SPECIAL COURT FOR SIERRA LEONE

Case No. SCSL-2004-16-T

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

Registrar: Robin Vincent

Date filed: May 27, 2005

THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

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

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I INTRODUCTION

1. The Prosecution has informed the Defence in writing via a letter dated 23 May 2005 that it is planning to introduce Witness TF1-150 at the trial session of 8 June 2005 to give evidence in chief, confirming that Witness TF1-150 will not be an expert witness.

2. The Prosecution has also confirmed that the witness has produced a report for the Prosecution, which it intends to bring into evidence.

3. The Prosecution has also informed the Defense that it intends to tender five other pieces of evidence through this witness, three of which the witness is not the author. The witness is one of the authors of the remaining two pieces of evidence. The Defense has been supplied with all five of these pieces of evidence.

4. Following the exchange of arguments and suggestions during the trial session of 26 May 2005, and the time schedule set by the honorable Trial Chamber to file the requested submissions, the Defense herewith, through this motion, notifies the honorable Trial Chamber and the Prosecution of its objections to the testimony to be given by said witness, at least as certain portions are concerned, which will be laid out in this motion.

5. This motion therefore serves to challenge both the admissibility and the nature of the evidence in chief to be adduced by Witness TF1-150, inclusive that of the specific documents relied upon by Witness TF1-150, which will also be addressed in this motion.

II LEGAL ARGUMENT

6. Before entering into the legal argument it is relevant to observe that the evidence to be adduced by Witness TF1-150, can be divided into two categories: 1) portions of the report based upon his direct knowledge, 2) alleged findings of fact which were based on primary and secondary information sources, which do not derive from the direct knowledge of said witness.

7. In para 10 of his report to the Prosecution, titled "Human Rights in Sierra Leone 1998-2000, Certain Aspects Relevant to the RUF-AFRC Indictments at the Sierra Leone Special Court," Witness TF1-150 defines primary and secondary information sources as follows:

> "Primary information" refers to the actual witnessing or experiencing of a human rights abuse on the part of the human rights monitor or the gaining of access to physical evidence of the matter under investigation. "Secondary information" refers to data gathered by monitors. This secondary information was subjected to a process of verification.

8. Notably, as to the secondary sources, the Witness states in para 10 that "reliability was assessed on the basis of a history of relationship with the information source and general evidence of the probity of that source."

9. The Defense objects against the admission of certain primary and secondary sources based on: a) lack of foundation; b) opinion evidence given by a lay witness; c) relevance of certain information adduced by this witness in said report in view of the generality of this information.[1]

Principal Sources of the UNAMSIL Reports that the Present Report Relies On

10. The Defense observes that in para 11 of this report, the witness relies on the following sources: direct investigative missions conducted by the human rights team, information 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.

11. Except for the first source, i.e., the direct investigation by the team of which the witness was part, the other mentioned sources pertain to information which do not derive from the own personal knowledge and experience of the witness and in addition, this information derives from reports of which he was not the author.

12. In particular, three additional objections arise as to the use of these principal sources.

13. **Firstly**, attention should be drawn to the fourth and fifth source, which relies on the "humanitarian community" and "the national human rights community." Aside from the question of how to define these communities, these sources are clearly too vague and broad to rely upon in the capacity as a witness. In fact, allowing the witness to be examined upon these specific sources would be tantamount to giving opinion evidence by a lay witness. It can reasonably not be said that a witness, who is not introduced as an expert witness, can testify on behalf of the "humanitarian community" or "the national human rights community." Such testimony would clearly fall outside of the competence of a particular lay witness.

14. As a consequence, the Defense believes that the testimony in chief of this witness can only be allowed with respect to the first principal source mentioned in para 11 of the report, namely, the "direct investigative missions conducted by the team."

15. **Secondly**, para 12 of the report states that it does not "purport to be comprehensive—instead it concentres [sic] on situations which have relevance with regard to the current RUF-AFRC related Special Court indictments."

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[1] In this regard reference is made to the separate opinion of Justice Robertson to the "Decision on appeal against 'Decision on Prosecution's motion for Judicial Notice and Admission of Evidence'" of 16 May 2005 case No.SCSL-2004-14-AR73, paras 26-32 with respect to the relevance and reliability of the contents of Security Council Resolutions and the UNICEF reports (see below).

16. Accordingly, this witness (not being an expert, let alone on legal matters pertaining to the indictment before an internationalized criminal court) can reasonably not assess the relevance of certain information in view of a certain indictment before an internationalized criminal court. Such assessment in terms of relevance of adduced information, clearly falls outside the personal competence of a lay witness. Therefore, the arguments of the Defense not to admit the testimony of Witness TF1-150 based upon the other seven principal sources, is reinforced by the argument that the selection of information presented by this witness amounts to a selection which can only be attributed to an expert witness.

17. **Thirdly,** the Witness TF1-150 repeatedly refers in his report to the term "reliability" as a criterion upon which he drafted his report.

    - In para 10 the author remarks "close attention was also paid to the reliability of the information source...."
    - In para 11 "on occasions data was omitted from reports on the basis that the report drafters lacked confidence in its quality."
    - In para 15 "a reliable humanitarian NGO source reported...."

18. From the report it is not clear whether and on which foundation the author determined the reliability of certain sources. In addition to that, in the absence of him being an expert witness, the Defense holds the view that a lay witness can reasonably not 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."

19. Also for this reason the Defense deems it contrary to the nature of the evidence to be given by a lay witness, that Witness TF1-150 is to be allowed to testify with respect to the mentioned sources.

20. By way of authority, the Defense refers to the ICTY Decision on the Prosecution application to Admit the Tulica Report and Dossier into Evidence, of 29 July 1999, in which case the ICTY Trial Chamber found that the prosecutor investigator in that case was not a contemporaneous witness of fact but had only recently collated certain materials in the dossier. These materials related to, inter alia, several maps, witness statements, transcripts from related cases, photographs, diagram and a map. In specific, the Trial Chamber held that the intended role of this investigator as a witness during trial, would therefore be limited to giving evidence on what was or was not in the particular dossier, and concluded that his testimony could not be considered of probative value. As a consequence, his

report was not admitted.[2] This case has considerable similarities with respect to the report of Witness TF1-150, who is called as a lay witness. As shown in this motion, Witness TF1-150, with respect to major portions of his report and the attached documents, cannot be considered as a contemporaneous witness of fact, but merely as a person who collected and collated certain materials in his report. Therefore, in keeping with said ruling of the ICTY, the probative value of his intended testimony can be questioned and therefore an objection tantamount to the lack of relevance, is justified.

21. In conclusion, and based on this mentioned authority, the Defense deems that the submitted objections should be upheld by the honorable Trial Chamber.

Sources of the Present Report

22. The same objections as enumerated in the previous section of this motion apply to the nature of the sources of the present report, as set out in para 13 of the report. This paragraph refers to five sources and except for the last two (personal notes) the other three pertain to sources of which Witness TF1-150 was not the exclusive author or were not written by him at all. Notably, this witness in this context refers to "the primary drafts of which were written by me," "the majority of which were written by me," and "some of which were written by me."

23. Now that this report does not make clear which specific parts of the mentioned sources were directly drafted by the witness or based upon his personal knowledge, the defense holds that the testimony in chief to be given by this witness should only be allowed with respect to the fourth and fifth sources, the issue of his personal notes. In addition, evidence to be given by this witness based upon these "personal notes" should only be allowed in so far as these notes rely on personal knowledge of said witness, and not on indirect sources or any other materials not based on his personal knowledge.

Objections and Reliability and Relevance of Press Releases, Communiqués, and Aide Memoire of which the Witness is not the Author

24. The same objections arise to several documents relied upon in this report by Witness TF1-150, of which he is clearly not the author, and the relevance of which can be questioned. These documents, which are attached to the witness report, pertain to the following materials:

    - UN press release titled "Joint Statement by Carol Bellamy, Executive Director of UNICEF; Sadako Ogata, UN High Commissioner for Refugees; Olara Otunnu, Special Representative of the Secretary-General for Children and Armed Conflict; Mary Robinson, UN High Commissioner for Human Rights and Sergio Vieira de Mello the UN

[2] See *Kordic and Cerkez* Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence, 29 July 1999, paras. 19-20. See also Judge Richard May and Marieke Wierda, *International Criminal Evidence* (2002), p. 251, which authors also describe this case.

Emergency Relief Coordinator" issued on 17 June 1998 cannot rightfully be brought into evidence, contrary to the Prosecution's intents. There is no link between the witness and that press release.

- The Joint Communiqué released from the Meeting Between the Special Representative of the UN Secretary-General to Sierra Leone and the delegation of the Revolutionary United Front cannot be rightfully brought into evidence by witness TF1-150, as he is neither the author of the communiqué, nor was present when it was drafted.

25. Now that these documents which are attached to the witness report are not written by the witness, and pertain to issues which clearly fall outside the competence of a lay witness, the Defense **primarily** holds that the witness should not be examined in chief about the contents of these materials and in addition to that these materials should not be admitted into evidence.

26. In the **alternative**, as to the admissibility of the mentioned attached documents, the Defense holds that also based on the lack of reliability and relevance thereof, these documents should not be admitted through Witness TF1-150.[3] As observed before, these attachments pertain to a press release of the UN, a Joint Communiqué, and an aide memoire presented by the UN observer mission in Sierra Leone of April 1999.

27. With respect to these documents the Defense raises similar objections as set out before, relying, at least by way of analogy, on the mentioned appeals chamber decision on judicial notice in the Fofana case, particularly the separate opinion of Justice Robertson to this decision.[4]

28. In the paras 28-32, albeit in the context of judicial notice, several observations are delivered by Justice Robertson with respect to the relevance and reliability of Security Council Resolutions, maps, piece agreements, treaties, press releases, UN humanitarian situation reports, etc. Notably, in para 28 of his separate opinion, Justice Robertson holds "Even Security Council resolutions do not come with an iron-clad guarantees of the truth of the facts stated in them." In addition, Justice Robertson observes that "it is unacceptable for the court simply to adopt an entire resolution, invariably a mixture of posited facts, propositions of law, and opinions of the Secretary General or the power that be in the Security Council. It is necessary for the prosecution to extrapolate from these wide-ranging resolutions such specific facts as it wishes the court to notice under 94(A), and present it to the court together with corrobatory material."

29. The Appeals Chamber itself in the mentioned Fofana decision on judicial notice of 16 May 2005, opined that only once the facts contained in the Security Council

[3] See pp. 00015197 till 00015236 of the Disclosed Statement.
[4] See *supra* Fn 1.

resolutions are extrapolated from each of the resolutions and recognized "as incapable of reasonable dispute" these resolutions do qualify for judicial notice.[5]

30. Mindful of the fact that in the instant case the mentioned attachments are not to be tendered into evidence by way of judicial notice, the Defense still believes that the analogy with the arguments of both the Appeals Chamber and the Separate Opinion of Justice Robertson and cited above, bear merit. After all, the Prosecution in the instant case seeks to admit all these attachments through Witness TF1-150, without the contents thereof being recognized "as incapable of reasonable dispute." Moreover, as to quote Justice Robertson, also here it seems "unacceptable" to simply adopt all these attachments through Witness TF1-150, attachments of which he is not the author, and the relevance of which cannot be determined through the evidence in chief of Witness TF1-150.

31. As a consequence the Defense objects against the tendering of all the mentioned attachments through the testimony in chief of Witness TF1-150 based on the lack of foundation, relevance, as well as the lack of specificity as to the "guarantee of the truth of the fact statement in them."[6]

32. For the foregoing reasons, the Defence prays the honorable Trial Chamber to:

- Firstly grant the objections of the Defense raised in this motion as to both the admissibility of the nature of the evidence in chief to be adduced by Witness TF1-150, as well as the tendering of the specific documents referred to in this motion, particularly the reliance on the UNAMSIL reports of which he was not the exclusive author and all those documents of which he had no part in writing.

- Secondly not the allow the Prosecution to examine Witness TF1-150 with respect to the mentioned the UNAMSIL reports of which he was not the exclusive author and all those documents of which he had no part in writing.

Respectfully submitted,

On May 27, 2005

Geert-Jan Knoops Momo Fofanah Glenna Thompson

[5] See *supra* Fn 1.
[6] See Para 28 of the mentioned separate opinion of Justice Robertson.

Table of Authorities

Decision on Appeal against 'Decision on Prosecution's motion for Judicial Notice and Admission of Evidence'" of 16 May 2005 case No.SCSL-2004-14-AR73

Separate Opinion of Justice Robertson to the "Decision on appeal against 'Decision on Prosecution's motion for Judicial Notice and Admission of Evidence'" of 16 May 2005 case No.SCSL-2004-14-AR73

Kordic and Cerkez Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence, 29 July 1999

Judge Richard May and Marieke Wierda, *International Criminal Evidence* (2002), p. 251, which authors also describe this case.