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Summary

The 4th week of the current RUF trial session saw the closed session testimony of both an insider witness as well as an expert witness for the Prosecution, who is set to close their case by the end of this session. The expert witness testified about the involvement of children under the age of 15 with RUF fighting forces during the conflict in Sierra Leone, as charged in Count 12 of the Indictment.¹ The Prosecution also tendered a report authored by the expert witness in question, which, despite vigorous objections by the defence, was admitted into evidence by Trial Chamber I. In its decision the Chamber reiterated its flexible approach to the admissibility of evidence, in line with other international criminal trials.

During the testimony of Witness TF1-041, the Defence launched objections regarding the lack of notice with respect to the witness’ testimony on the alleged reporting structure of the RUF as well as the implication of the third accused in certain events, with counsel describing himself as ‘surprised’ by the testimony. Disclosure by the Prosecution has been an ongoing point of contention throughout the RUF trial, with the Defence alleging that the Prosecution’s continuous and late disclosure of supplemental factual allegations contained in witness statements has deprived the Defence of adequate opportunities to cross-examine witnesses on such information. The Trial Chamber has consistently determined that the Prosecution has not breached its disclosure obligations by serving

¹ The Prosecutor v. Sesay, ‘Corrected Consolidated Amended Indictment’, SCSL-04-15-619, 2 August, 2006

these statements on the Defence and that such additional allegations are admissible provided they are germane to the factual allegations set out in the Indictment. Furthermore, the Chamber has reiterated that the Defence can continue to exercise its right to cross-examine witness on all information contained in these supplemental statements and to apply for an adjournment, should they require more time to prepare to do so.

Witness Profiles at a Glance

Witness TF1-041, represents the 79th witness called by the Prosecution in the RUF trial. The witness testified in Krio under protective measures in closed session. The examination-in-chief of the witness began during Monday's proceedings but his testimony was interposed with that of expert witness TF1-296 on Tuesday afternoon. The cross-examination of the witness by counsel for the second accused resumed on Friday afternoon and will continue with next week's proceedings.

Witness TF1-296 was called as an expert witness by the Prosecution. The witness testified in English, beginning the examination-in-chief on Tuesday and completing the cross-examination on Friday. The witness stated that she considers herself to be an expert in the area of the recruitment of child soldiers in fighting forces during the war in Sierra Leone during the 1990s, as well as an expert in the age-verification of child soldiers in Sierra Leone. Accordingly, the witness' testimony related to Count 12, as charged in the Indictment, which relates to the alleged recruitment and use of child soldiers by the RUF.²

The Principle of Orality and 'Rolling Disclosure'

During Monday's proceedings counsel for the first accused asked to make an objection in the absence of Witness TF1-041. The Trial Chamber obliged the request and Mr. Jordash indicated that his objection related to notice, a point he wished to put on record. Jordash argued that the Prosecution had just adduced at least ten minutes of detailed evidence from the witness with respect to the alleged reporting structure of the RUF, following just a few simple questions being posed by the Prosecution. Jordash stated that this information was contained in the Prosecution's proofing notes in February 2006, which were disclosed to the Defence 'in skeletal form' in the same month. In relation to this information regarding the RUF's reporting structure, Jordash stated that while the notes make a very quick reference to the reporting system, the details elicited in the testimony would have been of huge assistance to the Defence. Jordash claimed "We have had a reporting system created more than halfway through this trial. We now have, belatedly, this kind of skeletal disclosure, only belatedly and very skeletally. Then we have, simply, some questions asked of this witness and he seems quite capable of giving those details. Why weren't those details given in a disclosure note, so-called proofing notes in February

² The Prosecutor vs. Sesay, 'The Corrected Consolidated Amended Indictment', 2 August 2006. Count 12 alleges the use of child soldiers and states: "At all times relevant to this Indictment, throughout the Republic of Sierra Leone, AFRC/RUF routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities. Many of these children were first abducted, then trained in AFRC/RUF camps in various locations throughout the country, and thereafter used as fighters."

2006?”³ Furthermore, Jordash claimed that it is this information on the RUF’s reporting system that the Prosecution will utilize in proving command responsibilities as laid out in the Indictment. Counsel for the second and third accused noted that they shared the concerns expressed by Jordash and counsel for the third accused indicated his particular surprise and alarm as his client, Augustine Gbao, was not even mentioned in the skeletal version of the witness statement despite extensive testimony by the witness implicating Gbao. Counsel for the first accused indicated that his comments were simply for the record and that the remedy sought was outlined in a motion presently before the Trial Chamber (as discussed below). Counsel for the third accused asked for one of two remedies; more time to investigate or the exclusion of specific aspects of evidence related to Gbao.

The Prosecution indicated that this was also the first time that they had heard Gbao’s name mentioned in relation to the events being narrated by the witness and that they were similarly taken by surprise. The Presiding Judge suggested that they were thus still within the ‘rubric of the principle of orality’, which places primacy upon the direct evidence afforded by the oral testimony of witnesses.

In terms of the objection launched by Jordash, the ongoing issue of late and insufficient disclosure on the part of the Prosecution with respect to supplemental statements in the RUF trial was brought forward in a Defence motion on 29 June 2006.⁴ The submission begins by stating:

“During the course of the present trial proceedings Trial Chamber I has ruled on the admissibility of over a hundred supplementary factual allegations disclosed throughout the Prosecution case. The rulings, rejecting the Defence assertions of lack of notice, have permitted the Prosecution to continuously disclose factual allegations throughout the course of the Prosecution case, provided that the additional factual allegations are relevant to, and fall within, the temporal and subject matter of the Indictment.”⁵

The motion in question argued that it sought, not to circumvent the Trial Chamber’s previous rulings on such matters, but rather a ruling of clarification that the Defence is entitled to have the opportunity to cross-examine all relevant witnesses on all the supplementary factual allegations arising from any witness. This, it was argued, could include the possibility of recalling earlier Prosecution witnesses who might reasonably be able to testify about later allegations, disclosed through supplemental factual allegations proceeding their testimony. The so-called ‘rolling disclosure program’⁶ of the Prosecution has been a subject of ongoing objections, both in written motions as well as oral interventions, during proceedings in the RUF Prosecution case by the defence team for the first accused. The Trial Chamber has consistently found that the principle of orality has applied in such cases where witnesses have provided evidence not contained within witness statements, that the Defence has had sufficient notice of additional

³ SCSL Transcript, 10 July 2006, page 31, lines 2-8

⁴ ‘Motion for a Ruling That the Defence has been Denied Cross-Examination Opportunities’, SCSL-04-15-588, 29 June 2006

⁵ *Ibid.* paragraph 1

⁶ *Ibid.* paragraph 18

allegations contained in supplemental statements provided that they are germane to the factual allegations set out in the Indictment and that, finally, the Defence is able to counter any new factual allegations through the rigorous cross-examination of Prosecution witnesses.⁷

Admissibility of Expert Report

As the Prosecution sought to tender the report produced by the Expert Witness TF1-296, counsel for the third accused, Mr. O’Shea, launched an objection on behalf of all three of the accused. The thrust of counsel’s complaint was that, in dealing with in-court testimony, the Trial Chamber emphasizes the importance of the principle of orality. However, with respect to this particular witness and her report, he was concerned by the extensive factual nature of the document. Counsel argued that in most common law jurisdictions factual hearsay was inadmissible. In response to this, Justice Boutet noted that in Canada, which practices common law, factual hearsay was indeed admissible, although the judges should determine the weight to attribute to such evidence. Counsel further argued that as it was a live witness it was not appropriate for the Prosecution to submit this report with the amount of factual information it contained as it would be both repetitive and cumulative in nature and would involve admitting prior consistent statements. The submission of this evidence in documentary form *in lieu* of oral testimony meant that it would be subjected to the provisions of Rule 92*bis*, which regulates ‘alternative proof of facts’. As the report contained information that could be categorized as substantive evidence on issues in controversy in this trial, counsel argued that the receipt of such evidence by the Trial Chamber is precluded by Rule 92*bis*. Furthermore, counsel argued that the Appeals Chamber in the *Galic* case determined that Rule 92*bis* always trumps Rule 89(C), which states that the Chamber may admit any relevant evidence, in terms of the admissibility of evidence.

The Prosecution subsequently argued in their response that Rule 98*bis* was not applicable in the case of an expert witness as an expert witness is not allowed to testify unless they are able to offer information that is of use to the Trial Chamber and that that information is related to the person’s field of expertise. In the Prosecution’s arguments, counsel referred to the *Kovacevic* case as an example of where the Chamber admitted a report produced by an expert witness, who was a judge, that relied upon information gathered from the testimony of 400 witnesses. Counsel argued that as the current witness had conducted many of the interviews contained in the report herself, it placed her even closer to the sources of information. Accordingly, the prosecuting attorney contended that the question is thus ultimately a matter of weight rather than admissibility and that the hearsay rule does not apply.

⁷ For example, please see ‘Ruling on Oral Application for the Exclusion of Additional Statement for Witness TF1-060, SCSL-04-15-211, 23 July 2004, ‘Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 Dated Respectively 9th of October 2004, 19th and 20th of October 2004 and 10th January 2005’, SCSL-04-15-314, 4 February 2005 and ‘Decision on Defence Motion Requesting the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses of TF1-168, TF1-165 and TF1-041’, SCSL-04-15-519, 20 March 2006.

The ruling of the Chamber on the Defence objection to the admissibility of the report of expert witness TF1-296 was issued the following morning. The Chamber overruled the Defence objection, allowing the report to be admitted into evidence. In its oral decision the Chamber cited Rule 89(C), which stipulates that the Chamber may admit any relevant evidence. The Judges also noted the distinction established in international criminal trials between the legal admissibility of documentary evidence and the weight attached to the document. Accordingly, the reliability of evidence is a function of weight and probative value rather than that of admissibility.⁸

⁸ SCSL transcript, 13 July 2006, page 2-3