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 Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-T)

DECISION ON JOINT DEFENCE MOTION PERTAINING TO OBJECTIONS TO THE NATURE OF THE TESTIMONY IN CHIEF OF WITNESS TF1-150

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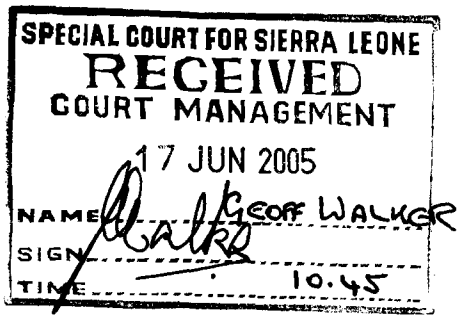

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Teresa Doherty, presiding, Justice Richard Lussick and Justice Julia Sebutinde;

SEISED of the Joint Defence Motion Pertaining to Objections to the Nature of the Testimony in Chief of Witness TF1-150, filed on 27 May 2005 ("Motion");

NOTING the Prosecution Response to the Motion, filed on 31 May 2005 ("Response");

NOTING the Defence Reply to the Prosecutions Response to the Motion, filed on 2 June 2005 ("Response");

HEREBY DECIDES as follows.

I. INTRODUCTION

1. According to the Introductory Note annexed to the Prosecution Response to Joint Defence Motion Pertaining to Objections to the Nature of the Testimony-in-Chief of Witness TF1-150, Michael O'Flaherty (Witness TF1-150) is an Irish national who served as the first human rights advisor to the UN Special Envoy for Sierra Leone, in May 1998. In July 1998 he established the human rights section of the new United Nations Observer Mission for Sierra Leone (UNOMSIL) and became its Chief while continuing to hold the position of human rights advisor to the UN Special Envoy (re-designated Special Representative of the UN Secretary General. He left Sierra Leone in January 2000 on appointment to a post at the office of the UN High Commissioner for human Rights in Geneva (OHCHR). In 2001 he continued to have a management responsibility for the OHCHR activities in support of the establishment of the Sierra Leone Truth and Reconciliation Commission.

2. The Prosecution in the case of *The Prosecutor v. Alex Tamba Brima et al*[1] intends to call Witness TF1-150 to testify on its behalf. In a pre-trial interview with the Office of the Prosecutor (OTP) Witness TF1-150 made a statement consisting of "*a written statement, report and documentary material*". In accordance with the Trial Chamber's Order to file witness statements dated 9 February 2005 the OTP filed the said witness statement and report on the 31 May 2005[2]. The Defence objections raised in their Joint Motion are based upon this document entitled "*Human Rights in Sierra Leone: 1998-2000, Certain Aspects Relevant to the RUF-AFRC Indictments of the Sierra Leone Special Court*" (the impugned Report)[3].

II. SUBMISSION OF THE PARTIES

The Defence Motion

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[1] Case No. SCSL-2004-16-T
[2] Document No. SCSL-2004-16-T-292
[3] ibid.

3. The Defence for the Accused Brima, Kanu and Kamara apply to exclude certain portions of what they describe as "the evidence to be adduced by testimony-in-chief of Witness TF1-150" who is set to testify sometime in the near future and to exclude specific documents identified by the witness in a report annexed to his pre-trial statement dated 18 April 2005, which documents the Prosecution may seek to tender in evidence in the course of his oral testimony. The Defence divides the "evidence to be adduced by Witness TF1-150 in regard to the impugned Report" into two categories, namely:

a) Portions of the Report based upon the witness's direct knowledge, against which the Defence raises no objection; and

b) Alleged findings of fact that were based on primary and secondary information sources, which do not derive from the direct knowledge of the witness, against which the Defence raises its objections in the Motion.

4. The Defence apply to exclude certain portions of the intended testimony-in-chief of Witness TF1-150 as well as specific documents identified by the witness in the impugned Report which documents the Prosecution may seek to tender in evidence in the course of this witness' oral testimony, on the following grounds:

a) Witness TF1-150 not being called as an expert witness but rather a witness of fact should not in giving his testimony, be permitted to rely upon the impugned Report in particular those parts of the report that constitute "*alleged findings of fact which were based on primary and secondary information sources, which do not derive from the direct knowledge of the said witness*".

b) Certain information in the said report should not be admitted in evidence because it is derived from "primary" or "secondary" sources that either lack foundation, or that amount to opinion evidence given by a lay witness, or that are irrelevant by reason of being too general.

c) With regard to the UNAMSIL Reports, the witness should not in his testimony be permitted to rely upon information derived from "*UN Human Rights officers in other types of missions to localities in Sierra Leone, data gathered by other parts of the UN Mission, the humanitarian community and the national human rights community*" because that information does not derive from his own personal knowledge and experience but rather from reports of which he was not the author.

d) The sources described in the Report as "*humanitarian community*" and "*the national human rights community*" are too vague and broad and are incapable of definition and a testimony based upon them would be tantamount to a lay witness giving inadmissible opinion evidence.

e) Witness TF1-150 being a lay witness of fact is not competent to testify on behalf of the "*humanitarian community*" or "*the national human rights community*".

f) With regard to paragraph 12 of the Report which purports to "*co-centre on situations which have relevance with regard to the current RUF-AFRC related Special Court Indictments*" Witness TF1-150 being a lay witness of fact is not competent to testify on legal matters pertaining to the indictment before "*an internationalised criminal court*" or to reasonably assess the relevance of certain information in view of such indictment.

g) The selection of information presented by this witness amounts to a selection which can only be attributed to an expert witness, which Witness TF1-150 is not.

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h) With regard to the use of the term "reliability" as a criterion upon which he drafted his report, Witness TF1-150 being a lay witness of fact is not competent to make a proper assessment on the "reliability" of primary or secondary sources on this specific area which, according to this witness, would have "*relevance with regard to the current RUF-AFRC related Special Court indictment*".

i) Witness TF1-150 cannot be considered a contemporaneous witness of fact but is merely a person who collected and collated certain materials in his report. As such his intended Testimony-in-chief lacks probative value and relevance and should therefore not be admitted. (Defence cites the ICTY Case of *Kordic and Cerkez Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence, of 29/07/99 paras.19-20*)

j) With regard to the sources of information referred to in paragraph 13 of the impugned Report, Witness TF1-150 should not be permitted to rely upon sources of which he is not the author or exclusive author. Even with regard to his "personal notes" he should not be permitted to rely upon them in so far as these notes do not rely on his personal knowledge but rather derive from indirect sources or any other materials not based on his personal knowledge.

k) With regard to the "Press releases, Communiqués and Aide Memoirs of which Witness TF1-150 is not the author, his intended testimony-in-chief based on these is unreliable, irrelevant, of little or no probative value and therefore inadmissible.

l) The materials contained in the impugned Report of which Witness TF1-150 is not the author should not be admitted in evidence through his intended testimony-in-chief as the relevance of these materials cannot be determined through his said testimony. The said materials and reports do not qualify for Judicial notice as they are capable of reasonable dispute. (Defence cites the Separate opinion of Justice Robertson in the *Fofana Decision on Appeal against Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence"* of 16/05/05 Case No. SCSL-2004-14-AR73, paragraphs 26-32)

The Prosecution Response

5. The Prosecution prays that the Joint Defence Motion should be dismissed in its entirety on the following grounds:

a) Witness TF1-150 is not called as an expert witness but rather one of fact. As such, the Prosecution does not intend to solicit opinion evidence from him.

b) The proposed testimony-in-chief of Witness TF1-150 is relevant and factual and therefore admissible under Rule 89 (C) of the Rules.

c) The Prosecution does not intend to tender in evidence the impugned Report wholesale, but rather to lead oral evidence relating to some of the matters referred to in the said Report.

d) The Prosecution intends to lead evidence-in-chief with regard to Witness TF1-150 about the monitoring and reporting of human rights abuses in Sierra Leone from May 1998 until December 1999. The intended evidence is relevant in proving that crimes were perpetuated in Sierra Leone as part of a widespread and systematic attack on the civilian population.

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e) All objections raised by the Defence against the intended testimony of Witness TF1-150 or the documents referred to by him in his report, go to issues of weight rather than admissibility.

f) Even the hearsay nature of portions of the proposed testimony of Witness TF1-150 is not a bar to its admissibility. Such hearsay evidence is admissible in evidence as long as it is relevant to the Prosecution case, subject to the weight and evaluation of that evidence by the Trial Chamber at the end of the Prosecution case.

6. The Prosecution submits that the documentary evidence that the Prosecution intends to tender in evidence through Witness TF1-150 is relevant to its case and is susceptible of confirmation. In particular, the Prosecution will at an appropriate time apply to tender in evidence "*all those documents which are annexed to the witness' pre-trial statement dated 18 April 2005, together with a selection of UN Security Council Resolutions (those referred to in the witness' report, and any others to which he is able to speak) and part only (the human rights section) of a series of reports on Sierra Leone which were presented by the UN Secretary General to the UN Security Council, some in the period in which the witness held office in Sierra Leone, the primary drafts of which were written by this witness)*".

7. In addition the Prosecution submits that the information in these documents is admissible under Rule 92*bis*.

The Defence Reply

8. The Defence reiterates its objection to the intended testimony-in-chief of Witness TF1-150 and to the impugned Report being tendered in evidence not on grounds of hearsay but rather on the grounds that certain (primary and secondary) sources underlying the report, which sources do not fall within the witness' personal knowledge and/ or competence to testify about, are inadmissible.

III. DELIBERATIONS

9. Witness TF1-150 has not yet given evidence and is only scheduled to testify some time in the near future. As such, it is pre-mature and speculative for anyone to refer to the "Testimony-in-chief" or "oral evidence" of this witness as it does not yet exist. Neither is the Trial Chamber seized with an application by the Prosecution to tender into evidence the impugned Report or any portions thereof pursuant to Rule 92*bis*. What the Prosecution has done however, is to disclose the witness' pre-trial statement of 18 April 2005 together with the impugned report as an attachment thereto, in discharge of their disclosure obligation pursuant to Rule 66 of the Rules. The Prosecution disclosure obligation under Rule 66 as persuasively elaborated by the Special Court in the case of *The Prosecutor v. Norman et al*[4] and the case of *the Prosecutor v. Sesay et al*[5] should not be misinterpreted to mean that the disclosed material is automatically evidence. In both these cases the trial Chamber observed that the Prosecution is under an obligation pursuant to Rule 66 to continuously disclose to the defence copies

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[4] *The Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T, Decision on Disclosure of Witness Statements and cross-examination, 16 July 2004, para. 6).

[5] *The Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-T, Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060, 23 July 2004, para. 15.

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of all statements of all witnesses whom they intend to call, including new developments in the investigation in the form of "will say statements" or interview notes or other forms obtained from a witness at any time prior to the witness giving his testimony in court.

10. The Prosecution in their submissions have made it clear that they do not intend to lead opinion evidence with regard to this witness. Nor does the Prosecution intend to tender the whole of the impugned Report in evidence. The Prosecution intends merely "*to lead oral evidence relating to some of the matters referred to in the report.*" The Trial Chamber is of the view that for it to entertain any objections on what amounts to mere "intentions" by the Prosecution with regard to Witness TF1-150 and not on his oral testimony, would at best be premature and speculative.

11. We note that the impugned Report is annexed to and forms part of the witness' pre-trial statement to the Prosecution, dated 18 April 2005. We further note that both the pre-trial statement and the annexed report are not evidence. They are merely documents disclosed by the Prosecution under Rule 66 in order to put the Defence on notice about the kind of evidence the Prosecution intends to adduce, and to enable the Defence to adequately prepare to cross-examine Witness TF1-150 on any aspect thereof, if the Defence so wishes. The Trial Chamber is further of the view that the disclosure of a witness' pre-trial statement does not automatically transform it into "evidence" in the absence of an application or request to tender by the party wishing to rely upon it. We know of no authority to the contrary.

12. By their Joint Motion, the Defence for the Accused Brima, Kanu and Kamara are in fact asking the Trial Chamber to exclude certain portions of the pre-trial statement of Witness TF1-150 dated 18 April 2005, namely the Report annexed to that statement. The Trial Chamber has no power or authority to order the Prosecution to change or alter the content of a witness' pre-trial statement. The Trial Chamber's power to entertain any objections with regard to "the intended oral evidence" of Witness TF1-150, is only set into motion once the Witness begins to testify or when the Prosecution has through his testimony applied or requested to tender documentary evidence pursuant to the Rules, but not before.

13. The *Kordic and Cerkez Case*[6] cited by both parties is both instructive and distinguishable. In that case the Office of the Prosecutor applied to tender in evidence the *Tulica* Dossier and Investigator's Report (consisting of maps, video footage, witness statements, court transcripts, exhumation reports, photographs and an investigators report) in response to the Trial Chamber's request to "*expedite proceedings without compromising the right of the accused to a fair trial.*" Clearly the Defence objections in the *Tulica* Case were made at an appropriate time after the Prosecution made its application to tender in evidence the Report. In the present Motion, the Prosecution has not yet led any oral evidence in regard to the impugned Report nor has the Prosecution applied to tender in evidence the said report or portions thereof as yet. The Trial Chamber accordingly finds that the Defence objections with regard to the intended testimony of Witness TF1-150 and the report annexed to this witness' pre-trial statement on grounds of lack of foundation, inadmissibility and relevance, are speculative and premature at this stage.

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[6] *The Prosecution v. Kordic and 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.

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FOR THE ABOVE REASONS

THE MOTION is dismissed.

Done at Freetown, Sierra Leone, this 16th day of June 2005.

Justice Richard Lussick

Justice Teresa Doherty
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]