SCSL-2004-15-PT
(6669 - 6684)

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: 18th June 2004

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 2004 – 15 – PT

ISSA SESAY PRE – TRIAL BRIEF

Office of the Prosecutor

Luc Cote
Robert Petit

Defence Counsel

Tim Clayson
Wayne Jordash
Serry Kamal
Sareta Ashraph

Introduction

1. Issa Sesay, the first accused named upon the amended Indictment filed by the Prosecution on the 13th May 2004, is charged therein with a wide-ranging series of offences which the Prosecution assert, if proved, would entitle this Court to find that he is one of those persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law[1] and thus liable for punishment[2].

2. Pursuant to the Order of this Trial Chamber the Defence files this Pre-Trial Brief.

Background.

3. Issa Sesay ("the Accused") was born on the 27th June 1970 in Freetown. He is now 33 years of age. He married in 1993 and has one son aged 7 years. He was 19 years old when he first met Foday Sankoh. He was forcibly conscripted and had no choice but to join the RUF. He found himself imprisoned within Liberia under threat of death. He had no choice but to stay and fight. He had a choice however *how* to fight.

4. Thereafter and throughout his association with the RUF the aim and purpose of the Accused was to fight justly and legitimately for the benefit of freedom and liberty for the people of Sierra Leone who for many years had suffered enormous oppression, intolerance, corruption and above all fundamental denial of human

[1] Article 1 (1) of the Statute or the Special court of Sierra Leone.

[2] The defence recalls that in its Decision on the preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on behalf of Accused Fofana, 3rd March 2004, at paragraph 44, the Trial Chamber stated *"It should be emphasised that in the ultimate analysis, whether or not in actuality the Accused us one of the persons who bears the greatest responsibility for the alleged violations of international humanitarian law and Sierra Leonean law is an evidentiary matter to be determined at the trial stage. At this procedural stage, the Trial Chamber is essentially concerned with mere allegations".*

rights, and with a view to the creation of a society based upon fairness and democracy.

5. The Prosecution theory that the RUF was a criminal organisation with a criminal purpose is fundamentally flawed. It is not the case that all within the RUF shared the same aims or even that those who shared the same aims set out to achieve them in the same way. Undoubtedly some elements of the RUF were criminals. Undoubtedly some were responsible for crimes. However it is clear – even from the Prosecution's own evidence - that there were some who believed that they were fighting a just cause – a revolution – for the betterment of all.

6. The theory of the Prosecution is a simplistic one. It seeks to suggest that the RUF were the same as the AFRC. It seeks to suggest that the RUF were one and those that were part are *all* guilty of crimes. This is a theory which flies in the face of common sense and more importantly is not even supported by the Prosecution's own evidence. It is simply a device to implicate all in the crimes of others.

7. Mr Sesay did not share the intent of those within the RUF who were criminals. He believed in a just war – a war in which civilians would be the beneficiaries of the war and not the victims. This will be demonstrated through not only the defence witnesses but also many of the Prosecution witnesses who knew him and observed his conduct. It is also demonstrated through the Prosecution's own exhibits which tell a tale of a man trying to do his best to protect civilians. The evidence will demonstrate that he did what he could – when he could - to protect civilians. Moreover this evidence will stand in contradistinction to the evidence of the very few witnesses who will attempt to implicate him in the actions of others. This evidence will not stand up to careful and rigorous challenge.

8. It is the case for the defence that those who knew him (and of him) during the conflict recognised that he did not approve or condone the crimes against civilians. It is Mr Sesay who protected civilians throughout the conflict. It is Mr

Sesay who protected Makeni from the excesses of others. It is Mr Sesay who disciplined severely those under his control when he knew or had reason to know of their crimes. It is Mr Sesay who prevented crimes when he knew or had reason to know that they were to be committed.

9. It is Mr Sesay who was chosen by ECOWAS as the man who should lead the RUF to the negotiating table. It was Mr Sesay, who once in a position of real authority and a great risk to himself, led the RUF to peace in order to protect his country from the war.

10. It was Mr Sesay who the Prosecution, through their investigators, cynically chose to trick, coerce and cajole into giving interviews. They too recognised that he was a man who was exceptional within the RUF and who would be vulnerable due to his desire to protect civilians and bring enduring peace to Sierra Leone.

11. Mr Sesay is guilty of being a member of the RUF but he is not guilty of any crimes.

Preliminary Matter.

12. On the 11th June 2004 at the request of Issa Sesay, Maurice Kallon and Augustine Gbao, the three persons accused in this case, there was filed with the Trial Chamber and the court Registry a letter in which the three Accused referred to an outstanding application lodged with the Supreme Court of Sierra Leone. The essence of the application was to seek an order from that Honourable Court declaring the Special Court of Sierra Leone to be in breach of the Constitution of

Sierra Leone. The three Accused have stated in the above letter that they will not attend the sittings of the Special Court of Sierra Leone unless and until the Supreme Court of Sierra Leone delivers and makes public its ruling upon the said application. In these circumstances this Defence Pre Trial Brief necessarily acknowledges the position of the Accused.

The Essence of the Prosecution Case.

13. The Prosecutor alleges[3] that "At all times relevant to this indictment Issa Hassan Sesay was a senior officer and commander in the RUF, Junta and AFRC/RUF forces, that Issa Hassan Sesay was party to a joint criminal enterprise with named others, and that he and they by their acts and/or omissions incurred criminal liability under national and international law in respect of the specific allegations contained within the various counts set out in the said Amended Indictment.

14. The defence notes the significant terms of paragraph 38 of the said Amended Indictment and especially the words "..which crimes each of (the accused) planned, instigated, ordered, committed or in whose planning, preparation or execution each Accused otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which each Accused participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which each Accused participated". Further, the Defence refers to the contents of paragraph 39 of the said Amended Indictment in which the Prosecution assert, additionally or in the alternative, that the Accused named are criminally liable in respect of the alleged acts and/or omissions by virtue of any of the established principles of command responsibility. Thus the Prosecution in respect of each Count upon the

[3] Para 20, Amended Consolidated Indictment, 13.05.04.

said Amended Indictment has brought against each Accused the widest possible assertions and variations of criminal liability that could theoretically be identified.

15. The Defence at the outset of this Pre Trial brief wish to emphasise to the trial Chamber that where a more specific form of allegation could be made, for example where there is evidence that an individual accused is responsible for a specific act, it is not merely good practice for the allegation to be specified in that manner, but that highly qualified Prosecutors with extensive experience within both national and international courts, should put forward their allegations in that way. The Defence submit that it is of significance that the Prosecution have not refined the allegations that it seeks to bring against Mr Sesay in relation to each and every count on the said Indictment. In this way the Prosecution has obscured the relative strengths and weaknesses of its case in all its component parts. Finally, and most importantly in relation to this point, the Defence invites the Trial Chamber seriously to consider why it is that the Prosecution has not brought specific allegations against each Accused if it is not because the Prosecution cannot pinpoint the case that it really should bring against an Accused. It is the global approach of the Prosecution which the defence resist and which seeks simply to implicate all due to membership of the RUF.

Prosecution Pre Trial Briefs.

16. Further, in the first Prosecution Pre Trial Brief the Prosecution did not adequately state its case against the Accused. It is impossible to understand why this was save that the natural inference is that the Prosecution did not want to have to set

out its case with any particularity. As a result, the Prosecution was ordered to file a Supplementary Pre Trial Brief which it did on the 21st April 2004.

17. In its Supplementary Pre Trial Brief the Prosecution set out its case with much greater detail than had ever been made plain previously. The Defence deplores the fact that it was served with this extensive document, some 417 pages in length including witness summaries with exhaustive cross referencing, and by far the most important document served by the Prosecution in the entire case, little more than two months prior to trial. Nonetheless, the Defence appreciates the fact that the Order of the trial Chamber has resulted in the production of the first clear statement of the Prosecution as to the detailed nature of its case.

Inferences and Circumstantial Evidence

18. It should be noted that the Prosecution has set out and developed a framework in its Supplementary Pre Trial Brief whereby it seeks to prove the various heads of criminal liability in connection with each charge by way of assertions of fact which, it is said, give rise to inferences of guilt. Such an approach reflects the paucity of direct evidence to establish guilt of the Accused upon any of the charges. This is astonishing bearing in mind the extremely high burden of proof that exists in relation to the prosecution of crimes of the utmost seriousness.

19. Furthermore, it is clear that the Prosecution asserts that it can call only minimal evidence of (i) direct personal commission by the accused of any crime charged and (ii) the giving of direct orders by the accused to any other person to the effect that one or more crimes charged should be carried out. This is somewhat surprising given the case which they allege against Mr Sesay and the fact they

have been investigating his role for at least two years. It is illustrative of his innocence rather than his guilt.

20. The Defence therefore emphatically underlines the fact that it is apparent that the Prosecution case against Mr Sesay rests upon inferences. The Prosecution therefore asserts that these inferences are sufficiently cogent and clear to support findings of guilt beyond reasonable doubt.

21. In this context the Defence poses the question that arises from the myriad of alternative forms of liability asserted by the Prosecution, firstly in its Amended Consolidated Indictment and now expanded upon in its Supplementary Pre Trial Brief. It is surely inconsistent both in logic and in common sense to assert mutually exclusive forms of criminal liability based upon competing inferences said to arise from different matters of fact. What the Prosecution describe as their "theory of the Case" is (again and in this respect) fundamentally flawed. The Prosecution lack confidence in their own case and feel unable to state it without relying upon mutually exclusive case theories.

22. The Defence are thus entitled to and do invite the Trial Chamber to scrutinise with the greatest of care any departure during the Trial the manner in which the Prosecution has presented its case in the Supplementary Pre Trial Brief. The point can be put in another way namely that for these reasons the Trial Chamber should be sceptical as to the significance of any individual inference sought by the Prosecutor. The greatest unfairness would arise in the event that the Prosecution ultimately are permitted to alter its present case in the inevitable event that it is not supported by the evidence. The Defence will be vigilant as to this issue throughout the trial and would invite the trial Chamber to bear this issue in mind throughout.

23. The defence submit that for the reasons advanced above where the Prosecution seeks to prove guilt by virtue of inferences from facts, the Trial Chamber must necessarily exclude all other inferences. The inference of guilt relied upon by the Prosecution must be an irresistible one and one which no reasonable tribunal could fail to draw. In other words the Trial Chamber must exclude the possibility that the facts relied upon and proven, together with any or all of the other facts established in the trial and/or other facts which although not known may reasonably be supposed to exist, might support some other inference. **The burden on the Prosecution is therefore a heavy one and more so because of their failure to build a case against Mr Sesay without relying almost exclusively on circumstantial evidence.**

Command Responsibility.

24. The Prosecution clearly believes that it will be easier to prove some form of command responsibility, rather than direct personal liability, in the absence of direct evidence of personal commission by act or order of any of the crimes charged in the said Consolidated Amended Indictment. The Defence submit that such a perception is completely misconceived. Liability pursuant to command has never been and hopefully never will be treated by any credible judicial tribunal, let alone by the members of this distinguished Trial Chamber, as a "soft option" whereby in the absence of compelling evidence of guilt of direct offending the Prosecution might receive some sort of consolation prize. The Prosecution approach is one of guilt by association or guilt by membership of the RUF. The

Defence once again ask that the Trial Chamber be sceptical of a Prosecution that puts forward an exaggerated form of Indictment and Pre Trial brief in order to encourage the Chamber to find more agreeable the lesser case for which the Prosecution argues at a later time.

25. Foday Sankoh was a ruthless and highly skilled manipulator of men. He promoted and demoted individuals at will and was proficient at ensuring that no one individual obtained a position from which he might be challenged. The Prosecution evidence will demonstrate this fact. It is the defence case that the RUF was not a regular army. It was a an organisation without a clearly defined or well structured military hierarchy or that such hierarchy as there was existed only for so long as Sankoh wished. The evidence will show that his approach was to "divide and rule" to pitch personality against personality; Commander against Commander; man against man. It is a fallacy and owes more to wishful thinking and an enthusiasm for convictions rather than a proper appraisal of the Prosecution evidence to suggest otherwise.

26. This is an important matter for when the Trial Chamber comes to consider what action to prevent criminal acts of subordinates or to punish any perpetrators thereof was realistically available to an officer subordinate both to Sankoh and Sam Bockarie or not in control of many of the other key players not on trial before the Special Court [4]and/or even those without identified position but with their own power base. Moreover, the RUF was an unstable ad hoc organisation with many factions; regular and irregular in nature; containing different personalities with many allegiances frequently operating in conditions of great difficulty with differing aims. Communication was difficult and made more so by

[4] Some of whom shall be bizarrely called as Prosecution witnesses.

the personalities involved and the egocentrism of some. Those who were from time to time were in a position of command within the regions cannot reasonably be held responsible for events outside their immediate control.

27. The Trial Chamber must scrutinise with care any suggestion of material control. In this regard the radio messages relied upon by the Prosecution reflecting the day to day activities of the RUF within 1998 – 1999 illustrate the limited control that any particular individual might have and how that control might change on a daily basis. They show the lack of control Mr Sesay had even within his so called area over the more criminal elements of the RUF.

28. The Prosecution allege[5] that Issa Sesay was a party to a joint criminal enterprise with others both named and unnamed and described as *"..a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise. (37) The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged within this Indictment...were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise".*

[5] Paragraphs 36 and 37, Amended Consolidated Indictment, 13th May 2004.

29. For a person to be party to a joint criminal enterprise the Prosecution must prove both the specific nature of the enterprise and that the person accused of participating therein did so with the requisite intent. In other words Mr Sesay must have participated in the common enterprise in some meaningful manner with sufficient knowledge of the criminal purpose of the plan and having agreed either explicitly or tacitly to the furtherance of the same through his own actions. In the alternative the Prosecution must prove that acts committed by others, whilst being outside the common design, were nevertheless a natural and foreseeable consequence of the effecting of that common design. The defence submit that there never was a joint criminal enterprise as alleged by the Prosecution or at all.

Matters of Unfairness

30. The Defence expresses its grave concern as to the following matters regarding the Prosecution's approach to this trial. Firstly, the undeniable fact is that in its preparation of the case prior to trial the Defence has suffered from a huge imbalance of resources when compared with those available to the Prosecution. These matters include a massive discrepancy in finance, staff, office accommodation, investigative and research facilities, and especially the fact that the Defence are not able to be present in Sierra Leone throughout the pre-trial period and are thus seriously inhibited in developing their case in Sierra Leone. The Prosecution has sought, whether deliberately or otherwise, to take advantage of this gross disparity. In particular the Prosecution has adopted a strategy of late and intensive "carpet bombing" of evidence which have overwhelmed the defence. It is trial by ambush and not by evidence.

31. It is quite clear that the Prosecution deliberately (through design or otherwise) waited until the last moment before serving material upon the Defence when fair

play and the spirit of the Rules would indicate that service of materials should take place as early as practicable. In this context the Defence has already pointed out in previous motions that the disclosure of a vast mass of material in late April 2004 could not be justified as a matter of fairness by the Prosecution as the majority of that material had been within its hands for over a year. No explanation has been offered for such action. The only inference from this matter is that the Prosecution has deliberately sought to embarrass the Defence.

32. Secondly, the Defence has grave concerns as to the Prosecution's approach regarding disclosure of evidence which may exculpate or tend to exculpate the Accused: only recently has any such material been identified to the Defence and then only in a very small quantity. In the light of the Prosecution's unjustified late service of material on which they seek to rely in the trial, the Defence believes that it is not enough for the Prosecution's assertion that it has been frank as to disclosure of exculpatory material to be accepted without more. For the avoidance of doubt and in order to emphasise the Prosecution's continuing duty to disclose such material the defence invite the Trial Chamber, prior to each trial period commencing, to ask for an assurance from the Prosecutor in open Court that to the best of its knowledge all material that tends to exculpate the Accused has been disclosed in accordance with the relevant rules of the Rules of Procedure and Evidence of the Special Court.

33. Further, the Defence believes that in at least three other respects the Prosecution has deliberately approached this case with a view to putting the Defence at a grave disadvantage. The Defence believes that the Prosecution has available to it all or most of the witness statements and other documentary evidence and materials in electronic form. There is no good reason why disclosure of statements, documents and other materials were made by the Prosecution in hard

copy rather than electronically and the Prosecution knows that disclosure in that form would be logistically far more convenient for the Defence counsel many of whom have to travel to and from Sierra Leone on a regular basis. The defence also understand that the OTP budget includes finance for the typing of witness statements. It is a shame that it was not used for the first 100 statements served upon the defence. Finally, the Defence requests that the Prosecution disclose whether it has used or attempted to use employees of the Special Court out with the OTP for the purposes of carrying out OTP functions such as but not limited to tracking down and/or interviewing witnesses; such actions would not merely be high-handed but would show as the Defence believes is the case that the Prosecution has pursued a "do or die" or "win at all costs" strategy in this case and would further extend the disparity between the resources available to and used by the OTP when compared with the Defence.

THE OTP OPENING

34. The Defence has noted the highly emotive opening statement of the Prosecutor in "the CDF" trial and trusts that the same style will not be adopted in "the RUF" trial. This is an international court of law dealing with highly emotive circumstances and alleged crimes. Justice will be done and seen to be done only when all before it approach the evidence with the same dispassionate analysis devoid of rhetoric and emotion.

The Defence Case.

35. In terms, the Defence denies that such matters as the Prosecution may be able to prove in relation to Issa Sesay could conceivably support any conviction for any crime charged upon the basis of the inferences for which it contends.

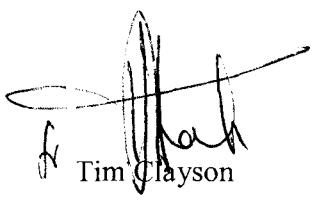
36. Issa Sesay joined the RUF as a young man after having been abducted. He was a man of modest education and background. He came to believe in the principles of democracy and fairness which the evidence will show were the stated aims of the RUF. He pursued those goals with uttermost probity. It was because he had a reputation for fairness and reliability that he will be able to rely upon a substantial amount of civilian witnesses who believe that he helped to save their lives and livelihood. It is because of this same reputation that he was attacked by the criminal elements within both the RUF and the AFRC who could not tolerate his vision nor his approach which put civilian lives above those of his own men.

37. Witness after witness (Prosecution and Defence) will confirm this fact and confirm that he was a man of reason and intelligence. The defence will show throughout this case that Mr Sesay fought a just war without recourse to crimes.

38. It was this reputation which ultimately led to him being chosen by the leaders of ECOWAS as the interim leader of the RUF. At great personal risk he undertook the pivotal role of bringing about disarmament of the RUF and thereby peace to Sierra Leone. Without his contribution the war in Sierra Leone might still be ongoing. In the context of this trial his defence will assert that his intent was to avoid distress and harm to civilians and will call evidence to this effect. His contribution to the peace process and disarmament of the RUF is not merely some late in the day change of heart but a reflection of his long-standing desire to pursue political change for the benefit of the people of Sierra Leone. He instructed troops to refrain from committing offences against the civilian population. When he could and to the extent of his ability he punished anyone under his authority who was shown to have misbehaved towards any civilian.

39. Issa Sesay denies that he at any time, whether within or outside the timeframe set out in the said Amended Consolidated Indictment, committed personally, jointly, by order or otherwise, any of the alleged criminal acts or omissions therein set out. As stated above, he further denies that there ever existed a joint criminal enterprise within the RUF and/or that if such existed that he was ever a party thereto.

40 In conclusion, Issa Sesay was a man who acted in support of the legitimate purposes that he understood and believed were the ideals of the RUF. He fought a just war with idealistic motives. The distinction between a just and an unjust war is the focus of his defence. It is a distinction the Prosecution fail (or refuse) to appreciate because it is inconsistent with their wrongly held belief that all within the RUF are guilty. Mr Sesay was a member of an army. He was not and is not a criminal. In due course and having heard the evidence he will submit that the Prosecution of him should fail on all counts.



Tim Clayson
Wayne Jordash
Serry Kamal
Sareta Ashraph

Dated the 18th of June 2004