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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Pierre Boutet
Hon. Justice Bankole Thompson

Registrar: Mr. Herman Von Hebel

Date: 6th March 2008

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

Public Document

DECISION ON DEFENCE MOTION FOR AN ORDER TO THE PROSECUTION TO CLARIFY AND SPECIFY THE SCOPE OF ITS CASE REGARDING RUF INVOLVEMENT IN THE FREETOWN INVASION ON JANUARY 6, 1999.

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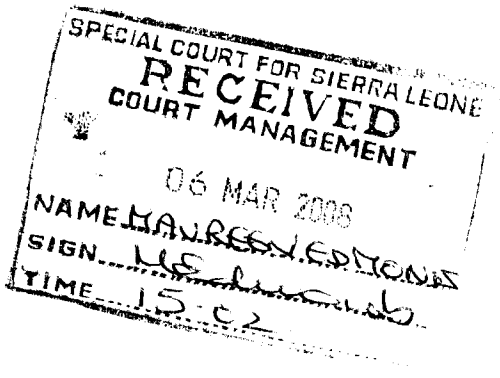

TRIAL CHAMBER I ("Trial Chamber I") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, Hon. Justice Bankole Thompson, and Hon. Justice Pierre Boutet;

HAVING HEARD the Oral Application raised by the Defence Counsel for Issa Sesay ("Sesay Defence") on the 12th of November 2007;

NOTING the oral submissions of Sesay Defence, Defence for Morris Kallon ("Kallon Defence"), Defence for Augustine Gbao ("Gbao Defence") on the 12th and 13th of November 2007 and oral response thereto by Prosecution on the 13th of November 2007;

CONSIDERING the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("Statute"), Rules 73 and 54 of the Rules of Procedure and Evidence ("Rules");

THE TRIAL CHAMBER, HAVING CONSIDERED the oral submissions and arguments of the Parties,

HEREBY ISSUES THE FOLLOWING DECISION:

I. BACKGROUND

1. On the 12th of November 2007, the Sesay Defence raised an objection to the line of questioning employed by the Prosecution. The Sesay Defence specifically argued that the Prosecution in cross-examining of defence witness DIS-281 had limited the scope of their case with respect to role of RUF in the "so-called" invasion of Freetown on January 6, 1999. The Sesay Defence orally applied for a Court Order for the Prosecution to state their exact case with regard to the January 6, 1999 invasion of Freetown. Both the Kallon and Gbao Defence endorsed the application and made oral submissions thereto. The Prosecution responded on the 13th of November 2007 denying any alterations in their case.

II. ARGUMENTS OF THE PARTIES

A. The Defence

2. The Sesay Defence submits that the Prosecution must define with clarity and specificity the scope of its case with respect to the role of the RUF in the invasion of Freetown on January 6, 1999.

3. The Sesay Defence argues that the Prosecution in cross-examination put a specific factual scenario to witness DIS-281 in which it limited the RUF involvement in the invasion to an attempt to coordinate with the SAG Musa or Gullit's troops in Freetown and offering Gullit's troops assistance to retreat from Freetown.[1]

4. The Sesay Defence therefore submits that if the Prosecution has now limited the scope of its case regarding the role of RUF in the Freetown invasion to an attempt and/or assistance they offered to the Sierra Leonean Army ("SLA"), the Defence would welcome this limited case. Thereupon, the Sesay Defence states that the Prosecution must admit that this is now their case.[2]

5. The Kallon Defence submits that in cross-examination, the Prosecution put a concrete state of factual events and propositions to defence witness DIS-281 which have no basis. It therefore argues that Prosecution is under a duty to explain to the court reasons why it should not be bound by these equivocal propositions. Further, according to the Kallon Defence, in the event the Prosecution does not offer a satisfactory explanation, the Kallon Defence is entitled to assume that the proposals made by the Prosecution now represent their case, rather than what is alleged in the indictment, Pre-Trial Brief and/or in the testimony of Prosecution witnesses.[3]

6. The Kallon Defence affirms that the concrete propositions or factual scenario made to witness DIS-281 are very clear and unequivocal and the Defence must therefore assume this as the Prosecution's case.[4]

7. The Gbao Defence asserts that it is constantly in a state of uncertainty about the Prosecution's case against Augustine Gbao on the grounds of Joint Criminal Enterprise[5] noting, that the umbrella of Joint Criminal Enterprise, cloudy and nebulous as it is, hangs over Mr. Gbao's head to a great extent. The Gbao Defence further argues that if the Prosecution is now limiting its case from its original wide ambit to a narrower one, the Gbao Defence would like to be informed of this so that it

[1] Transcript of 12 November 2007, pp. 119-120.
[2] Transcript of 12 November 2007, p. 120.
[3] Transcript of 13 November 2007, p. 40.
[4] Transcript of 13 November 2007, p. 41.
[5] Transcript of 12 November 2007, p. 121, *The Gbao Defence argue that Prosecution has led evidence in chief, of an alleged big meeting in Buedu in December 1998, where plans were laid for the attack on Freetown. The Gbao Defence recalls that in cross-examining Prosecution witness TF1-371, attempted to distance Gbao from such a meeting with some success.*

can be placed in a position where it can take advantage of this in accordance to the principle of fundamental fairness.[6]

B. The Prosecution

8. In reply, the Prosecution submits that it relies on the body of evidence of approximately 27-29 witnesses to demonstrate and prove beyond reasonable doubt that the crimes alleged in the Indictment with respect to Freetown were committed.[7] The Prosecution adds that from its evidence-in-chief, there were RUF fighters in Freetown before the invasion. The Prosecution further states that there were fighters who went as far as Waterloo/Hastings areas further towards Orugu Bridge, but that this particular group did not make it to Freetown.[8]

9. The Prosecution further contends that the purpose of cross examination is three-fold; (i) to undermine the credibility of a particular witness; (ii) to try and undermine the credibility of another Defence witness; and (iii) to try and obtain evidence which corroborates Prosecution evidence. It submits that there are no restrictions on any cross-examining party as to which rules or functions to apply. The Prosecution therefore argues that the view it took with respect to witness DIS-281 is not the complete review of the Prosecution evidence, but that it has continued to rely on some of these areas of evidence within its case.[9] It asserts further that it is not changing or narrowing its case and that its cross-examinations serve certain functions as stated above and in no way seek to infringe upon the Rules of Procedure.[10]

10. Moreover, the Prosecution further submits that the Defence's application is not contemplated by the Rules and as such not an appropriate discussion to take place at this point in time.[11]

III. APPLICABLE LAW

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[6] Transcript of 12 November 2007, p. 121.
[7] Transcript of 13 November 2007, p. 31, *some of the Prosecution witnesses who testified about events in Freetown during the January 6, 1999 invasion included TF1-167, 023, 101, 097, 022, 314, 360, 029, 104,184 who testified on RUF, SLA/AFRC presence in Freetown. However, TF1- 093 who testified to the contrary that there were no RUF in Freetown on January 6, 1999.*
[8] Transcript of 13 November 2007, p. 31, See also: *Prosecution Witness TF1-360, who testified that a group of RUF fighters were told to attack ECOMOG at Kosseh Town with the aim of going the main RUF group in Freetown. However they were not able to do so because the RUF side from Waterloo/Hastings did not respond the way they were expected to, and TF1-360's group reported to Gullit at Ferry Junction*, Transcript of 21 July 2005.
[9] Transcript of 13 November 2007, p. 31
[10] Transcript of 13 November 2007, p. 38.
[11] Transcript of 13 November 2007, p. 38.

11. On a preliminary review of the parties submissions, the Chamber opines that, in the absence of an express and specific statutory provision empowering it to grant the relief claimed, to wit, an order requiring the Prosecution to clarify and specify the scope of its case on a particular issue as alleged in the Indictment where the Prosecution has already closed its case, the relevant provisions pursuant to which the Defence can properly move the Chamber for the relief sought are Rules 54 and 73(A). According to Rule 54:

> at the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

12. Rule 73 (A) states that:

> subject to Rule 72, either party may move before the Designated Judge or a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Designated Judge or the Trial Chamber, or a Judge designated by the Trial Chamber from among its members, shall rule on such motions based solely on the written submissions of the parties, unless it is decided to hear the parties in open court.

IV. DELIBERATIONS

13. Thus guided as to its authority to dispose of the order sought, can or could the Chamber properly decide interlocutorily this matter at this stage of the proceedings? Thus, where the Prosecution has closed its case, and the Court has issued its Rule 98 Decision can or could the Chamber rule that the Prosecution has or has not, during its cross-examination of witness DIS-281, limited the scope of its case on the allegation of the invasion of Freetown on January 6, 1999 as a legally and logically indistinct question from that of an alleged defect in the form of the Indictment as to specificity? If so, can or could the Chamber in its discretion, grant the relief sought?

14. In this regard the Chamber takes the view that cognisant of the distinction between the facts of a case and the evidence adduced at the trial by the Prosecution, irrespective of the degree of specificity or lack thereof in the Prosecution's pleading or the lack or otherwise of clarity of its evidence-in-chief or cross-examination of witnesses, as was observed in the ICTY case of *Prosecutor v.*

Brdanin[12], "it is for the Chamber then to determine at the end of the trial whether there is enough evidence to support the charges pleaded in the Indictment."

15. We are further strongly of the view that the issue of whether the Prosecution, during cross-examination of a defence witness, to wit, in this case, DIS-281, on the specific allegation of the invasion of Freetown by the RUF on January 6, 1999 has or has not limited the scope of its case as originally conceived as regards the said allegation, is in essence one that goes to the root of the form of the Indictment. The short point is whether a judicial inquiry of this nature is one for interlocutory determination, bearing pre-eminently in mind the fact that the Prosecution has already closed its case.

16. Predicated upon the foregoing analysis of the issue, it is the Chamber's view that in the context of this trial the decision of the Prosecution to cross-examine a witness (.i.e. DIS-281) on some aspects and not on others about specific allegation or whether to cross-examine as to credibility and not as to issue or *vice versa* in respect of that particular allegation, cannot, at this stage of the proceedings where the Prosecution has closed its case, properly be the basis of an interlocutory ruling because it raises collaterally and, in a disguised manner, an issue of possible defect in the Indictment. Hence, the Chamber holds that this is a judicial inquiry which by reason of Rule 72(B)(ii) of the Rules of Evidence and Procedure of the Court, it is precluded from embarking upon at this phase of the trial of this case.

17. The foregoing reasoning of the Chamber notwithstanding, it cannot be controverted that, as a matter of law, the expectation generally is for the Prosecution to maintain a consistent, clear and specific framework of its case as adduced in examination-in-chief or as alleged in the Indictment.[13] By parity of reasoning, it is the Chamber's view that it is incumbent on the Prosecution to cross-examine with precision and focus on the evidence already adduced in its case in support of the allegations against the Accused. This, however, is not to suggest that the Chamber can, either statutorily or inherently, order the Prosecution, barring clear cases where the law may require the Prosecution to be put to its election, to cross-examine specific defence witnesses on every conceivable aspect of allegations made in the Indictment. Nor do we have the authority to make a judicial determination, at this stage of the presentation of the Defence evidence, as to whether cross-examination on some specific issues connected with the allegations in the Indictment is either too limited or too wide in

[12] *Prosecutor v. Brdanin, "Decision on Motion to Dismiss Indictment", Case No. It-96-36-PT, 5 October 1999, para. 15.*
[13] [13] *Prosecutor v. Momcilo Krajisnik & Biljana Plavsic, "Decision on Prosecution Motion for Clarification in respect of Application of Rules 65 TER, 66(B) & 67(C)," 1 August 2001, para. 13.*

terms of the Prosecution's case as pleaded. This is certainly a matter of prosecutorial judgement or discretion.

18. After a careful examination of the state of the records in so far as it relates to the subject matter of the instant Defence Motion and the order sought by the defence, the Chamber is of the opinion that there is no compelling consideration, factor or circumstance justifying it to incline to the view that there is judicial warrant, at this stage of the proceedings, to call upon the Prosecution to define the scope of its case with regard to the allegation of the invasion of Freetown on January 6, 1999 in the light of the nature of its cross-examination of DIS-281.

19. The Chamber also reiterates its position that the exercise of such a discretion in the context of this trial at this stage of the proceedings can only be properly undertaken as part of a judicial inquiry into alleged defects in the form of the Indictment, an inquiry which the Chamber, by reason of Rule 72(B), is foreclosed from engaging in at this phase of the trial. Nor does it appear to the Chamber that the Prosecution's approach to the cross-examination of DIS-281 has derogated in any manner from the rights of the Accused under Article 17(2) of the Statute.

20. We, likewise, opine that the Prosecution, during its cross-examination of DIS-281 has not transgressed the purpose of cross-examination which is to negate or undermine an opponent's case either by cross-examining on issues in controversy between the parties or as to credibility.

IV. DISPOSITION

21. Predicated upon the foregoing considerations, the Chamber concludes that the Motion is meretricious and accordingly dismisses it.

Done at Freetown, Sierra Leone, this 6th day of March 2008

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

[Seal of the Special Court for Sierra Leone]