> Furthermore, neither the Special Court Rules nor the Rules of the *ad hoc* tribunals address the type of examination to be permitted in multi-Accused trials by Court Appointed Counsel for each of the Accused ("Defence Counsel") that have not called a given witness as a common witness.<sup>32</sup>

18. The Chamber has therefore invoked its discretion under Rule 90(F) to institute a mode and order of interrogating witnesses that is both efficient and effective for the ascertainment of the truth. With respect to the scope of cross-examination, the established and consistent practice of The Chamber has been to allow an open system of cross-examination. The cross-examining party, whether the Prosecution or co-Accused, is not strictly limited to addressing questions that arise from the direct examination of the witness, but may also cross-examine on matters of joint criminal enterprise and credibility.<sup>33</sup> There are limits, however, to the questions that may be asked during cross-examination. The Chamber recalls its explicit instructions to this effect: "The exact extent and manner of questioning permitted [...] will depend on the nature of the testimony which has been given by the witness and the purpose of

<sup>29</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 9, l. 6 - 19.

<sup>30</sup> *Prosecutor v. Norman et al*, SCSL-04-14-724, "Confidential Defence Request for Full Review of Prosecution Evidence to Identify Rule 68 Material for Disclosure", filed 24 October 2006.

<sup>31</sup> The definition of cross-examination provided in Rule 90(H)(i) of the Rules of Procedure and Evidence of the ICTY and Rule 90(G)(i) of the Rules of Procedure and Evidence of the ICTR is identical: "Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case."

<sup>32</sup> Rule 85(B) of the Rules of the Special Court, the ICTR and the ICTY state only that "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."

<sup>33</sup> See for example Transcript of the 6<sup>th</sup> of October, 2006, p. 13, l. 6 - 9; p. 38, l. 4 - 7; See also *Prosecutor v. Norman et al*, SCSL-04-14-613, "Decision on the Third and Second Accused's Request for Leave to Raise Evidentiary Objections", 8 June 2006, p. 3.

the questioning. This will be decided on a case by case basis."<sup>34</sup>

19. It is beyond dispute that the right of the Accused to examine or have examined the witnesses against him, enshrined in Article 17(4)(e) of the Statute, is fundamental to the conduct of a fair trial. In this regard, May and Wierda have observed that "the [A]ccused's right to examine a witness is most relevant in situations where the witness' evidence pertains directly to him and his involvement in the crimes."<sup>35</sup>

20. The Chamber recognizes that the Accused's right to adequate time and facilities for the preparation of his or her defence, set out in Article 17(4)(b) of the Statute, is similarly vital to the conduct of a fair trial. In international criminal law jurisprudence, the "real issue" of what constitutes adequate time and facilities to prepare a defence has been characterized as "not whether the parties have equal time and facilities but rather if either party, and in particular the accused, is put at a disadvantage when presenting their case."<sup>36</sup> In The Chamber's view, this is a matter of common sense.

21. The Chamber notes that the present Objection was brought by Counsel for Fofana in relation to cross-examination conducted by the Prosecution of a witness who was called by the Third Accused and who was not a common witness. Furthermore, the Chamber notes that no evidence relating to the Second Accused was adduced during direct examination of this witness.<sup>37</sup> We therefore find that the impugned line of cross-examination is not related to the testimony elicited during direct examination of the witness.

22. The Chamber recalls that in response to questions from the Bench the Prosecution stated that, if the evidence elicited from the witness called by the Third Accused was incriminating with respect to the Second Accused, the Prosecution would seek to rely on that information to establish the alleged criminal liability of the Second Accused.<sup>38</sup> It is The Chamber's view that there is a clear distinction between attempts to elicit direct evidence relating to an Accused who has not called the witness in question and attempts to elicit evidence relating to the alleged participation of that Accused in a joint criminal enterprise. The Chamber notes that in joint trials, each accused shall be accorded the same rights as if he were being tried separately.<sup>39</sup>

23. We therefore hold that in the present case, fairness dictates that the absence of notice to the Second Accused of the areas to be canvassed through cross-examination by the Prosecution constitutes a

<sup>34</sup> Transcript of the 5<sup>th</sup> of April, 2006, p. 30, l. 21 - 25 (citing *Prosecutor v. Bagosora*, ICTR-98-41-T, "Decision on Modalities for Examination of Defence Witnesses", 26 April 2005) [Emphasis added]. The Chamber notes that the instructions cited above were given in the context of instructions to Defence Counsel; however, The Chamber considers that the statement is equally applicable to the Prosecution.

<sup>35</sup> Judge Richard May and Marieke Wierda, *International Criminal Evidence* (Ardsey, NY: Transnational Publishers, Inc., 2002), § 8.65. [Emphasis in the original.]

<sup>36</sup> *Prosecutor v. Naletilic and Martinovic*, IT-98-34, "Decision on the Accused Naletilic's Motion to Continue Trial Date", 31 August 2001, para. 7.

<sup>37</sup> Transcript of the 5<sup>th</sup> of October, 2006, p. 84, l. 4 - 7. As per the standard practice of The Chamber following the examination-in-chief of witnesses called by the Third Accused, Court Appointed Counsel for the First Accused ("Counsel for Norman") conducts cross-examination, if deemed necessary, followed by any cross-examination by Counsel for Fofana, if necessary, and finally cross-examination by the Prosecution.

<sup>38</sup> Transcript of the 6<sup>th</sup> of October, 2006, p. 34, l. 26 - p. 35, l. 24.

<sup>39</sup> Rule 82(A) of the Rules of the Special Court.



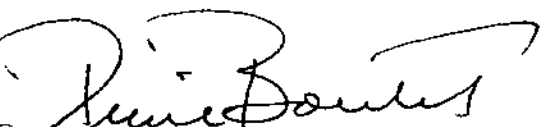
serious disadvantage to the Second Accused, who has not been afforded the opportunity to conduct investigations in relation to this witness or to prepare effective cross-examination in respect of any evidence which may be elicited with respect to the Second Accused. The Chamber rules that under the circumstances of the present Objection, eliciting evidence that may potentially incriminate the Second Accused is not an acceptable purpose of cross-examination.

24. In light of the foregoing considerations, The Chamber, in the circumstances of the present Objection, finds that the potential prejudice that may result from allowing the Prosecution to elicit, during cross-examination, direct evidence pertaining to an accused who has not called the witness in question would outweigh any potential probative value of evidence thereby elicited and would infringe upon the protection afforded by Rule 82(A) to the Second Accused when jointly tried.

#### V. DISPOSITION

**THE CHAMBER HEREBY REITERATES** its Oral Decision of the 6<sup>th</sup> of October, 2006 and rules that the Objection to the impugned line of cross-examination is sustained.

Done in Freetown, Sierra Leone, this 10<sup>th</sup> of November 2006.



  
 Hon. Justice Benjamin Mutanga Itoe    Hon. Justice Bankole Thompson    Hon. Justice Pierre Bouter

