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SCSL - 2004 - 16 - PT  
(764 - 796)

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SPECIAL COURT FOR SIERRA LEONE  
OFFICE OF THE PROSECUTOR  
FREETOWN - SIERRA LEONE

Before: Judge Bankole Thompson, Presiding  
Judge Benjamin Itoe  
Judge Pierre Boutet

Registrar: Robin Vincent

Date filed: 29 March 2004

**THE PROSECUTOR**

Against

**ALEX TAMBA BRIMA**  
CASE NO. SCSL - 2004 - 16 - PT

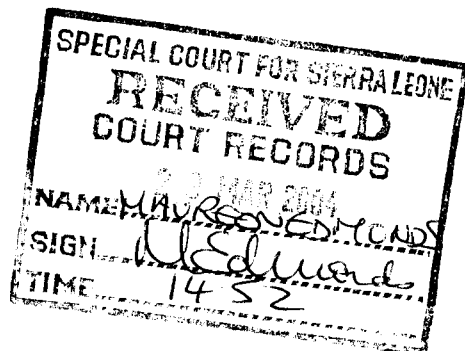
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**PROSECUTION RESPONSE TO DEFENCE MOTION FOR EXCLUSION OF  
PROSECUTION WITNESS STATEMENTS AND STAY ON FILING OF PROSECUTION  
WITNESS STATEMENTS PURSUANT TO RULES 5 AND 66(A)(i)**

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Office of the Prosecutor  
Luc Côté  
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Defence Office  
Terrence Terry  
Karim Khan  
Kojo Graham



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FREETOWN – SIERRA LEONE**

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**INTRODUCTION**

1. The Prosecution files this response to *Motion For Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statements Pursuant to Rules 5 and 66(A)(i)* (the motion) filed by the Defence on behalf of the Accused, Alex Tamba Brima on 23 March 2004.
2. In the motion, the Defence argues that the Prosecution has breached its disclosure obligations under Rule 66(A)(i) of the Rules of Procedure and Evidence for the Special Court (the Rules) by continuously disclosing witness statements to the Defence beyond the 30<sup>th</sup> day following the initial appearance of the Accused without first showing good cause and seeking an order from the Court. Consequently, the Defence argues that the Prosecution should be sanctioned and seeks various relief.
3. The Prosecution submits that the Defence motion should be dismissed as it is based on an erroneous interpretation of Rule 66(A)(i).

4. Further, the Prosecution notes that the Defence, in paragraph VII(1) of its motion, requests that as a result of the Prosecution's alleged breach of Rule 66(A)(i), all witness statements filed after 18 April 2003 should be excluded or expunged from the case file. To the extent that the case file referred to is the Court file on this case, this is not a remedy to be considered at all by this Court. The Prosecution's disclosure to the Defence has been done *inter partes*, and the witness statements do not form part of the Court records.
5. Should the Chamber consider that the relief intended by the Defence is to estop the Prosecution from calling to testify those witnesses whose statements were disclosed after 18 April 2003, the Prosecution's submissions below and more particularly in paragraph 19, hereby refer.

#### ARGUMENTS

6. The Prosecution admits that it has continuously made disclosure to the Defence after 18 April 2003, and submits that it has done so in accordance with its disclosure obligations under Rule 66(A)(i) (the Rule) as it should be understood.
7. In its previous form which is relied on by the Defence, Rule 66(A)(i) provided as follows:

Subject to the provisions of Rules 53, 69 and 75, the Prosecutor shall:

Within 30 days of the initial appearance of an accused, disclose tot the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial. Upon good cause being shown, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time.
8. The Prosecution submits that the obligation which the Rule imposes on the Prosecution is to disclose within the 30 days of the initial appearance of the accused statements from the pool of evidence gathered at that stage of witnesses whom the Prosecution intends to testify. Principles of international criminal law and the Statute of the Special Court (the Statute) as well as the Rules reflect that the Prosecution has a

continuous duty to investigate and to disclose evidence to the Defence. It is the Prosecution's submission therefore that the Rule does not preclude the Prosecution from continuously disclosing evidence to the Defence, even beyond the 30 day period following an initial appearance and the Prosecution need not show cause in order to do so.

7. The Defence admits throughout its motion that the Prosecution has "statutory continuing disclosure obligations under Rule 66 and Rule 68". In addition to these provisions referred to by the Defence, the Prosecution submits that other provisions in the Statute and the Rules provide for on-going investigations by the Prosecution and consequently, continuous disclosure. For instance, Article 15 of the Statute gives the Prosecutor investigative powers viz crimes falling within the jurisdiction of the Court. Rule 2 of the Rules defines "investigation" as occurring both before the issuance of an indictment and after, thus up until the completion of trial. Rule 50, and in particular, Rule 50(B), allows for the amendment of an indictment, thus implicitly recognizing, *inter alia*, the Prosecution's acquisition of additional evidence following the issuance of an indictment and the initial appearance of an accused. Rule 73 bis(E) makes allowance for the Prosecution, after the commencement of trial, to vary its list of witnesses to be called at trial. This in itself is, *inter alia*, a recognition that additional evidence by way of investigations or other means could come into the possession of the Prosecution which would be useful for trial and thus require disclosure.
9. In light of the Prosecution's on-going investigation duties, it would be cumbersome to the Prosecution and consequently frustrating to the legal process if, for each witness statement taken in the course of investigations, the Prosecution had to go before a Judge to show good cause why the statement should be disclosed.
10. Furthermore, to require the Prosecution, after the expiration of the 30 days following the initial appearance of an accused, to show good cause in order to be able to disclose witness statements in effect, places a restriction on the Prosecution's disclosure obligation too early in the stage of the proceedings. This, the Prosecution submits is at odds with the well established principle and practice of international criminal law

which sets forth a lower threshold for the sufficiency of evidence required for the confirmation of an indictment than the threshold for the sufficiency of evidence required for the conviction of an accused person.<sup>1</sup> The difference in the threshold requirements suggests that the Prosecution could seek to acquire and could obtain more evidence following the confirmation of an indictment or after the initial appearance of an accused person. Further, as evidence is collected, the decision as to which Prosecution witnesses will be called to testify might be affected, regardless of when the statement of a witness was obtained. For instance, as later evidence sheds further light on events, it may become necessary to select for trial witnesses whose statements had been obtained earlier, before the initial appearance, for example, but at the time had been deemed of little value. Given these realities Rule 66(A)(i) cannot and does not place restrictions on the Prosecution's disclosure at such an early stage of the proceedings as within the 30 days of the initial appearance of an accused.

11. As to the historical objective of Rule 66(A)(i) as stated in paragraph 12 of the Defence motion, the Prosecution notes that unlike the version of Rule 66(A)(i) which exists at the ICTR and the ICTY, the version of Rule 66(A)(i) which applies in this Court does not make reference to supporting material.<sup>2</sup> Alternatively, the Prosecution submits that if the objective behind the Prosecution's maiden disclosure is for the Prosecution to disclose the supporting material accompanying the indictment, then this reflects an acknowledgement that at the stage of the initial appearance, the Prosecution at minimum has the evidence gathered for the issuance of the indictment, and this is what it is expected to disclose by the 30 days following the initial appearance. The Rule does not however limit the Prosecution's on-going investigations and consequently, on-going disclosure.
12. In view of the foregoing, the Prosecution does not agree with the Defence interpretation of the second limb of Rule 66(A)(i) and submits that the good cause

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<sup>1</sup> See Rule 47 of the Rules, for example.

<sup>2</sup> Rule 66(A)(i) of the ICTR and ICTY Rules of Procedure and Evidence provide that the Prosecutor shall "within thirty days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused . . ." Practice at the ICTR suggests that supporting material is the evidence submitted by the Prosecution in support of the allegations in the indictment at the time the indictment was submitted for confirmation.

requirement therein applies to the Defence and not the Prosecution. The second limb of the Rule is silent as to which party bears the onus of showing good cause for the disclosure of statements of additional witnesses. An understanding of the second limb of the Rule turns on the meaning of the phrase “statements of additional prosecution witnesses”. As the first limb of the Rule deals with trial witnesses, the Prosecution submits that the words “additional prosecution witnesses” as used in the second limb refer to all other Prosecution witnesses who will not be called at trial. The Rule must be interpreted as placing the onus on the Defence to show good cause why the statements of those additional witnesses, i.e. Prosecution witnesses not intended to be called at trial, should be disclosed to them.

13. Rule 66(A)(i) was amended at the fifth plenary meeting of the Judges of the Special Court which took place between 11 and 14 March 2004; any doubt as to the meaning of the Rule has now been clarified by the amendment. The amended version of the Rule i.e. Rule 66(A)(ii) shows that copies of the statements of additional prosecution witnesses mentioned in the previous Rule 66(A)(i) refers to statements of witnesses that the Prosecution does not intend to call.
14. The Rule, i.e. Rule 66(A)(ii), now clarifies that after the 30<sup>th</sup> day of the initial appearance of an accused, the Prosecution can continuously disclose to the Defence statements of witnesses to be called to testify and does not require that the Prosecution show good cause after the expiration of the 30<sup>th</sup> day. The Rule clarifies that the Prosecution’s disclosure obligation or duty, continues up until 60 days before trial and thereafter, imposes a requirement on the Prosecution to show good cause to disclose any more statements of witnesses it intends to call at trial.
15. Specifically, Rule 66 now reads:
  - a. Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:
    - (i) Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial.
    - (ii) Continuously disclose to the Defence copies of the statements of all

additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecution does not intend to call be made available to the defence within a prescribed time.

16. This amendment came on the heels of much debate on the meaning of Rule 66(A)(i), particularly at the Status Conference for the RUF cases on 2 and 3 March 2004 and the AFRC cases on 8 March 2004. The amendment therefore sheds light on the intended meaning of Rule 66(A)(i) in its previous form. The Defence interpretation of the Rule is therefore erroneous and accordingly, the Defence motion should be rejected.
17. In any event, the relief prayed for by the Defence under Rule 5 of the Rules cannot and should not be granted. Rule 5 requires that a complaint of non-compliance with the Rules be brought at the earliest opportunity possible. In paragraph 4 of the Defence Motion, the Defence mentioned various occasions ranging from dates between June 2003 and March 2004 when the Prosecution allegedly breached Rule 66(A)(i). Since the Defence did not bring a motion when the first breach allegedly occurred, the Defence motion is therefore untimely for purposes of Rule 5 and the relief requested by the Defence under Rule 5 should be denied.
18. Alternatively, the Prosecution submits that none of the relief sought by the Defence in the motion should be granted. For the reasons stated above, the relief requested in paragraph VII (1)-(3) of the Defence motion should be denied.
19. As to the relief sought in paragraph VII(1), to the extent that the Defence seeks to bar from testifying Prosecution witness whose statements were disclosed after the 30 day period following the initial appearance, the Prosecution submits that this is not an appropriate remedy. The Rules do not provide for such a remedy in the case of breach of disclosure obligations. Further, the exclusion of Prosecution witnesses from testifying is too extreme a measure and is not in accord with the principle of proportionality. Even in the *Furundzija* case which the Defence cites in support of its

argument for sanctions against the Prosecution, the ICTY did not bar the Prosecution from calling the affected witnesses; the Chamber instead ordered the Prosecution to make disclosure by a given deadline. In *The Prosecutor Against Bagasora*, the ICTR held that although the Prosecutor had not met her disclosure obligations, the Defence was not prejudiced because the trial had been postponed and there remained sufficient time for the Defence to prepare for trial.<sup>3</sup> In the instant case, there is no prejudice suffered by the Defence as all the statements complained about by the Defence were disclosed at the pre-trial stage of the proceedings, with a trial date not set, leaving ample time for the Defence to prepare for trial.

20. Regarding the relief sought in paragraph VII (4) of the motion, the Prosecution submits that the recent amendment to the Rules renders the issue moot as Rule 66(A)(ii) sets forth a cut-off date (60 days before the commencement of trial) for disclosure of statements of Prosecution witnesses to be called at trial.
21. The relief sought in paragraph IV(5) of the motion should be rejected. The full disclosure of Prosecution evidence is not required for the completion of a Defence Pre-Trial Brief. To the extent that any disclosure from the Prosecution is required for the drafting of a Defence Pre-Trial Brief, as was stated during the Status Conference in this case, the Prosecution has disclosed well over 300 witness statements to the Defence, and this should enable the Defence to prepare a Pre-Trial Brief.

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<sup>3</sup> *Prosecutor Against Bagasora*, ICTR- 96-7, Decision on the Motion by Defence Counsel for Disclosure, 27 November 1997. *But see Prosecutor Against Bagilishema*, ICTR-95-1A-T (oral decision), barring the Prosecution from calling witnesses whose statements were disclosed within a month of the commencement of trial. Research undertaken to obtain the transcripts of the said decision in *Bagilishema* did not yield any result and at the time of the writing of this motion, the transcripts had not been obtained.

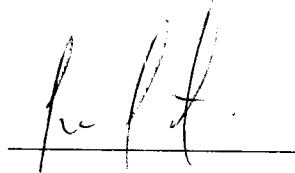


**CONCLUSION**

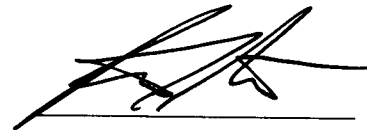
21. For the foregoing reasons, the Defence motion should be dismissed.

Freetown, 29 March 2004.

For the Prosecutor,



Luc Côté



Robert Petit

**PROSECUTION BOOK OF AUTHORITIES**

**PROSECUTION INDEX OF AUTHORITIES**

1. Rule 66 of the Rules of Procedure and Evidence for the ICTR
2. Rule 66 of the Rules of Procedure and Evidence for the ICTY
3. *The Prosecutor Against Bagasora*, ICTR- 96-7, Decision on the Motion by Defence Counsel for Disclosure, 27 November 1997.

**PROSECUTION AUTHORITIES**

1. Rule 66 of the Rules of Procedure and Evidence for the ICTR

## **RULES OF PROCEDURE AND EVIDENCE**

## **RÈGLEMENT DE PROCÉDURE ET DE PREUVE**

Adopted on 29 June 1995; as amended on

12 January 1996

15 May 1996

4 July 1996

5 June 1997

8 June 1998

1 July 1999

21 February 2000

26 June 2000

3 November 2000

31 May 2001

6 July 2002 and

27 May 2003

Adopté le 29 juin 1995 et modifié successivement les

12 janvier 1996

15 mai 1996

4 juillet 1996

5 juin 1997

8 juin 1998

1 juillet 1999

21 février 2000

26 juin 2000

3 novembre 2000

31 mai 2001

6 juillet 2002 et

27 mai 2003

### Section 3: Production of Evidence

#### Rule 66: Disclosure of Materials by the Prosecutor

Subject to the provisions of Rules 53 and 69;

- (A) The Prosecutor shall disclose to the Defence:
- i) Within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and
  - ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time.
- (B) At the request of the defence, the Prosecutor shall, subject to Sub-Rule (C), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.
- (C) Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose pursuant to Sub-Rule (A) and (B). When making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential.

#### Rule 67: Reciprocal Disclosure of Evidence

Subject to the provisions of Rules 53 and 69:

- (A) As early as reasonably practicable and in any event prior to the commencement of the trial:
- (i) The Prosecutor shall notify the defence of the names of the witnesses that he intends to call to establish the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-Rule (ii) below;
  - (ii) The defence shall notify the Prosecutor of its intent to enter:
    - (a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

**PROSECUTION AUTHORITIES**

2. Rule 66 of the Rules of Procedure and Evidence for the ICTY

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**RULES OF PROCEDURE AND EVIDENCE**

**(ADOPTED 11 FEBRUARY 1994)**  
**(AS AMENDED 5 MAY 1994)**  
**(AS FURTHER AMENDED 4 OCTOBER 1994)**  
**(AS AMENDED 30 JANUARY 1995)**  
**(AS AMENDED 3 MAY 1995)**  
**(AS FURTHER AMENDED 15 JUNE 1995)**  
**(AS AMENDED 6 OCTOBER 1995)**  
**(AS FURTHER AMENDED 18 JANUARY 1996)**  
**(AS AMENDED 23 APRIL 1996)**  
**(AS AMENDED 25 JUNE AND 5 JULY 1996)**  
**(AS AMENDED 3 DECEMBER 1996)**  
**(AS FURTHER AMENDED 25 JULY 1997)**  
**(AS REVISED 20 OCTOBER AND 12 NOVEMBER 1997)**  
**(AS AMENDED 9 & 10 JULY 1998)**  
**(AS AMENDED 4 DECEMBER 1998)**  
**(AS AMENDED 23 FEBRUARY 1999)**  
**(AS AMENDED 2 JULY 1999)**  
**(AS AMENDED 17 NOVEMBER 1999)**  
**(AS AMENDED 14 JULY 2000)**  
**(AS AMENDED 1 AND 13 DECEMBER 2000)**  
**(AS AMENDED 12 APRIL 2001)**  
**(AS AMENDED 12 JULY 2001)**  
**(AS AMENDED 13 DECEMBER 2001)**  
**(INCORPORATING IT/32/REV. 22/CORR.1)**  
**(AS AMENDED 23 APRIL 2002)**  
**(AS AMENDED 11 AND 12 JULY 2002)**  
**(AS AMENDED 10 OCTOBER 2002)**  
**(AS AMENDED 12 DECEMBER 2002)**  
**(AS AMENDED 24 JUNE 2003)**  
**(AS AMENDED 17 JULY 2003)**

**(IT/32/REV.28)**

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**Section 4 : Production of Evidence**

**Rule 66**

**Disclosure by the Prosecutor**

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; and

(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 *bis*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

(B) The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from an obligation under the Rules to disclose that information. When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

**PROSECUTION AUTHORITIES**

3. *Prosecutor Against Bagasora, ICTR- 96-7, Decision on the Motion by Defence Counsel for Disclosure, 27 November 1997.*



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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**CHAMBER II**

**OR:ENG.**

**Before:**

Judge William Sekule: Presiding Judge  
Judge Yakov Ostrovsky  
Judge T.H. Khan

**Registry:** Prisca Nyambe

**Decision of:** 27 November 1997

**THE PROSECUTOR  
VERSUS  
THEONESTE BAGOSORA**

**Case No. ICTR-96-7-T**

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**DECISION ON THE MOTION BY THE DEFENCE  
COUNSEL FOR DISCLOSURE**

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**The Office of the Prosecutor:**

Mr. James Stewart  
Mr. Luc Côté

**Counsel For the Defence**

Mr. Raphaël Constant

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),**

SITTING as Trial Chamber II (the "Tribunal"), composed of Judge William H. Sekule, Presiding Judge, Judge Yakov Ostrovsky, and Judge Tafazzal H. Khan;

CONSIDERING the order of 17 May 1996 for provisional detention and transfer of the accused for a period of 30 days, issued by Judge Lennart Aspegren addressed to the Republic of Cameroon, pursuant to rule 40*bis* (B) of the Rules of Procedure and Evidence (the "Rules");

CONSIDERING the order for continued detention of the accused, which was issued by Judge Lennart Aspegren on 18 June 1996, pursuant to rule 40*bis* (D) of the Rules addressed to the Republic of

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Cameroon, extending the detention of the accused for a further period of 30 days as of 17 June to 16 July 1996 inclusive;

CONSIDERING the final provisional order for extending the detention of the accused, which was issued by Judge Laïty Kama on 15 July 1996, pursuant to rule 40*bis* (D) addressed to the Republic of Cameroon, for a further maximum period of 30 days beginning 15 July 1996 up to and including 14 August 1996;

CONSIDERING the indictment against the accused, which was confirmed by Judge Lennart Aspegren on 10 August 1996 pursuant to rule 47 (D) of the Rules, on the basis that there was sufficient evidence to provide reasonable grounds for indicting him for Genocide, Crimes Against Humanity, violations of common Article 3 to the 1949 Geneva Conventions, and of the 1977 Additional Protocol II thereto, as alleged in the indictment;

CONSIDERING ALSO that the accused was transferred to the Tribunal's Detention Unit on 23 January 1997 from the Republic of Cameroon;

FURTHER CONSIDERING that at his initial appearance pursuant to rule 62 of the Rules, on 7 March 1997, the accused pleaded not guilty to all counts of the indictment;

HAVING RECEIVED a Defence Motion filed on 22 October 1997, based on rule 66 (B) of the Rules for requesting the disclosure of evidence;

HAVING RECEIVED from the Prosecution, on 24 October 1997, a reply to the abovementioned Defence Motion;

HAVING ALSO RECEIVED a rejoinder from the Defence Counsel on 31 October in support of his motion for disclosure of evidence;

HAVING PERUSED the Defence Motion, reply of the Prosecution to the motion and rejoinder of the Defence Counsel;

HAVING HEARD the parties on 31 October 1997;

### **ARGUMENTS BY THE PARTIES**

(A) Though the Defence Counsel generally referred to rule 66 when alleging irregularities in the disclosure of evidence by the Prosecution, he primarily based his motion on rule 66 (B) of the Rules;

(B) The Defence Counsel in support of his motion made the following specific submissions:

(i) that the Tribunal should acknowledge that the Prosecution has violated the rights of the accused as enshrined in Article 20 (4) (a) of the Statute of the Tribunal (the "Statute) and rule 66 of the Rules (adopted on 5 July 1996 and as amended on 6 June 1997), and it should direct the Prosecution to disclose specific evidence as mentioned in his motion;

(ii) that the accused has been in detention for more than one year without having been informed of any evidence against him, and thereby has not been able to prepare his defence;

(iii) that although the Prosecution has communicated to the accused a document entitled "Supporting

Material", this in itself does not constitute a complete disclosure within the ambit of rule 66 (B) of the Rules, and the Defence Counsel, therefore requests that the full disclosure be made of all the materials in the custody or control of the Prosecution;

(iv) that the Prosecution failed to respond to his 3 letters, dated 12, 21 and 25 August 1997 respectively, requesting full disclosure;

(v) that the filing of a motion by the Prosecution under rule 69 of the Rules for protective measures for witnesses does not relieve the Prosecution of its obligations under rule 66 (A) of the Rules, and consequently the Prosecutor should disclose redacted witness statements; and

(vi) that the date of trial was fixed for 24 October 1997; therefore it was incumbent on the Prosecution to make full disclosure of evidence not later than 60 days before said date, as provided under Rule 66 (A) (ii) of the Rules.

(C) The Prosecution in response contended that it has disclosed some evidentiary material to the Defence Counsel on 5 July 1996 and another version thereof on 6 June 1997; therefore it has fulfilled its obligations under rule 66 (A) of the Rules (adopted on 5 July 1996 and as amended on 6 June 1997) and there has been no violation of Article 20 (4) (a) of the Statute;

(D) Furthermore, the Prosecution raised the following specific contentions:

(i) that the right guaranteed under Article 20 (4) (a) of the Statute constitutes a continuing process whereby the accused will continue to receive any new evidence, the Prosecution intends to use against him;

(ii) that the documents which are in the archives of the Ministry of Defence of the Republic of Rwanda are not in her possession or control, though she has been given access to some material, hence the allegation of the Defence is not tenable;

(iii) that the specific documents requested for by the Defence Counsel in paragraphs 1, 2 and 4 up to 12 as mentioned in his motion are witness statements, and the disclosure of the said documents could be made after the Tribunal's decision on the Prosecution motion for protective measures for witnesses;

(iv) that documents or records requested for by the Defence Counsel in paragraph 3 of his motion are not under the custody of or control of the Prosecution;

(v) that it is the intention of the Prosecution to complete disclosure, in accordance with rules 66 (B) through to rule 70, either in redacted or non-redacted form depending upon the decision by the Tribunal on the Prosecution motion for protective measures for witnesses; and

(vi) That the scheduled date of 24 October 1997 was in fact a tactical date so far as the trial was concerned, and dependent on the availability of the courtrooms; therefore the date was intended only for the consideration of the Prosecution motion for protective measures for witnesses, and as indicated in the Registrar's notice of 19 September 1997, not for the trial as argued by the Defence Counsel.

## **DELIBERATIONS**

That pursuant to rule 69 (A) of the Rules, the Prosecution may apply to the Trial Chamber for an order of non-disclosure of the identity of a victim or a witness, who may be in danger or at risk, until such

person is brought under the protection of the Tribunal. Similarly, rule 75 (A) of the Rules provides that a Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit (the "WVU") order appropriate measures for the privacy and protection of victims and witnesses.

However, in both rule 69 and rule 75 (A), it is stipulated that the measures applied should not prejudice the right of the accused to a fair trial. Therefore, the Prosecution has an obligation to comply with the time limits prescribed in rule 66 (A) (i) and (ii) of the Rules.

With respect to the contention of the Prosecution whereby the scheduled date for the start of the trial was merely a tactical date dependant on several practical factors. It is noted that the first official indication that the trial may not commence on this date came with the Registrar's notice of 18 September 1997 scheduling the hearing of the Prosecution Motion on protective measures for its witnesses. However, in view of rule 66 (A) (ii), the disclosure of copies of the statements of all witnesses the Prosecution intends to call to testify before the Tribunal, should have taken place by 24 August 1997. Therefore, on 18 September 1997, the deadline for the disclosure had already expired, as such the contention of the Prosecution with regard to the 18 September 1997 notice is untenable. However, the Trial Chamber notes that part of the supporting material was communicated to the Defence Counsel on two occasions, 5 July 1996 and 6 June 1997.

The Tribunal, therefore opines that had the Trial commenced on 24 October 1997 as originally planned, the right of the accused to a fair trial in accordance with Article 20 of the Statute would have been prejudiced. The Tribunal is at all times mindful of the full respect of the rights of the accused. Thereupon, the Tribunal will unequivocally ensure that the Defence Counsel has sufficient time to prepare the defence of the accused as laid down in Article 20 (4) (b) of the Statute. However, in respecting the rights of the accused under Article 20 (4) (b) of the Statute, the Tribunal must take due notice of the rights of the accused to be tried without undue delay in accordance with Article 20 (4) (c) of the Statute. In this case, however, as the trial has already been postponed, no material prejudice has been caused to the rights of the accused under Article 20 of the Statute, despite the incomplete disclosure of evidence by the Prosecution.

Further, with the respect to rule 66 (B) of the Rules, the Tribunal is of the opinion that the Defence Counsel must fulfill two fundamental requirements in order to succeed in his claim for disclosure of evidentiary material, which has relevant to the accused. First, the defence must demonstrate *prima facie* materiality of the evidence in question, and secondly that the said evidence is in the custody or control of the Prosecution. Moreover, it is also implied therein that the Defence Counsel must make specific identification of any requested documentation, thus enabling the the Trial Chamber to take action. In this regard, the Defence Counsel, however, has only made a broad request for documents without specifying any categories thereof from the archives of the Ministry of Defence of the Republic of Rwanda. The Prosecution, however, has denied the possession of these documents.

The Trial Chamber also takes note of the assurance given by the Prosecution that if and when they will have access to the documents from the archives, and if it intends to use them against the accused, the defence Counsel will be supplied the copies thereof. The Trial Chamber takes note of the lack of response by the Prosecution to the 3 letters written by the Defence Counsel asking for disclosure of evidence, and expects more cooperative attitude of the Prosecution towards the defence.

**(E) FOR ALL THE ABOVE REASONS,**

**THE TRIAL CHAMBER FINDS: -**

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(i) That the non-disclosure of the witnesses statements by the Prosecution to the Defence Counsel is violative of rule 66 (A) (i) of the Rules. The mere fact of filing a motion by the Prosecution for protective measures for her witnesses does not in any way relieve it of the obligations for disclosure to the defence under rules 66 (A) (i) of the Rules. The Prosecution should note that the pendency of a motion under rule 53 of the Rules for protective measures does not exonerate the Prosecution of its other obligations imposed by the Rules:

(ii) That if the Prosecution apprehends any potential risk to any of her witnesses in fulfilling her obligations of disclosure under rule 66 (A) of the Rules, she should promptly approach the Trial Chamber for an appropriate order;

(iii) That complete non-disclosure by the Prosecution to the Defence Counsel 60 days before the scheduled date 24 October 1997 is in violation of rule 66 (A) (ii) of the Rules;

(iv) That the Defence has been unable to demonstrate a *prima facie* materiality of the evidence requested for, and also failed to show that such evidence is under the control or custody of the Prosecution, as required under rule 66 (B) of the Rules;

(v) That despite the failure of the Prosecution to strictly comply with the provisions of rule 66 of the Rules in furnishing the witnesses' statements to the defence, this Trial Chamber is clearly of the view that the defence will not be prejudiced in any way in as much as the trial of the case has been postponed and the defence will consequently have sufficient time to prepare for the trial; and

(vi) That in the instant case the Prosecution has been non- cooperative with the Defence Counsel as it did not reply to any of the 3 letters written to her by the Defence Counsel seeking disclosure and underscores the need of such cooperation in future.

## THE TRIAL CHAMBER

(1) **DIRECTS** the Prosecution to fulfill its obligations under rules 66 (A) (ii), by disclosing the witnesses statements to the Defence Counsel within two weeks from the signing of this decision, if need be, in redacted form;

(2) **ALSO DIRECTS** the Prosecution to disclose any other evidence to the Defence Counsel promptly, if it obtains the custody or control over any evidence, which she intends to use against the accused;

(3) **FURTHER DIRECTS** the Prosecution to comply with the requirements of complete disclosure in accordance with rules 66 to 70 without undue delay;

(4) **DEPLORES** that the Prosecution did not respond to any of the requests of the Defence Counsel for disclosure of evidence; and

(5) **EXHORTS** the Prosecution to be more cooperative with the Defence Counsel in general, and with respect to disclosure in particular;

Arusha, 27 November 1997

Judge William H. Sekule: Presiding Judge

Judge Yakov Ostrovsky: Judge

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Judge T.H. Khan: Judge

(Seal of the Tribunal)



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SCSL-2004-16-PT  
(673-695)

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**THE SPECIAL COURT FOR SIERRA LEONE  
FREETOWN - SIERRA LEONE**

Before: Judge Bankole Thompson  
Judge Itoe  
Judge Boutet

Registrar: Mr. Robin Vincent  
Date filed: March 23, 2004

**THE PROSECUTOR**

Against

**ALEX TAMBA BRIMA also known as TAMBA ALEX BRIMA  
also known as GULLIT**

**CASE NO. SCSL-2004-16-PT**

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**MOTION FOR EXCLUSION OF PROSECUTION'S WITNESS  
STATEMENTS AND STAY ON FILING OF PROSECUTION WITNESS  
STATEMENTS PURSUANT TO RULES 5 AND 66(A)(I) -**

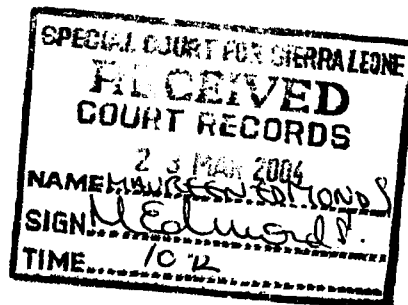
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**Office of the Prosecutor:**

Mr. Luc Cote  
Mr. Robert Petit  
Mr. Paul Fynn  
Mr. Abdul Tejan-Cole  
Ms. Leslie Taylor  
Ms. Boi-Tia Stevens  
Mr. Christopher Santora  
Ms. Sharon Parmar

**Defence Counsel**

Mr. Terrence Terry  
Mr. Karim Khan  
Mr. Kojo Graham



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The Accused the Applicant herein Tamba Alex Brima brings this Motion before the Trial chamber seeking specific reliefs referred to below against the Prosecution in this case for the latter's past and continuing breach and violations of Rule 66(A)(i) of the Rules of Procedure and Evidence of the Special Court of Sierra Leone, and Article 1 of the Practice Direction on Disclosure by the Prosecution Pursuant to Rule 66 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

**I. INTRODUCTION**

A. This Motion is filed as a sequel to the legal submissions made before the Honourable Trial Chamber by Defence counsel at the status conference, convened on March 8, 2004, at which the defence contended that the Prosecution was in breach of the letter and spirit of Rule 66(A)(i) of the Rules of Procedure and Evidence of the Special Court of Sierra Leone, the principal rule governing the production of evidence, and within the context of this Motion, the disclosure of evidentiary materials by the Prosecutor to the Defence.

B. The Motion seeks to enforce the provisions of Rule 66(A)(i) of the Rules of Evidence and Procedure regarding the time limits for disclosure by the Prosecution, record the Defence's objections to non-compliance of the Prosecution with the aforesaid rules, followed by a prayer seeking the consequential statutory relief under the said Rule 5 of the Rules of Procedure and Evidence for non-compliance.

**II ARGUMENT**  
**RULES**

- i) Rule 73 of the Rules of Procedure and Evidence of the Special Court of Sierra Leone. (Attached as Index of Attachment **ONE**).
- ii) Rule 66(A)(i) of the Rules of Procedure and Evidence of the Special Court of Sierra Leone. (Attached as Index of Attachment **TWO**).
- iii) Rule 5 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone. (Attached as Index of Attachment **THREE**).

**III INHERENT JURISDICTION**

The Inherent Jurisdiction of the Trial Chamber of the Special Court for Sierra Leone.

**IV ARTICLES**

Article 1 of the Practice Direction on Disclosure by the Prosecution Pursuant to Rule 66 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone. (Attached as Index of Attachment **FOUR**).

**V FACTUAL BASIS FOR THE MOTION**

The factual basis for this motion originates from the prosecution's continuous violations of the provisions of Rule 66(A)(i) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone. On or around March 17, 2003 the Applicant herein made his initial appearance before Judge Benjamin ITOE, sitting as a single Judge of the Trial Chamber, in accordance with Rule 61 of the Rules of Procedure and Evidence regarding the initial appearance of accused persons and their plea. After the initial appearance of the accused the Prosecution was required by law to disclose specified evidentiary materials to the Defence within 30 days after the initial appearance. On the available facts, the 30 day period envisaged by the said Rule 66(A)(i) has expired by the effusion of time, yet the Prosecution has nevertheless continued to disclose evidence of the nature specified in the said Rule 66(A)(i) without an Order of the Trial Chamber and in the absence of any evidence showing a proof of good cause.

The defence will rely on the affidavit of Ayo Max-Dixon sworn to on the 22<sup>nd</sup> day of March, 2004 at 11.30 o'clock in the forenoon which is hereby attached as Index of Attachment FIVE. The Defence will also rely on paragraphs 2 to 10 inclusive of the said affidavit of Ayo Max-Dixon.

**VI. LEGAL BASIS FOR THE MOTION**

1. The enabling authority for this Motion is rooted in Rule 73(A) of the Rules of Procedure and Evidence of the Special Court of Sierra Leone which

states as follows:

*“ Subject to Rule 72, either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Trial Chamber, or a Judge designated by the Chamber from among its members, may rule on such motions having heard the parties in open Court. The Trial Chamber may request that the parties submit written submissions in support of a motion”.*

2. Rule 66(A)(i) of the Rules of Procedure and Evidence provides as follows:

*“ Subject to the provisions of Rules 53, 69, and 75, the Prosecutor shall:*

- (i) Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 bis at trial. Upon good cause being shown, a judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence with a prescribed time. “*

3. The operative elements of the preceding rule are two-fold:

- i) That the Prosecutor **SHALL** (*emphasis is mine*) within 30 days of the **INITIAL APPEARANCE** (*emphasis is mine*) of an accused, disclose to the Defence copies of the statements of **ALL** (*emphasis is mine*) witnesses whom the Prosecutor intends to call to testify and **ALL** (*emphasis is mine*) evidence to be presented pursuant to Rule 92 bis.
- ii) Upon **GOOD CAUSE** (*emphasis is mine*) being shown, a judge of the Trial Chamber **MAY ORDER** that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time.

4. The defence submits further that the word “shall” in the aforesaid Rule 66(A)(i) commands a mandatory effect. The accused made his initial appearance in this case on or around March 17, 2003. It is exactly one year and five days today since the accused made his initial appearance and yet the

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Prosecution continues to unleash an unceasing avalanche of witness statements, most recently yesterday, March 18, 2004, when an additional 280 pages of witness statements were served on the Defence. Prior to that, voluminous witness statements were served in June 2003, and at various times in the months of February and March of 2004, respectively.

5. The Defence submits that the Prosecution is in clear breach of the first leg of Rule 66(A)(i) of the Rules of Evidence and Procedure which requires that, all such statements be made available to the defence within 30 days of the initial appearance of the accused. The provision is mandatory and not discretionary.
6. The Defence submits further that, in as much as it recognises the Prosecution's statutory continuing disclosure obligations under Rule 66 and Rule 68 of the Rules of Procedure and Evidence of the Special Court of Sierra Leone, the continuing obligations must be exercised in accordance with the law and due process of the Court, and such requires the Prosecution to obtain an order from the court permitting it to disclose additional evidentiary material in accordance with Rule 66(A)(i) of the Rules of procedure and Evidence of the Special Court of Sierra Leone.
7. The Defence contends that the prosecution cannot, with respect, use its statutory continuing disclosure obligations under Rule 66 and Rule 68 of the Rules of Procedure and Evidence of the Special Court of Sierra Leone as a shield for its continuing non-compliance, nor as a sword to strike out its mandatory obligation under Rule 66(A)(i) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.
8. It is further submitted that upon an application to show good cause for the purpose of obtaining an order to disclose additional evidence the presiding Judge has discretion and is vested with the necessary power to grant the order if so requested. The operative part of the rule provides that upon a showing of good cause, a Judge of the Trial Chamber may order that copies of additional prosecution witnesses be made available to the defence within a prescribed time.

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9. The Defence submits that a true reading of Rule 66(A)(i) allows disclosure to be made to the Defence after the 30 day time limitation, but only upon the Prosecutor successfully showing **GOOD CAUSE** (*emphasis is mine*), and obtaining an order from the Trial Chamber or Judge to that effect. To that extent, it can be argued at least persuasively, that the second leg of Rule 66(A)(i) of the Rules of Evidence of the Special Court of Sierra Leone is designed to provide an ameliorating relief, when necessary, to the strict time-limits imposed by the first leg of the said Rule 66(A)(i).
10. Article I of the said Practice Direction provides that the "*Prosecutor shall disclose materials to the defence in accordance with Rule 66 of the Rules.*"
11. It is the submission of the Defence that the Practice Direction highlights and reinforces the importance the Special Court for Sierra Leone attaches to Rule 66 of the Rules of Procedure and Evidence, which rule, the Prosecution has and continues to disregard.
12. It is further submitted that, the historical purpose of Rule 66(A)(i) is "to broaden the rights of suspects and accused persons" and more significantly, "to introduce certain time-limits within which the Prosecutor must disclose to the defence the supporting material which accompanied the indictment and witness statements."<sup>1</sup>
13. Section 5 of the said Rules of Procedure and Evidence of the Special Court for Sierra Leone deals with non-compliance with the rules of this court and provides that, "*Where an objection on the ground of non-compliance with the Rules and Regulations is raised by a party at the earliest opportunity, the Trial Chamber or the Designated Judge may grant relief.*"
14. The Defence further submits that the objection to the Prosecution's non-compliance with the rules has been raised at the earliest opportunity and for

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<sup>1</sup> See John R.W.D. Jones and Steven Powles, *International Criminal Practice* (2003) at 648-649, discussing the historical origins and objects of Rule 66(A). (hereinafter Jones and Powles)

good cause. The Defence by this Motion therefore prays the Trial Chamber to grant the RELIEFS sought in this application.

- 15. The Defence submits that the Prosecution has failed to fulfil its disclosure obligations under the Rules and therefore ought to be sanctioned<sup>2</sup>. In the ICTY *Decision on Motion of Defendant Anto Furundzija to preclude testimony of certain Prosecution witnesses*<sup>3</sup> “ rendered by the Trial Chamber in *Furundzija* on April 1998, the trial Chamber expressed its “grave concern at the unjustifiable failure of the Prosecution to comply with its disclosure obligations” (*emphasis is mine*) under Rule 66.<sup>4</sup>

**VII INHERENT JURISDICTION**

On the question of inherent jurisdiction Counsel for the Applicant submits that this doctrine is applicable both in Civil and Criminal cases, although in the latter case opinions differ as to whether limitations exist. See in this connection I.H. Jacob: “The inherent jurisdiction of the Court” (1970) 23 Current Legal Problems page 23; Cohen: *Due Process of Law* (1977), Chapter 6, page 343; *Connelly v. Director of Public Prosecutions* (1964) 2 AER 401; and *R v Jefferies* (1968)3 All ER 238.

In his Article on the subject Master Jacob had this to say at pages 27, 28, under the rubic “Juridical Basis of Inherent Jurisdiction”:

“.... The essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court: it is its very life-blood, its very essence, its eminent attribute. Without such a power, the Court would have form but lack substance. The jurisdiction which is inherent in a Superior Court of law is that which enables it to fulfil itself as A Court of Law. The Juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.”

<sup>2</sup> Jones and Powels at page 654, paragraph 8.5.334, on sanctioning the Prosecution for failure to comply with its disclosure obligations.

<sup>3</sup> *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Trial Chamber, Judgement , 10 December 1998. (hereinafter *Furundzija*).

<sup>4</sup> Jones and Powels, at pages 654, 655, paragraphs 8.5.334 to 8.5.336 and paragraphs 8.5.340 to 8.5.342.

Based on the foregoing reasons canvassed above, and in particular the blatant and continuous breach by the Prosecution of Rule 66(A)(i) of the Rules of Procedure and Evidence the Defence submits that this a proper case for the Trial Chamber to proceed to exercise its discretion in granting the below remedies and consequential orders if only to guarantee the rights of the Accused in the above matter.

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## **VII ORDERS SOUGHT**

In the light of the afore-mentioned serious breaches of Rule 66(A)(i) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, the Applicant herein requests the Designated Judge OR the Trial Chamber of the Special Court for Sierra Leone to issue the following Orders:

- 1) That all witnesses statements filed after April 18, 2003 be excluded or expunged from the case file of the accused herein Tamba Alex Brima.
- 2) That the Trial Chamber do graciously grant the necessary consequential orders to give effect to the reliefs stated in (1) above.
- 3) In the alternative, that the prosecution be barred or restrained from further disclosure of evidentiary material as specified in the said rule except on show of good cause and pursuant to an order or orders of this Honourable Trial Chamber.
- 4) That the Trial Chamber do graciously grant an order setting out a limitation period within which the Prosecution ought properly to put an end to any further disclosure of evidentiary material as required by the said Rules of Procedure and Evidence of the Special Court of Sierra Leone.
- 5) That in the light of the foregoing matters and reasons and arguments canvassed above that the Trial Chamber do graciously proceed to grant a further order extending the time



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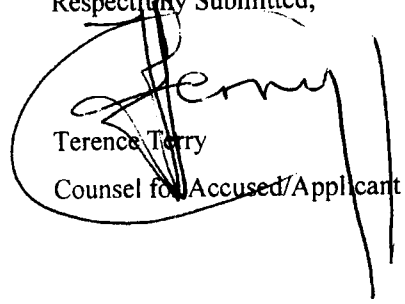
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within which the Defence should take steps to respond to the Prosecution's Pre-Trial Brief with the express caveat that such an exercise shall be carried out by the Defence only after Prosecution has completed disclosure within the letter and spirit of both the statute of the Special Court and the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

- 6) Any other relief that the Honourable Trial Chamber may deem just in the circumstances in order to ensure and guarantee a fair trial for the Applicant Accused herein.
- 7) An interim stay of all further proceedings except those envisaged under Orders 1 to 6 above prayed for herein.

Freetown, March 22, 2004

Respectfully Submitted,



Terence Terry  
Counsel for Accused/Applicant