SPECIAL COURT FOR SIERRA LEONE

Case No. SCSL-2004-16-T

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

Registrar: Robin Vincent

Date filed: April 19, 2005

THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

JOINT DEFENCE RESPONSE TO SUBMISSIONS ON OBJECTION TO QUESTION PUT BY DEFENCE IN CROSS-EXAMINATION OF WITNESS TF1-227 AND MOTION TO RULE ON ADDITIONAL INFORMATION AND ORDER OF WITNESSES

Office of the Prosecutor:
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Robert Petit

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Defence Counsel for Brima:
Kevin Metzger
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Defence Counsel for Kamara:
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I INTRODUCTION

1. During the cross-examination of witness TF1-227, a question put by the Defence Counsel for the Accused Brima concerning the contents of the preparation of the witness on the day before he was to testify in Court, was objected to by the Prosecution, on the basis of a recent decision taken by the ICTR Trial Chamber taken in *Prosecutor v. Bizimungu*.[1]

2. In support of its oral objection, the Prosecution filed its written "Submissions on Objection to Question Put by Defence in Cross-Examination of Witness TF1-227" ("**Prosecution Submissions**") on April 14, 2005. The Defence herewith files its "Joint Defence Response to Submissions on Objection to Question Put by Defence in Cross-Examination of Witness TF1-227" ("**Response**").

3. The Prosecution formulated its objection as follows:

> *As a matter of principle, the question goes beyond the scope of what is permissible in cross-examination being a question relating to the substance of a pre-testimony meeting between a Prosecution lawyer and a witness.*
>
> *Questions relating to pre-testimony meetings between a Prosecution lawyer and a witness ought properly to be limited to the number of such meetings, the dates of the meetings, and their duration, save in exceptional circumstances.*[2]

4. The Defence herewith presents its Response to the Prosecution objection. In addition thereto, and in reaction to issues raised by the Prosecution in its Prosecution Submissions, the Defence requests the honorable Trial Chamber to rule on the disclosure obligation of the Prosecution, as well as order the Prosecution to abide by its obligation to provide an order of witnesses 14 days prior to the testimony of the first witness in the group.

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[1] See *Prosecutor v. Bizimungu*, Case No. ICTR-00-56-T, Decision on Bizimungu's Urgent Motion Pursuant to Rule 73 to Deny the Prosecutor's Objection Raised During the 3 March 2005 Hearing, 1April 2005 ("***Bizimungu* Decision**").

[2] See para. 5 of the Prosecution Submissions. It subsequently provides two examples of instances where the Defence would be allowed to go into the substance of said meetings.

5. In addition, the Defence requests the honorable Trial Chamber to allow an extension of page limits. The Defence has started to file its motions jointly for all three AFRC teams, which results in less work for all parties. Should the Defence require an extension, considering that this is a joint response on behalf of all three Accused, then the Court's indulgence is hereby sought for said extension. Moreover, the current Response is extended with a motion to the Trial Chamber to rule on additional witnesses and order of witnesses, which also resulted in the transgression of the page limit.

II *BIZIMUNGU* DECISION

2.1 Conformity with Ethical Principles

6. The ICTR Trial Chamber in the aforementioned decision in *Bizimungu*, notes that questions relating to preparatory meetings could relate to the witness's credibility.[3] However, the Chamber continues stating that Counsel perform their duties in accordance with the ethical principles that govern the legal profession in their respective countries which apply, *mutatis mutandis*, to the proceedings before the ICTR.

7. The Defence contends that the right to ask witnesses questions about the substance of their meetings with the Prosecution cannot be excluded by the assumption that Prosecution Counsel conform with ethical principles of their respective jurisdictions.

8. In addition thereto, the Defence notes that not all members of the Prosecution holding interviews with witnesses are necessarily members of the bars of their respective countries, and are thus not bound by any national ethical rules. The meeting witness TF1-227 referred to on 12 April 2005 is not reflected in any of the Prosecution's additional information documents provided to the Defence. Therefore, Counsel for the Defence cannot verify whether this preparatory meeting was in fact done by a member of the Prosecution who is admitted to the bar.[4]

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[3] *Id.*, para. 34.

[4] Therefore, it would be incorrect to say in the underlying case that only specific allegations of misconduct could be brought forward, as was held by the ICTR Trial Chamber in para. 8 of the *Bizimungu* Decision.

2.2 Rule 90(G)(i) ICTR Rules

9. The *Bizimungu* Decision furthermore mentions Rule 90(G)(i) of the ICTR Rules, which is in the same terms as Rule 90(H)(i) of the ICTY Rules, referred to in para. 9 of the Prosecution Submissions.

10. However, this Rule upon which the ICTR Trial Chamber bases its Decision, does not have an equivalent in the Rules of Procedure of the Special Court. While initially the Rules of Procedure of the ICTR were applicable to the Special Court proceedings,[5] the Special Court has drafted its own Rules of Procedure, to replace the Rwandan Rules. It was then obviously decided that the Rules of the Special Court would deviate from the provision of Rule 90(G)(i) of the ICTR Rules.

11. Therefore, the *Bizimungu* Decision where the Prosecution relies on in its objection cannot serve as a basis for the objection before this Court, as the underlying provision of that decision does not exist in this Court's Rules of Procedure. For this reason alone, the Defence submits that the Prosecution objection should be overruled.

12. On the basis of the foregoing, the Defence contends that the *Bizimungu* decision provides no basis for the requested relief in the Prosecution Submissions.

III OTHER ARGUMENTS

13. Apart from the aforementioned *Bizimungu* Decision, the Prosecution in its Prosecution Submissions, puts forward two other arguments to substantiate its objection.

14. In the **first place**, the Prosecution relies on Rule 90(F) of the Rules of Procedure,[6] and argues the existence of a general principle which limits the scope of cross-examination on pre-testimony meetings between Prosecution counsel and Prosecution witnesses on matters relating to the substance of a pre-testimony meeting between a Prosecution lawyer and a witness, "because cross-examination going outside these limits will generally be relevant neither to the issues in the case nor on the credibility of a witness."

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[5] See Article 14(1) of the Special Court Statute.
[6] See para. 6 and onwards of the Prosecution Submissions.

15. Instead, the Prosecution asserts that the Defence be required to apply for permission to pursue those lines of enquiry upon grounds being shown. The Defence submits that this is in clear contradiction to the Rules of the Special Court, which, by omitting the specific Rule 90(H) of the ICTR Rules, allows for questions on a broader basis than merely the subject-matter of the evidence-in-chief. The Defence thus submits that if it would be required as a principle to ask permission for questions which might be broader than the evidence-in-chief would thus violate the wording and spirit of the Rules of the Special Court. Rather, the Defence advocates another sequence: if the Prosecution believes that a question is improper on any basis, it should object to the Defence question in Court.

16. The ICTR and ICTY case law submitted by the Prosecution to support its objection are submitted to be irrelevant by the Defence, because of the explicit differences in the Rules of said Tribunals.

17. In the **second place**, the Prosecution puts forward the argument that the Defence should be allowed, where it is aware, whether through the Prosecution or the witness in answer to questions, of any modification of disclosed statements (whether original, supplemental, or interview or proofing notes) made in the course of a pre-testimony meeting, to ask questions in this regard.[7] Para. 18 of the Prosecution Submissions indicates that the Defence did not allege with regard to Witness TF1-227 "that any modification of existing disclosed statements was made by the witness when he met with a Prosecution lawyer on the Thursday before he testified (...)." The Defence wishes to indicate that this requirement suggested by the Prosecution is not based on any of the Rules of Procedure of the Special Court, and neither does the Prosecution submit any alternative basis for this argument. Furthermore, it would be impossible for the Defence to properly make such an allegation without having had disclosure as regards the relevant proofing. The Defence therefore humbly submits that this argument be dismissed.

[7] See para. 4 of the Prosecution Submissions.

IV ADDITIONAL INFORMATION

4.1 Introduction

18. In response to para. 18 and onwards of the Prosecution Submissions, the Defence wishes to bring another issue concerning the additional information to the Trial Chamber's attention. This concerns a more general issue, but also concerns the additional information underlying the Prosecution objection of 12 April.

19. The Prosecution has, since the start of the trial, provided the Defence on several occasions with documents titled "additional information," "proofing" and "interview notes," but also transcripts of witnesses who testified in another trial (hereafter commonly referred to as "additional information"). This information, in some instances, was discussed with the witness, but was in most cases, according to the headings of the documents, not reviewed by the witness or read back to him. The Defence respectfully requests the Trial Chamber to make a ruling on the character of these "additional information" documents for the following reasons.

4.2 Rule 67(D)

20. Presumably, the Prosecution bases its term additional information on Rule 67(D) of the Rules, which Rules states that "[i]f either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials."

21. This Rule was interpreted by Trial Chamber I in a decision in *Prosecutor v. Norman*, where it held that "[i]n circumstances where the Prosecution obtains additional evidence from a witness that is subject to disclosure, then the Prosecution is required, pursuant to this Rule, to continuously disclose this material. Should there be evidence, however, that the Prosecution has failed in its duty to prepare and disclose witness statements in accordance with these Rules, the Defence should provide concrete evidence of this violation."[8]

[8] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004, para. 27.

22. The Defence primarily submits to the honorable Trial Chamber that this Rule is not applicable to the current situation where the Prosecution files its additional information. Rule 67(D) is quite clear in its wording when it states that "[i]f either party discovers additional evidence or information (...)."[9] According to the Defence, the word "discovers" should not be interpreted as covering the situation of the finding of additional information as is currently the practice within the Office of the Prosecution. Given the fact that this additional information is obtained from witnesses who are being prepared for trial, this information is not "discovered" but "obtained," which, according to the Defence, is distinguishable. By preparing a witness for trial and taking another witness statement from the witness (as described above, the additional information should be considered witness statements), the Prosecution consciously seeks additional information, which is not covered by Rule 67(D). By scheduling a meeting with a witness so close to the testimony at trial – which the Prosecution up to now seems to do with (almost) every witness – the Prosecution is consciously seeking additional evidence. For most witnesses called at trial to date, the Prosecution has provided the Defence with additional information at a very late stage, i.e. a few days up to a few hours before the testimony-in-chief of the particular witness. The Defence submits to the Trial Chamber that if the Prosecution finds it necessary to prepare its witnesses at so close a date to their testimony at trial, it should not go further into the contents of the statements, which, according to the Defence amounts to seeking additional information, but rather should it stick to the technicalities of the preparation of the witness, such as preparing the witness for the stress in the court room.

23. An additional argument for non-applicability of Rule 67(D) is that there would be no time limit at all for the Prosecution to provide this kind of information to the Defence, as they would be under an obligation to provide such information. If they would speak to the witness on the morning of the trial, they would still need to disclose such "discovered" material to the Defence on the same day under this Rule, as the Rule does not provide for any time limit. The Defence therefore contends that the additional information provided by the Prosecution, be considered to fall outside of the scope of Rule 67(D).

[9] Underlining added.

24. In the alternative, if the honorable Trial Chamber would find that the disclosure of additional information does fall under Rule 67(D), the Defence respectfully submits that the Prosecution has failed in its duty to prepare and disclose witness statements in accordance with the Rules.[10]

25. The Prosecution tends to meet many of its witnesses only a few days up to one day before their testimony in Court, and in those meetings in many cases the contents of their testimony is being discussed, from which additional information arises, which then needs to be disclosed to the Defence under Rule 67(D). By doing so at this very late stage, the Prosecution is acting in violation of the spirit of Rule 66, which obliges the Prosecution to disclose any material to the Defence at as early a stage as possible, and in any case providing enough time to the Defence to properly prepare its Defence in accordance with Article 17 of the Statute. By meeting their witnesses up to a day before the trial, the Prosecution willingly takes the risk of having to provide the Defence with additional information on up to the day of the testimony of the particular witness. It is the Defence submission that the Prosecution could easily prevent such circumstances by meeting with their witnesses to discuss the substance of their testimony at an earlier stage, and thus, by not doing it at an earlier stage, violates Rule 66.

26. Therefore, the Defence holds that the current interpretation of Rule 67(D), if the Trial Chamber would find that the additional information does indeed fall under this Rule, is unclear, and that the current application thereof by the Prosecution leads to prejudice to the Accused. It is also for this reason that the Defence requests the honorable Trial Chamber to rule on this matter, and to order that the Prosecution provide all its additional material and other documents relating to a witness at least two weeks before the witness will testify in Court, which seems a reasonable time for the Defence to prepare its cross-examination of the witness in accordance with Article 17(4)(e) of the Statute.

4.3 Rule 66

27. Rule 66(A)(ii) of the Rules, as amended at the 5th Plenary Session from 11 – 14 March 2004, states that the Prosecutor shall "[c]ontinuously disclose to the Defence

[10] See for this requirement *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004, para. 27.

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 or the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution. (...)."

28. In the Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation in Preparation for the Commencement of Trial of 1 April 2004 in the case against the Accused, Trial Chamber I indicated that "that one of the primary purposes of placing disclosure obligations upon the Prosecution, as prescribed in the Rules – and indeed ensuring its compliance with those obligations – is to ensure that the rights of the accused are respected," and "that the right of the Accused to be tried promptly must be interpreted in light of the right of the Accused to have adequate time and facilities to prepare his defence."[11]

29. Rule 66 was subsequently interpreted by Trial Chamber I in the case against the three Accused in three separate motions, in which the Prosecution was ordered to disclose to the Defence materials which could lead to the identification of the witness 42 days before the trial,[12] and is therefore a modification of the time limit laid down in Rule 66 of the Rules. The Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims in *Prosecutor v. Kanu* of 24 November 2003 mentions in para. 44 under (a) orders the Prosecution "to disclose <u>any materials</u> provided to the Defence in a redacted form until twenty-one (21) days before the witness is to testify at trial (...)."[13] The Defence holds that "any materials" is not restricted to data which could lead to the identification of the witness, but <u>all</u> material relating to a witness. Therefore, the Defence submits that all materials relating to a witness should be disclosed 42 days prior to the day the witness will be called at trial.

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[11] See p. 5 of this Decision.
[12] See Prosecutor v. Brima, Case No. SCSL-2003-6-PT, Decision on Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003; Prosecutor v. Kamara, Case No. SCSL-2003-10-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 October 2003, and Prosecutor v. Kanu, Case No. SCSL-2003-13-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims, 24 November 2003. In the case against Accused Kanu the disclosure period was initially 21 days, but was later extended to 42 days in *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-PT, Interim Order on Modification of Protective Measures for Witnesses, 20 January 2005, p. 3.
[13] Underlining added.

30. The Defence further submits that, in spite of the misleading title provided to these documents by the Prosecution, these "additional information" documents do in fact fall under the definition of "witness statements" as laid down in Rule 66(A)(i), and thus fall under the disclosure obligations of the Prosecution under that specific Rule.

31. In *Prosecutor v. Blaskic*, the ICTY Trial Chamber defined a witness statement as "an account of a person's knowledge of a crime which is recorded through due procedure in the course of an investigation into the crime."[14] In *Prosecutor v. Norman et al.*, Trial Chamber I of the Special Court states that: "[i]ndeed, the Chamber observes that nowhere in the Rules is a witness statement defined (...). The Tribunals have also considered that transcribed trial testimony, radio interviews, unsigned witness declarations and records of questions put to witnesses and answers given, constitute witness statements."[15] And later on in the same decision, the Trial Chamber states that "we are of the opinion and we so hold, that any statement or declaration made by a witness in relation to an event he witnessed and recorded in any form by an official in the course of an investigation, falls within the meaning of 'witness statement' under Rule 66(A)(i) of the Rules."[16] This, according to the humble opinion of the Defence, makes abundantly clear that the additional information as continuously provided to the Defence by the Prosecution, should be considered as "witness statements" in the sense of Rule 66 of the Rules.

32. As stated, the Prosecution, almost on a daily basis, continues to disclose to the Defence this additional information. This also provides a practical problem to the Defence, as this material is often served at a very late stage of this information. In addition to the principal argument that disclosure should fall within the obligation of Rule 66(A)(i), the Defence herewith presents a very practical issue which hampers the preparation of the Defence. All members of the various Defence teams are practicing in their respective local firms and chambers, because they are not working as staff of the Special Court, unlike the Counsel for the Prosecution. Therefore, it will hardly ever happen that an entire Defence team is present at the same time in

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[14] *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, paras. 15 – 16.
[15] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004, para. 10 (footnotes omitted).
[16] *Id.*, para. 23.

Freetown to be present during the proceedings.[17] Having documents served at such a late stage therefore obstructs the Defence in consulting between the various team members and to properly prepare its case for trial. The Defence very well realizes its own responsibility in this, but merely indicates to the Trial Chamber its limited resources available. By delivering documents at such a late stage, it is difficult for the Defence to have contact between the different members of the teams to properly prepare for the cross-examination of the witness, and may thus violate the right of the Accused to have prepare its case in accordance with Article 17(4)(b) and (e) of the Statute.

33. In conclusion, the Defence submits that by providing additional information to the Defence, which has not been reviewed by or read back to the witness, and subsequently objecting to any Defence question relating to the further contents of such meeting, leads to prejudice to the Defence. It is for this reason that the Defence respectfully requests the honorable Trial Chamber to rule on this matter.

4.4 Order of Witnesses

34. The Defence raises a separate issue here, which supports these practical problems the Defence faces during the trial. The Prosecution on several occasions changed the order of the witnesses who they intend to hear at trial.[18] On 9 February 2005, the Prosecution was ordered by Trial Chamber II "[t]o provide the Defence and the Trial Chamber with a list of the next 10 witnesses to be called at trial and a copy of all their statements, and to file these 14 days prior to the testimony of the first witness of each group."[19] In Prosecutor v. Norman et al., Trial Chamber I affirmed that Article 17 of the Statute "provides *inter alia* that the Defence should have sufficient notice and adequate time to prepare for trial," and "that it is in the interests of justice for the Prosecution to disclose to the Defence the order of witnesses it intends to call, with sufficient time available for case preparation and investigation," and furthermore that

[17] The budget for the Defence teams is also limited in the sense that not the entire Defence team can be present during the entire trial.
[18] See various e-mails of Senior Trial Counsel Ms. Lesley Taylor changing the order which were sent to both the Defence and Chambers during the course of this and last week, some e-mails of which were sent after office hours, and even a few hours before the day's session. See also the e-mail by Ms. Taylor of 12 April 2005, which e-mail was sent on the morning of the cross-examination, confirming the order of witnesses of this same day and two e-mails by Ms. Taylor of 19 April 2005 changing the order for the same day.
[19] *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-PT, Order to Prosecution to Provide Order of Witnesses and Witness Statements, 9 February 2005, p. 3.

"the Trial Chamber would benefit from having access to witness statements in advance of each witness testifying at trial, for the purpose of promoting comprehension of the issues and for the effective management of the trial."[20]

35. In the aforementioned Order to Prosecution to Provide Order of Witnesses and Witness Statements in *Prosecutor v. Norman et al.*, Trial Chamber I held that "[i]t is of course the role of the Trial Chamber to enforce disclosure obligations in the interests of a fair trial, and to ensure that the rights of the Accused, as provided in Article 17(4)(e) of the Statute, to examine or have examined, the witnesses against him or her, are respected and where evidence has not been disclosed or is disclosed so late as to prejudice the fairness of the trial, the Trial Chamber will apply appropriate remedies which may include the exclusion of such evidence."[21]

36. The Defence submits that by (repeatedly) changing the order of the witnesses to be called at trial, the Prosecution is in breach of said Order of 9 February 2005.

4.5 Alternative Defence Argument

37. If the Trial Chamber finds that the Prosecution is in fact under an obligation to continuously disclose its new findings, i.e. that this does not fall under Rule 66(A)(i) disclosure obligation, the Defence submits that the Prosecution be given a time limit for disclosing additional or information or proofing to the Defence. Since the Prosecution tends to meet some of their witnesses just a few days to one day before their testimony at trial, the "risk" of having to tender new information to the Defence only a few days up to a few hours before the testimony of the particular witness, is quite realistic. It would assist the Defence greatly if the Prosecution would meet with its witnesses at an earlier stage, so that the Defence be provided with the additional information well before the witness testifies in Court. The Defence suggests that it should be in possession of said materials at least two weeks before the witness be

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[20] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT, Order to Prosecution to Provide Order of Witnesses and Witness Statements, 28 May 2004, p. 2. This decision orders the Prosecution to do so 14 days in advance of the witness being called at trial, see p. 3 of this decision. This was later affirmed in the same case in Order to Prosecution to Provide Order of Witnesses and Witness Statements of 29 July 2004, and Order to the Prosecution to Provide Order of Witnesses and Witness Statements of 25 January 2005.

[21] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004, para. 7, referring to *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Scheduling Order, 29 April 1998.

called at trial, so as to be put in a position where it can properly prepare its case, pursuant to its right under Article 17(4)(b) of the Statute.

V ALTERNATIVE PROSECUTION ARGUMENT

38. In para. 26 of the Prosecution Submissions, the Prosecution makes an alternative objection to the line of questioning of Witness TF1-227 by Defence Counsel for the Accused Brima, on the basis of repetition and a waste of the Court's time, and that further questions on this issue should be excluded pursuant to Rule 90(F)(ii) of the Rules. It mentions two issues which, the Prosecution submits, questions are likely to be "repetitious and a waste of this court's time." The first issue relates to "the different spellings of a village at which he says an incident occurred" and the second issue relates to "evidence as to what the pre-testimony meetings to which he was testified were 'about'."

39. As concerns the first issue, the Defence indicates that it will not ask further questions to Witness TF1-227. However, as regards second issue the witness has not yet provided the Defence with any answer to the proposed question concerning the testimony of Thursday 7 April 2005, as the Prosecution made the underlying objection to that question. The Defence therefore submits that it be allowed, on the grounds of the preceding arguments, to proceed with this line of questioning.

VI CONCLUSION

40. It is for the above reasons that the Defence respectfully requests the honorable Trial Chamber to:

A. Allow the Defence to transgress its page limit for the current Response; and

B. Dismiss the Prosecution request as formulated in para. 27 of the Prosecution Submissions under (i) and (ii); and

C. Order that:

(i) The additional information falls under Rule 66(A)(i) of the Rules, and thus under the obligation to disclose such materials 42 days before the witness be called at trial; or

(ii) In the alternative, to order that the Prosecution provides the Defence with said materials *at least* two weeks before the witness will testify in Court, so as to allow the Defence to properly prepare its case; and

(iii) In addition, that the Prosecution provides the Defence and the Trial Chamber with a list of the order it intends to call witnesses to testify, 14 days in advance of their testimony.

Respectfully submitted,
On April 19, 2005

Geert-Jan Knoops

Kevin Metzger

Wilbert Harris

OR: ENG

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TRIAL CHAMBER II

Before:
Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 1 April 2005

The PROSECUTOR
v.
Augustin BIZIMUNGU
Augustin NDINDILIYIMANA
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-00-56-T

DECISION ON BIZIMUNGU'S URGENT MOTION PURSUANT TO RULE 73 TO DENY THE PROSECUTOR'S OBJECTION RAISED DURING THE 3 MARCH 2005 HEARING

Office of the Prosecutor:
Mr Ciré Aly Bâ
Mr Alphonse Van
Mr Ifeoma Ojemeni
Mr Segun Jegede
Mr Abudacarr Tambadou
Mr Faria Rekkas (Case Manager)
Mrs Anne Pauline Bodley (Case Manager)

Counsel for the Defence:
Mr Gilles St. Laurent and Mr Ronnie Mac Donald **for Augustin Bizimungu**
Mr Christopher Black and Ms Tiphaine Dickson **for Augustin Ndindiliyimana**
Mr André Ferran and Ms Danielle Girard **for François-Xavier Nzuwonemeye**
Mr Fabien Segatwa and Mr Seydou Doumbia **for Innocent Sagahutu**

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEISED OF Bizimungu's Urgent Motion Pursuant Rule 73 to Deny the Prosecutor's Objection Raised During the 3 March 2005 Hearing filed on 3 March 2005 (the "Motion")[1];

HAVING RECEIVED AND CONSIDERED the

(i) Prosecutor's Response to Bizimungu's Urgent Motion Pursuant Rule 73 to Deny the Prosecutor's Objection Raised During the Audience on 3 March 2005 filed on 7 March 2005 (the

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"Response")[2];

(ii) Bizimungu's Reply to the Prosecutor's Response filed on 10 March 2005 (the "Reply") [3];

(iii) Ndindiliyimana's Motion in Support of General Bizimungu's Urgent Motion Requesting the Chamber to Deny Prosecutor's Objection Raised on March 3rd 2005, filed on 14 March 2005 (Ndindiliyimana's "Motion in Support");[4]

(iv) Prosecutor's Reply to Motion in Support of General Bizimungu's Urgent Motion Requesting the Chamber Deny (sic) Prosecutor's Objection Raised on March 3rd, 2005 filed on 16 March 2005 (the Prosecutor's "Rejoinder").[5]

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules") in particular Rules 70 and 97 of the Rules;

HEREBY DECIDES the Motion on the basis of written briefs filed by the Parties pursuant to Rule 73 of the Rules.

SUBMISSIONS OF THE PARTIES

The Defence

1. Pursuant to Rule 73, the Defence seeks that the Motion be heard orally, that the Prosecutor's objection raised on 3 March 2005 be denied and that Counsel be authorised to cross-examine Prosecution witnesses on the content of their interview by the Prosecution.

2. The Defence for Bizimungu recalls that during the 3 March 2005 hearing, the Prosecution objected to a question raised by the Defence for Bizimungu on the basis that the information it sought to elicit was privileged. The Defence argues that there is no foundation in fact or in law that an interview between the Prosecution and a Witness is confidential.

3. The Defence argues that it has the right to cross-examine the witness on all matters that could affect the witness's credibility, bearing in mind that the right to cross-examination is the cornerstone of a plain and full defence as recognized in Articles 19 and 20(4) of the Statute and in Rule 90 of the Rules.

4. The Defence argues that the Prosecution's objection pursuant to Rule 97, aims at limiting the Defence's right to cross-examine Witness GFC on the content of the discussions he may have had with the Prosecution with regard to his extra judicial statements.

5. The Defence admits that there exists a privilege for all communications between lawyer and client that are not subject to disclosure, unless the client agrees to disclosure or has voluntarily disclosed the communication. However, the Defence argues that communications between the Prosecution and a witness are not of a confidential nature and that the relation between the two can never be considered as lawyer-client relation. Furthermore, the Defence argues that the witness is by no means a client of the Prosecution.

6. The Defence submits that when the Prosecution calls a witness, it has to be aware that the communication with the witness might be part of the cross-examination by the Defence.

The Prosecution

7. The Prosecution opposes the Motion and submits that in an accusatory penal system, the

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Parties gather and evaluate the evidence before submitting it to the judges.

8. The Prosecution further submits that the Rules of Procedure and Evidence specify which documents have to be disclosed to the other Party and recalls that Rule 70(A) excludes some documents from disclosure or notification.

9. The Prosecution therefore argues that documents that should not be disclosed or notified do not have to be discussed.

10. The Prosecution submits that only verifiable facts can be cross-examined and Rule 90 of the Rules should not be used in support of a fishing expedition.

11. Finally, the Prosecution submits that it is up to the Party who seeks the amplification of cross-examination to show that this is in the interest of justice.

The Defence Reply

12. The Defence for Bizimungu argues that the Prosecution has changed its argumentation by dropping its initial argument based on Rule 97(A) raised during the hearing on 3 March 2005.

13. The Defence for Bizimungu argues that for this reason, the Prosecution's response has to be rejected as it no longer represents the initial argumentation which was the basis for the Defence's Motion. The Prosecution is not allowed to bring up new arguments that were not made during the hearing.

14. The Defence therefore asks the Chamber not to consider the Prosecution's new arguments.

15. The Defence submits that Rule 70 of the Rules is a specific exception to the Prosecution's obligation to disclose materials to the Defence.

16. The Defence further submits that as an exception to a general rule, Rule 70 (A) has to be restrictively interpreted.

17. The Defences submits that Rule 70(A) applies to reports, memoranda, or other internal documents but does not include the communications between the Prosecution and its witnesses.

18. The Defences argues that Rule 70(A) does not affect the Defence's right to cross-examine a witness about the meetings with the Prosecution and its witnesses.

19. The Defence submits that the credibility of a witness has to be evaluated on the totality of circumstances and therefore it is not only allowed but to wish that one part of the cross-examination allows the Chamber to evaluate those facts emanating from the witness' memory and those that come from perception or suggestion.

20. The Defence submits that the Prosecution and its assistants do not benefit from a special status in interviewing a witness merely by virtue of being Prosecutor or assistant, and that there is nothing to indicate that the right to full cross-examination should be limited for that reason alone.

21. The Defence argues that in the interest of justice, a doubtful practice by the Prosecution in meeting a witness several times within a brief period of time during the proceedings, should be brought to light for the sake of equity and transparency.

Ndindiliyimana's Motion in Support

22. Defence for Ndindiliyimana bases its motion mainly on the arguments brought forward by Defence for Bizimungu.

23. In addition, Defence for Ndindiliyimana argues that the scope of cross-examination, set out in Rule 90 of the Rules, explicitly includes the testing of a witness' credibility.

24. Defence for Ndindiliyimana further argues that questions posed with respect to preparatory meetings between the Prosecution and witnesses do no constitute any attempt to widen the scope of cross-examination, but rather fall into its traditional ambit, as reflected by practice before the Chambers both at the ICTR and ICTY, and as reflected by the Rules. This includes, for instance, questions designed to elicit the existence of advantages attached to a witness' testimony, or a potential modification of the witness's version of events.

Prosecutor's Rejoinder

25. The Prosecution argues that the Defence's submission that it has been the practice of both the ICTY and the ICTR to allow Defence counsel to cross-examine prosecution witnesses with respect to conversations they have had with Prosecutors is misconceived and totally misleading.

26. The Prosecution submits that cross-examination is governed exclusively by Rule 90 of the Rules.

27. The Prosecution argues that cross-examination of a Prosecution witness on the contents of discussions in pre-testimony meetings with the Prosecutor is allowed only in very exceptional circumstances.

DELIBERATIONS

28. The Chamber recalls Rule 70(A) of the Rules which provides as follows:

Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

29. The Chamber also recalls Rule 97 of the Rules which provides as follows:

All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless:

(i) The client consents to such disclosure; or

(ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

30. First, the Chamber notes that Rule 70(A) lists "reports, memoranda, or other internal documents" and exempts them from the Prosecutor's disclosure obligation. It is the Chamber's view that oral communications between Counsel and a witness in the course of preparing a witness for testimony fall outside the scope of documents protected under Rule 70(A). Indeed, oral communication can hardly qualify as "documents" within the context of that Rule.

31. The Chamber further concludes that a Prosecution witness is not a client of the Prosecutor, and therefore the privilege provided for under Rule 97, does not apply to the relationship between the Prosecution and its witnesses.

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32. The Chamber also recalls Rule 90(G)(i) of the Rules which provides as follows:

> Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness, and where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case.

33. The Chamber notes under Rule 90(G) (i) the scope of cross-examination is limited to evidence given by the witness in chief, to the witness's credibility, or matters relevant to the case of the cross-examining party. Rule 90 (G) (iii) gives the Chamber discretion to permit inquiry into additional matters.

34. The Chamber notes that questions posed with respect to preparatory meetings between the Prosecution and witnesses could relate to the witness's credibility.

35. The Chamber however notes that a presumption exists that Counsel perform their duties in accordance with the ethical principles that govern the legal profession in their respective countries and that apply, *mutatis mutandis*, before the Tribunal. This includes Counsel's conduct during preparatory meetings with witnesses. Unless a party makes a specific allegation of misconduct on the part of Counsel, in which case the allegation must be substantiated, questions that generally tend to probe into the details of communication between a lawyer and a witness during pre-testimony preparations would, if allowed by the Chamber, render the presumption nugatory.

36. The Chamber also considered the Law Society's Rules of Professional Conduct and the Advocates' Society Principles of Civility for Advocates in Canada. Section 62 of the Advocates' Society Principles of Civility provides as follows:

> Judges are entitled to expect Counsel will treat the Court with candour, fairness and courtesy.

37. In the instant case, the Chamber notes that the Defence has not specifically alleged any misconduct on the part of Prosecuting Counsel. In the circumstances, the Chamber concludes that questions relating to pre-testimony meetings between the Prosecutor and witnesses, while permissible, must in the absence of any substantiated allegation of misconduct be limited to the number of such meetings, the dates of the meetings, and their duration.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion in the following terms: the Defence can cross-examine a witness about pre-testimony meetings with the Prosecutor provided that such cross-examination is limited to the number of preparatory meetings, the dates of the meetings and the duration of the meetings.

Arusha, 1 April 2005

Asoka de Silva	Taghrid Hikmet	Seon Ki Park
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

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[1] The Motion was originally filed in French: « *Requête urgente demandant à la Chambre de rejeter l'objection soulevée par le Procureur lors de l'audience du 3 mars 2005* ».

[2] The Reply was originally filed in French: « *Réponse du Procureur à la requête présentée par le Conseil d'Augustin Bizimungu, sollicitant le rejet de l'objection soulevée par l'accusation lors de l'audience de 3 mars 2005* ».

[3] The Response was originally filed in French : « *Réplique à la Réponse du Procureur à la requête présentée par le Conseil d'Augustin Bizimungu, sollicitant le rejet de l'objection soulevée par le Procureur lors de l'audience du 3 Mars 2005* ».

[4] The Motion was originally filed in English.

[5] The Reply was originally filed in English.

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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 16 July 2004

PROSECUTOR Against SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-PT)

DECISION ON DISCLOSURE OF WITNESS STATEMENTS AND CROSS-EXAMINATION

Office of the Prosecutor:
Luc Côté
James Johnson

Defence Counsel for Sam Hinga Norman:
Sam Hinga Norman

Defence Counsel for Moinina Fofana:
Michiel Pestman
Arrow Bockarie

Defence Counsel for Allieu Kondewa
Charles Margai
Yadda Williams

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

SEIZED of an Objection taken by Defence Counsel for Kondewa and Norman ("Defence") and their supporting grounds and submissions during the trial proceedings on the 15th, 18th and 21st of June 2004, as to the admissibility of the portion of the oral testimony of Prosecution witness TF2-198, and the Prosecution's submissions in response;

NOTING the submissions of the Prosecution and Defence made in closed session, during the Status Conference held on 1 June 2004, relating to the form of witness statements disclosed to the Defence pursuant to Rule 66 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules");

NOTING the Prosecution Submission of Case Law in Support of its Position, filed on 21 June 2004;

CONSIDERING Rule 66 of the Rules and Article 17 of the Statute of the Special Court for Sierra Leone ("Special Court");

HEREBY ISSUES THE FOLLOWING RULING:

I. THE SUBMISSIONS OF THE PARTIES

Defence Submissions

1. The facts that gave rise to this oral Motion by the Defence are that in the course of his examination-in-chief, the 1st Prosecution witness, TF2-198, testified on facts that were not contained in his statement, that was disclosed to the Defence prior to his oral testimony. This witness in effect, orally testified to the fact that his back was burnt by a lit plastic bag that was placed by Kamajors on his back around his shoulders. He alleged that he had been tied and beaten in the process. However, the fact of the burns which he testified to does not appear in his disclosed witness statement. Counsel for the Defence submits that this evidence be expunged from the records on the grounds of a violation of Rule 66(A)(i) of the Rules in that the Prosecution did not disclose this evidence to the Defence prior to the witness's oral testimony in Court.

2. It is these initial facts that sparked off a chain of objections by the Defence which, in addition to the above, include the following:

(i) That the Prosecution are in possession of a signed witness statement for Witness TF2-176, that has not been disclosed to them, and that the Prosecution have statements for all three witnesses that testified during the trial session on the 15th, 16th, 17th and 18th of June 2004, that have not been disclosed to the Defence.

(ii) That no witness statements have been disclosed to them for the witnesses who testified on the 15th, 16th, 17th and 18th of June 2004, as they only received interview notes prepared by the Prosecution with respect to each witness, and that interview notes do not constitute witness statements within the meaning of Rule 66(A)(i).

(iii) That by failing to disclose the statements of these witnesses whose oral testimony is already on the record or doing so later than prescribed under Rule 66, the Defence submits that the Prosecution

is carrying out a trial 'by ambush' because the Defence has not been given enough time to prepare for their defence as provided for in Article 17(4)(b) of the Statute. 7758

(iv) That the Defence be allowed to cross-examine witnesses on inconsistencies between their oral testimony and prior witness statements and to tender such statements as Court exhibits.

Prosecution Submissions

3. In reply to these arguments put forward by the Defence in support of this oral Motion, the Prosecution advanced the following submissions:

(i) That witness statements that are disclosed by the Prosecution to the Defence in accordance with Rule 66A(i) of the Rules, will not cover all areas that may be testified to by a witness at trial, nor is it to be expected that they should cover all those areas.

(ii) That the contents and nature of witness statements disclosed by the Prosecution have been discussed previously between the parties and before the Trial Chamber at the Status Conference on 1 June 2004, where the Prosecution explained that witness statements are prepared in various forms. They assert that the Prosecution are fully in compliance with their disclosure obligations under Rule 66 of the Rules. The Prosecution further points out that there is no requirement in the Rules that a witness statement must be signed.

(iii) That having disclosed all witness statements in their possession relating to the witnesses who have testified, they have fully fulfilled their disclosure obligations under Rule 66 of the Rules, and that arguments by the Defence of non-disclosure are unsubstantiated and baseless.

(iv) That a witness may be cross-examined on a matter of inconsistency between a prior witness statement and their testimony in court, but asserts that it is unnecessary to tender the witness statement in Court as an exhibit.

II. THE APPLICABLE LAW

A. Disclosure Obligations

4. The law governing the disclosure of materials by the Prosecution and the Defence is embodied in Rules 66, 67 and 68 of the Rules of Procedure and Evidence of the Special Court ("Rules"). Rule 66 provides as follows:

> **Rule 66: Disclosure of materials by the Prosecutor**
>
> (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 clause 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 Prosecutor does not intend to call be made available to the defence within a prescribed time.

(iii) At the request of the defence, subject to Sub-Rule (B), 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, upon a showing by the defence of categories of, or specific, books, documents, photographs and tangible objects which the defence considers to be material to the preparation of a defence, or to inspect any books, documents, photographs and tangible objects in his custody or control which are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

(B) Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further 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 a Judge designated by the President sitting *ex parte* and *in camera*, but with notice to the Defence, to be relieved from the obligation to disclose pursuant to Sub-Rule (A). When making such an application the Prosecutor shall provide, only to such Judge, the information or materials that are sought to be kept confidential.

5. As a matter of statutory interpretation, it is the Chamber's opinion that Rule 66 requires, *inter alia*, that the Prosecution disclose to the Defence copies of the statements of all witnesses which it intends to call to testify and all evidence to be presented pursuant to Rule 92*bis*, within 30 days of the initial appearance of the Accused. In addition, the Prosecution is required to continuously disclose to the Defence, the statements of all additional Prosecution witnesses it intends to call, not later than 60 days before the date of trial, or otherwise ordered by the Trial Chamber, upon good cause being shown by the Prosecution. Rule 67 also requires reciprocal disclosure of evidence, from the Prosecution and the Defence. The Chamber opines that the Prosecution is required to disclose the names of the witnesses that it intends to call as early as reasonably practicable, prior to commencement of trial. The Defence is required to notify the Prosecutor of its intent to enter the defence of alibi or any special defence. Rule 68 also requires the Prosecutor to disclose exculpatory evidence within 30 days of the initial appearance of the Accused, and thereafter to be under a continuing obligation to disclose exculpatory material.

6. The Chamber finds that these provisions clearly require more disclosure from the Prosecutor, than from the Defence, which is more in line with the civil law system than the common law tradition. The Prosecutor is obliged to continuously disclose evidence under Rule 66, which is limited to new developments in the investigation, and under Rule 68, to further exculpatory material. Rule 67(D) enunciates continuous disclosure obligations and provides as follows:

> If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.

7. It is evident that the premise underlying the disclosure obligations is that the parties should act *bona fides* at all times. [1] There is authority from the evolving jurisprudence of the International Criminal Tribunals that any allegation by the Defence as to a violation of the disclosure rules by the Prosecution should be substantiated with *prima facie* proof of such a violation. This Chamber in recent decisions has indeed ruled that the Defence must "make a *prima facie* showing of materiality

[1] *Prosecutor v. Delalic*, Decision on the Applications Filed by the Defense for the Accused Zejnil Delalic and Esad Landzo, 14 February 1997 and 18 February 1997, 21 February 1997, para 14.

and that the requested evidence is in the custody or control of the Prosecution".[2] It is of course the role of the Trial Chamber to enforce disclosure obligations in the interests of a fair trial, and to ensure that the rights of the Accused, as provided in Article 17(4)(e) of the Statute, to examine or have examined, the witnesses against him or her, are respected and where evidence has not been disclosed or is disclosed so late as to prejudice the fairness of the trial, the Trial Chamber will apply appropriate remedies which may include the exclusion of such evidence.[3]

B. Meaning of a Witness Statement

8. We note that the Defence raised the issue of what constitutes witness statements within the meaning of Rule 66. The Defence has strenuously argued that a statement made or recorded in the third person rather than in the first person cannot properly be classified as a witness statement, and further, that interview notes do not amount to statements within the meaning of Rule 66 of the Rules.

9. In this regard, the Chamber would like to refer to the definition of a statement in Black's Law Dictionary,[4] which defines a statement as:

> 1. *Evidence.* A verbal assertion or non-verbal conduct intended as an assertion. 2. A formal and exact presentation of facts. 3. *Criminal Procedure.* An account of a person's (usu. a suspect's) knowledge of a crime, taken by the police pursuant to their investigation of the offence.

10. Indeed, the Chamber observes that nowhere in the rules is a witness statement defined. It is worth noting that the Appeals Chamber of the ICTY has considered that the usual meaning to be ascribed to a witness statement is "an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime".[5] (emphasis added) The Tribunals have also considered that transcribed trial testimony,[6] radio interviews,[7] unsigned witness declarations[8] and records of questions put to witnesses and answers given, constitute witness statements.[9]

11. The Trial Chambers of the ICTY have interpreted Rule 66 of the Rules to require disclosure of all witness statements in the possession of the Prosecution, regardless of their form or source. For instance, the Trial Chamber of the ICTY in the *Blaskic* case, stated that:

> The same interpretation of Sub-rule 66(A) leads the Trial Chamber to draw no distinction between the form or forms which these statements may have. Moreover, nothing in the text permits the

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[2] *Prosecutor v. Sesay*, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, Para. 27. See also *Prosecutor v. Kondewa*, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and materials Pursuant to Rule 68, 8 July 2004.

[3] See *Prosecutor v. Furundzija*, Scheduling Order, 29 April 1998.

[4] Black's Law Dictionary, Seventh Edition, 1999, page 1416.

[5] *Prosecutor v. Blaskic*, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, paras 15-16.

[6] *Prosecutor v. Blaskic*, Decision on the Defence Motion for Sanctions for the Prosecutor's Failure to Comply with Sub-Rule 66(A) of the Rules and the Decision of 27 January 1997 Compelling the Production of All Statements of the Accused, 15 July 1998; *Prosecutor v. Kupreskic*, Decision on the Prosecutor's Request to Release Testimony Pursuant to Rule 66 of the Rules of Procedure and Evidence Given in Closed Session Under Rule 79 of the Rules, 29 July 1998.

[7] *Prosecutor v. Musema*, Judgment, 27 January 2000, para. 85.

[8] *Prosecutor v. Musema*, Judgment, 27 January 2000, para. 85; *Prosecutor v. Akayesu*, Trial Judgment, 2 September 1998, para. 137.

[9] *Prosecutor v. Niyitegeka*, Appeals Judgment, 9 July 2004, para. 34.

introduction of the distinctions suggested by the Prosecution between "the official statements taken under oath or signed and recognised by the accused" and the others.[10]

12. In addition, that Trial Chamber decided that all documents in the Prosecution's file should be disclosed, regardless of their source and making an analogy between the criteria for prior statements of the accused person and those in respect of witnesses, observed as follows:

> [t]he principles [...] in support of the interpretation of Sub-rule 66(A) lead the Trial Chamber to the decision that all the previous statements of the accused which appear in the Prosecutor's file, whether collected by the Prosecution or originating from any other source, must be disclosed to the Defence immediately. [...] furthermore, the Trial Chamber considers that the same criteria as those identified in respect of the accused's previous statements must apply mutatis mutandis to the previous statements of the witnesses also indicated in Sub-rule 66(A).[11] (emphasis added)

13. The ICTY Trial Chamber in the *Kordic*[12] case, considering a motion to compel the compliance of the Prosecution with Rule 66(A) and 68, ruled that:

> [a]ny undisclosed prior statements of [co]Accused in the possession of the Prosecution made in any type of judicial proceedings, and whether collected by the Prosecution or originating from any other source, save for any material covered by Rule 70(A) of the Rules which have not been disclosed.

14. In its recent Judgement, the Appeals Chamber of the ICTR in the *Niyitegeka* case, observed that the Prosecution is required to make available to the Defence, the witness statement in the form in which it has been recorded.[13] Setting out the standard for recording interviews with witnesses, the Appeals Chamber, however, stated that the mere fact that a particular witness statement does not correspond to this standard, does not relieve a party from its obligation to disclose it pursuant to Rule 66(A)(ii) of the Rules. The said Chamber stated furthermore, that a statement not fulfilling the ideal standard is not inadmissible as such and that any inconsistency of a witness statement with that standard would be taken into consideration when assessing the probative value of the statement, if necessary.[14]

15. The Trial Chamber of the ICTR in the *Akayesu* case, determined that statements by witnesses that were not made under solemn declaration and not taken by judicial officers were still admissible. However, the probative value attached to them was considerably less than direct sworn testimony before the Chamber. The Chamber approached the issue of inconsistencies and contradictions between these statements and testimony at trial with caution.[15]

C. Cross-Examination on Prior Inconsistent Statements

16. Black's Law Dictionary defines a prior inconsistent statement as:

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[10] *Prosecutor v. Blaskic*, Decision on the Production of Discovery Materials, 27 January 1997, paras 37.

[11] *Prosecutor v. Blaskic*, Decision on Motion to Compel the Production of Discovery Materials, 27 January 1997, paras 37-38.

[12] *Prosecutor v. Kordic*, Order on Motion to Compel the Compliance by the Prosecutor with Rule 66(A) and 68, 26 February 1999.

[13] *Prosecutor v. Niyitegeka*, Appeals Judgement, 9 July 2004, para. 35.

[14] *Id*, para. 36.

[15] *Prosecutor v. Akayesu*, Trial Judgement, 2 September 1998, para. 137.

> A witness's earlier statement that conflicts with the witness's testimony at trial. In federal practice, extrinsic evidence of an unsworn prior inconsistent statement is admissible – if the witness is given an opportunity to explain or deny the statement for impeachment purposes only.[16]

17. The adversarial criminal system requires certain safeguards to be met before a witness can be cross-examined on a prior inconsistent statement or have that statement admitted into evidence.[17] This is a feature of the common law tradition and the practice of the International Criminal Tribunals. A cursory review of the applicable legislation in the United Kingdom,[18] Canada,[19] Australia,[20] and Sierra Leone,[21] reveals that in all of these systems a certain standard and procedure is followed when dealing with prior inconsistent statements. Generally, a witness may be asked whether he or she made a statement and be cross-examined upon the general nature of the statement's contents without being shown the statement. However, if the prior statement is made in writing, the witness will be shown this statement before he can be asked about any alleged inconsistency, and if the statement is proved, the statement is admitted into the record as evidence. This requirement is consistent with the ruling in *The Queen's Case*[22] that a witness is not compelled to answer any questions on a statement until the statement is shown to him or her and is tendered. Such documents must therefore be capable of being admitted into evidence.

18. In the opinion of the Chamber, prior inconsistent statements are generally admissible in international criminal trials, as a means to impeach the credibility of a witness.[23] In the *Akayesu*[24] case, the ICTR Trial Chamber was confronted with a similar problem of alleged inconsistencies between the oral testimonies of witnesses and pre-trial statements that were composed of interview notes not made in English and had to be translated from the indigenous language spoken by the witness. The Chamber decided that the issue was one of probative value and not of admissibility. As far as admissibility of evidence is concerned, due to its *sui generis* mixture of common and civil law procedural and evidentiary rules, this Court does not necessarily conform to any specific legal system or tradition. Indeed, as enshrined in Rule 89(B) of the Rules, it will be guided by the will to "favour a fair determination of the matter before it".

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[16] Black's Law Dictionary, Seventh Edition, 1999, page 1416,

[17] An important Rule of Common Law practice is that known in *Browne v Dunn* (1984) 6 R 67 (HL), where Hunt J stated:

> It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn.

[18] Sections 4 and 5 of the United Kingdom Criminal Procedure Act 1865, cited in Peter Murphy, Murphy on Evidence (2000) Blackstone Press Limited, 524.

[19] Sections 10 and 11, Canada Evidence Act, Revised Statutes of Canada, 1985, as amended in 1994.

[20] Section 36, Evidence Act 1958, Victoria, Australia.

[21] Sierra Leone Criminal Procedure Act 1965 (as amended).

[22] *The Queen's Case*, 4 Wigmore, para. 1259.

[23] See *Prosecutor v. Musema*, Judgement and Sentence, 27 January 2000, para. 86; *Prosecutor v. Akayesu*, Judgment, 2 September 1998, para. 137; *Prosecutor v. Tadic*, Decision on Prosecutor's Motion for Production of Defense Witness Statements (Separate Opinion of Judge McDonald), 27 November 1996, para. 46.

[24] *Prosecutor v. Akayesu*, Judgment, 2 September 1998, para. 137.

19. The ICTR Trial Chamber in the *Ruzindana*,[25] case ruled that whenever Counsel for the Prosecution or the Defence perceives that there is a contradiction between the written and oral statement of a witness, they should raise this issue formally by:

> [p]utting to the witness the exact portion in issue to enable the witness to explain the discrepancy, inconsistency or contradictions, if any, before the Tribunal. Counsels should then mark the relevant portion of such a written statement and formally exhibit it so as to form part of the record of the Tribunal.

20. During the *Kunarac* trial, the ICTY Trial Chamber ruled that a prior statement may be tendered in evidence as an exhibit, after an inconsistency with the trial testimony has been established.[26]

21. Considering this analysis and the applicable jurisprudence, this Trial Chamber, as a matter of law, is of the opinion, and rules accordingly, that:

(i) A witness may be cross-examined as to previous statements made by him or her in writing, or reduced into writing, or recorded on audio tape, or video tape or otherwise, relative to the subject matter of the case, in circumstances where an inconsistency has emerged during the course of *viva voce* testimony, between a prior statement and this testimony;

(ii) In conducting cross-examination on inconsistencies between *viva voce* testimony and a previous statement, the witness should first be asked whether or not he or she made the statement being referred to. The circumstances of the making of the statement, sufficient to designate the situation, must be put to the witness when asking this question;

(iii) Should the witness disclaim making the statement, evidence may be provided in support of the allegation that he or she did in fact make it;

(iv) That a witness may be cross-examined as to previous statements made by him or her, relative to the subject matter of the case, without the statement being shown to him or her. However, where it is intended to contradict such witness with the statement, his or her attention must, before the contradictory proof can be given, be directed to those parts of the statement alleged to be contradictory;

(v) That the Trial Chamber may direct that the portion of the witness statement that is the subject of cross-examination and alleged contradiction with the *viva voce* testimony, be admitted into the Court record and marked as an exhibit;

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[25] *Prosecutor v. Ruzindana*, Order on the Probative Value of Alleged Contradiction Between the Oral and Written Statement of a Witness During Examination, 17 April 1997.

[26] *Prosecutor v. Kunarac*, Transcript, 24 July 2000, T.5189-5190. See also *Prosecutor v. Kayishema*, Decision on the Prosecution Motion Request to Rule Inadmissible the Evidence of Defence Expert Witness, Dr. Pouget, 29 June 1998.

III. THE MERITS OF THE APPLICATION

Disclosure of Witness Statements

22. In the light of the foregoing analysis, the Trial Chamber finds no merit in the Defence contention that the Prosecution interview notes, prepared from oral statements of witnesses, do not in law constitute witness statements. *The fact that a witness statement is not, grammatically or, from the point of view of syntax, is not in the 'first person' but in the 'third person' goes more to* ***form*** *than to* ***substance,*** and does not deprive the materials in question of the core quality of a statement. The Trial Chamber agrees with the assertion given by the Prosecution at the 1 June 2004 Status Conference that a statement can be, "anything that comes from the mouth of the witness" regardless of the format. By parity of reasoning, the fact that a statement does not contain a signature, or is not witnessed does not detract from its substantive validity.

23. In this regard, we are of the opinion and we so hold, that any statement or declaration made by a witness in relation to an event he witnessed and recorded in any form by an official in the course of an investigation, falls within the meaning of a 'witness statement' under Rule 66(A)(i) of the Rules. When confronted with matters of legal characterization, this Chamber must also take cognisance of the socio-cultural dynamics at work in the context of the legal culture in which it functions, for example, the limited language abilities and capabilities of potential prosecution witnesses, and their level of educational literacy. In addition, and in the particular circumstances of this case, the witness who we have on record as an illiterate, certainly depended largely on the investigator to record all the information that he disclosed to him during his interrogation.

24. We find that the facts contained in the interview notes, which, in the final analysis, are far from being statements of the investigator who is only the recorder, in fact constitute and are indeed, statements made by the witness in the course of an investigation and consequently, come within the purview, context, and meaning, of 'witness statements' under the provisions of Rule 66(A)(i) of the Rules.

25. The contention that Witness TF2-198 testified at trial about matters not included in his witness statement does not find support from the evolving jurisprudence as invalidating his oral testimony. The Defence argument is that the witness testified about burning plastic being placed on his back and to suffering serious burns, evidence which was not part of his witness statement disclosed prior to trial. The fact that burns to the witness' shoulders were not in the brief interview notes, does not amount to a breach by the Prosecution of it's Rule 66 disclosure obligations. The Trial Chamber considers that it may not be possible to include every matter that a witness will testify about at trial in a witness statement. *The Special Court adheres to the principle of orality, whereby witnesses shall, in principle, be heard directly by the Court.* While there is a duty for the Prosecution to diligently disclose witness statements that identify matters that witnesses will testify about at trial, thereby providing the Defence with essential information for the preparation of its case, it is foreseeable that witnesses, by the very nature of oral testimony, will expand on matters mentioned in their witness statements, and respond more comprehensively to questions asked at trial. The Trial Chamber notes that where a witness has testified to matters not expressly contained in his or her witness statement, the cross-examining party may wish to highlight this discrepancy and further examine on this point.

26. Accordingly, the Trial Chamber finds that there is no evidence that the Prosecution has breached Rule 66(A)(i) as regards the disclosure of witness statements. In effect, there is no *prima facie* showing of materiality by the Defence that the allegedly objectionable evidence sought to be

suppressed as inadmissible, was in the possession or in control of the Prosecution and that it withheld disclosure of the same.

27. The Trial Chamber recalls that on 26 April 2004, the Prosecution disclosed to the Defence copies of all witness statements for witnesses they intended to call at the trial, that had not already been disclosed. The Prosecution, in keeping with its continuing obligation to disclose additional materials, have continued to disclose such materials prior to and during trial, in some instances up to a day before the witness is due to testify. The Trial Chamber does not have any evidence before it, at this time, that the continued disclosure of witness statements by the Prosecution has violated the disclosure rules. Rule 67(D) provides that if either party discovers additional evidence that should have been produced earlier pursuant to the Rules, that party should notify the other party and the Trial Chamber of the existence of such material. In circumstances where the Prosecution obtains additional evidence from a witness that is subject to disclosure, then the Prosecution is required, pursuant to this Rule, to continuously disclose this material. Should there be evidence, however, that the Prosecution has failed in its duty to prepare and disclose witness statements in accordance with these Rules, the Defence should provide concrete evidence of this violation. As previously stated, there is no material before the Trial Chamber from which it may be concluded that the Prosecution is in breach of its disclosure obligations.

Cross-Examination on Prior Inconsistent Statements

28. The Trial Chamber reiterates that cross-examination on prior inconsistent statements is permissible, in accordance with the requirements outlined in the paragraph 21 of this Decision.

FOR ALL THE ABOVE-STATED REASONS,

The Trial Chamber allows, in part, the request of the Defence to cross-examine witnesses on prior inconsistent statements, in accordance with the requirements outlined in paragraph 21 of this Decision, and dismisses the other objections, applications and submissions made in support of the other aspects of this oral Motion.

Done in Freetown, Sierra Leone, this 16th day of July 2004

Hon. Judge Pierre Boutet | Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Trial Chamber | Hon. Judge Bankole Thompson

[Seal of the Special Court for Sierra Leone]

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THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated Judge Pursuant to Rule 28 of the Rules

Registrar: Robin Vincent

Date: 23rd May 2003

The Prosecutor Against:

Alex Tamba Brima aka **Tamba Alex Brima,** aka **Gullit**
(Case No. SCSL-2003-06-PT)

DECISION ON THE PROSECUTOR'S MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE

Office of the Prosecutor:
Luc Côté, Chief of Prosecution
Brenda Hollis, Senior Trial Counsel

Defence Counsel:
Terence Terry Esq.

THE SPECIAL COURT FOR SIERRA LEONE ("the Court")

JUDGE BANKOLE THOMPSON, sitting as a single Judge designated Pursuant to Rule 28 of the Rules of Procedure and Evidence ("the Rules") on behalf of the Trial Chamber;

BEING SEIZED of the Motion by the Office of the Prosecutor for Immediate Protective Measures for Victims and Witnesses and for Non-Public Disclosure ("the Motion") and of the "Briefs" (Written Submissions) with attachments in support of the said Motion, filed on the 7th April 2003;

CONSIDERING also the Response filed by the Defence Counsel on behalf of the Accused Alex Tamba on 23rd April 2003, to the aforementioned Prosecution's Motion ("the Response");

CONSIDERING the Prosecutor's Reply filed on 29th April 2003 to the aforesaid Defence Response ("the Reply");

WHEREAS acting on the Chamber's Instruction, Court Management Section advised the parties on 29th April 2003 that the Motion, Responses, and Reply would be considered and determined on the "Briefs" (Written Submissions) of the parties **ONLY** pursuant to Rule 73 of the Rules;

COGNISANT OF the Statute of the Court ("the Statute") particularly Articles 16 and 17 thereof, and specifically Rules 53, 54, 73, and 75 of the Rules;

NOTING THE SUBMISSIONS OF THE PARTIES

The Prosecution Motion:

1. By the aforementioned Motion, the Prosecutor seeks orders for protective measures for persons who fall into three categories (paragraph 16 of the Motion):

   (a) Witnesses who presently reside in Sierra Leone and who have not affirmatively waived their rights to protective measures;

   (b) Witnesses who presently reside outside Sierra Leone but in other countries in West Africa or who have relatives in Sierra Leone, and who have not affirmatively waived their rights to protective measures;

   (c) Witnesses residing outside West Africa who have requested protective measures.

2. By the said Motion, the Prosecutor also requests that the Defence be prohibited from disclosing to the public or media any non-public materials which are provided to them as part of the disclosure process.

3. Further, the Prosecutor requests that the persons categorised in paragraph 16 of the Motion and the prohibition as to non-public disclosure sought in paragraph 17 of the Motion be provided protection and effected respectively by the sought Orders set out below (as contained in paragraph 20 of the Motion):

(a) An Order allowing the Prosecution to withhold identifying data of the persons the Prosecution is seeking protection for as set out in paragraph 16 or any other information which could lead to the identity of such a person to the Defence until twenty-one days before the witness is to testify at trial; and consequently allowing the Prosecution to disclose any materials provided to the Defence in a redacted form until twenty-one days before the witness is to testify at trial, unless otherwise ordered;

(b) An Order requiring that the names and any other identifying information concerning all witnesses, be sealed by the Registry and not included in any existing or future records of the Court;

(c) An Order permitting the Prosecution to designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in the Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person determine the identity of any such persons;

(d) An Order that the names and any other identifying information concerning all witnesses described in paragraph 20 (a), be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with the established procedure and only in order to implement protection measures for these individuals;

(e) An Order prohibiting the disclosure to the public or the media of the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of witnesses and victims, and this order shall remain in effect after the termination of the proceedings in this case;

(f) An Order prohibiting the Defence from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any persons or entity other than the Defence;

(g) An Order that the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-disclosure;

(h) An Order requiring the Defence to provide to the Chamber and the Prosecution a designation of all persons working on the defence team who, pursuant to paragraph 20 (f) above, have access to any information referred to in paragraph 20 (a) through 20 (e) above, and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

(i) An Order requiring the Defence to ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;

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(j) An Order requiring the Defence to return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;

(k) An Order the Defence Counsel shall make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witnesses or any relative of such person, and such request shall be timely served on the Prosecution. At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her content or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.

The Defence Response:

4. On behalf of the said Alex Tamba Brima, the Defence Counsel states that "cannot truly be opposed to some of the measures envisaged for the protection of witnesses and victims having regard particularly to the true and proper constructions of Articles 16 - 17 of the Statute of the Special Court for Sierra Leone and Rule75 of Rules of Procedure and Evidence" (page 5 of the Response). The Defence Counsel however contends that the measures sought go far beyond what is conceivably acceptable within the letter and spirit of the aforesaid Articles and Rule. The position taken by the Defence on behalf of Alex Tamba Brima is summed up at page 8 of the Response thus:

The Defence submits most respectfully that the Motion praying for the protective orders ought to be rejected on the following grounds:

(i) Case law jurisprudence of the ICTR because the language in Rule 69 and 75 there is highly similar language used in the ICTR and the Rules;

(ii) The Prosecution has also attached only one decision rendered the ICTY and has otherwise made heavy mention of the ICTR jurisprudence;

(iii) The Prosecution has also not exhibited witness statements showing that threat to their lives and limbs as expressed but rather lay emphasis on the general security situation;

(iv) The Prosecution has not further shown in their affirmations in support of the application how the present security situation would affect witnesses who stay outside Sierra Leone;

(v) They have also not shown that objective situation exists as required over and above express fears of witnesses that warrant the grant of such an order;

(vi) The Prosecution has not supported the statements made in their affirmations with evidence (such as country report from International human rights organisations,

UNAMSIL security update etc) as to the volatile nature of the security situation in Sierra Leone;

(vii) The Prosecution did not take into account the infringements on the rights of the Accused of the wide range of measures sought to protect witnesses and victims.

(viii) The Prosecution did not consider other less oppressive measures which could achieve the purpose for which protective measures are sought.

The Prosecution Reply:

5. The Prosecution, in its Reply filed on 29th April 2003 to the Response of the Defence in respect of Alex Tamba Brima, submits, *inter alia*, as follows (paragraphs 22 and 23 of the Reply):

> Defence Counsel omits very key language when he asserts that the Statute of the Special Court states that the Trial Chamber shall be guided by the jurisprudence of the Supreme Court of Sierra Leone. Article 20 of the Statute states that "The Judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone." The Prosecution concurs with the premise which apparently underlies Defence Counsel's assertion, i.e, the law which guides the Trial Chamber and those who practice before it.
>
> However, the Prosecution submits the above quoted language means that, in deciding cases brought under Article 2, 3 and 4 of the Statute, the applicable jurisprudence is that of the international ad hoc tribunals. That is appropriate since those articles encompass internationally recognised crimes, and the body of international law that develops regarding such crimes should be consistent and international in character. However, in deciding cases brought under Article 5 of the Statute, the Court would appropriately be guided by the law as determined by the highest Court of Sierra Leone, the Supreme Court.

AND HAVING DELIBERATED AS FOLLOWS

6. Pursuant to Article 16 of the Statute, the Court is authorized to provide in its Rules for the protection of victims and witnesses. Such protective measures shall include, without being limited to, the protection of a witness's identity. Rule 75 provides, *inter alia*, that a Judge or a Chamber may, on its own Motion, or at the request of either party, or of the victims or witnesses concerned, or of the Victims and Witnesses Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the Accused.

7. According to Rule 69 of the Rules, under exceptional circumstances, either of the parties may apply to a Judge of the Trial Chamber or the Trial Chamber to order the non-disclosure of the

identity of a witness who may be in danger or at risk until the Judge or Chamber otherwise decides.

8. Article 17 of the Statute of the Court sets out the Rights of the Accused including *inter alia*, the right "to have adequate time and facilities for the preparation of his or her defence and the right to examine, or have examined the witnesses against him or her" As designated Judge, I also take cognisance of Rule 69 (C) of the Rules whereby the identity of a witness shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the Defence.

9. Pre-eminently mindful of the need to guarantee the utmost protection and respect for the rights of the victims and witnesses, and seeking to balance those rights with the competing interests of the public in the administration of justice, of the international community in ensuring that persons accused of violations of humanitarian law be brought to trial on the one hand, and the paramount due process right of the Accused to a fair trial, on the other, I am enjoined to order any appropriate measures for the protection of the victims and witnesses at the pre-trial stage that will ensure a fair determination of the matter before me, deciding the issue on a case-by case basis consistent with internationally recognised standards of due process. Such orders are to take effect once the particulars and locations of the witnesses have been forwarded to the Victims and Witnesses Support Unit.

10. In determining the appropriateness of the protective measures sought, I have evaluated the security situation affecting concerned witnesses in the context of the available information attached to the Prosecutor's "Briefs" (Written Submissions), more particularly the affidavit of Morie Lengor dated 5th March 2003, and the Declaration of Dr. Alan W. White dated 7th April 2003. Despite some formal defects, generalities and unsubstantiated matters, rightly pointed out by the Defence Counsel, in respect of those documents, it is my considered view that, in terms of substance, the combined effect of those affirmations is to demonstrate, within the bounds of reasonable foreseeability and not absolute certainty, the delicate and complex nature of the security situation in the country and the level of threat from several quarters of the ex-combatant population that participated in the conflict to witnesses and potential witnesses. It is significant to note that there was no affidavit in opposition. The irresistible inference, therefore, is that such threats may well pose serious problems to such witnesses and the effectiveness of the Court in the faithful discharge of its international mandate.

11. Concerning the need for the protection of witnesses' identities, *at the pre-trial phase* as distinct from *the trial phase*, I have sufficiently advised myself on the applicable body of jurisprudence. Without meaning to detract from the precedential or persuasive utility of decisions of the ICTR and the ICTY, it must be emphasized, that the use of the formula "shall be guided by" in Article 20 of the Statute does not mandate a slavish and uncritical emulation, either precedentially or persuasively, of the principles and doctrines enunciated by our sister tribunals. Such an approach would inhibit the evolutionary jurisprudential growth of the Special Court consistent with its own distinctive origins and features. On the contrary, the Special Court is empowered to develop its own jurisprudence having regard to some of the unique and different socio-cultural and juridical dynamics prevailing in the *locus* of the Court. This is not to contend that sound and logically correct principles of law enunciated by ICTR and ICTY cannot, with necessary adaptations and modifications, be applied to similar factual situations that come before the Special Court in the course of adjudication so as to maintain

logical consistency and uniformity in judicial rulings on interpretation and application of the procedural and evidentiary rules of international criminal tribunals.

12. Instructive though, from a general jurisprudential viewpoint, some of the decisions of ICTR and ICTY relied upon by both Prosecution and Defence Office on the subject of delayed disclosure and confidentiality of witnesses and victims may be in terms of the principles therein enunciated, the issue is really one of contextual socio-legal perspective. Predicated upon such a perspective, one can reach various equally valid conclusions applying a comparative methodology into: (a) whether the security situation in Sierra Leone can, at this point in time, in relation to Rwanda be objectively characterized as really more or less volatile; (b) whether the security situation in Rwanda during the grant or denial of the protective measures sought in those cases, was more or less volatile than the present security situation in Sierra Leone; or (c) whether there is any logical basis for comparison at all. Evidently, it takes no stretch of the legal imagination to discover that in such matters speculation can be endless and quite fruitless. It depends on one's analytical or methodological approach. They are not matters that can be determined with any mathematical exactitude.

13. With all due respect to learned Counsel for the Defence, it must be pointed out that the five-fold criteria enunciated by the ICTY in the case of *The Prosecutor vs. Tadic*, IT-4-I-10, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10th August 1995, cannot logically be applied to the instant Motion. In that case, the Trial Chamber was confronted with a request by the Prosecution to provide anonymity for one of its witnesses in testifying by withholding the identity of the witness from the Accused. A majority of the Trial Chamber held that it had to balance the right of the Accused to a "fair and public trial" against the protection of victims and witnesses. Observing that the right to a "fair trial" was not absolute but was subject to derogation in exceptional circumstances such as a state of emergency and that the situation of on-going conflict in the area where the alleged atrocities took place constituted such exceptional circumstances, the Chamber took a "contextual approach" and held that it was justified in accepting anonymous testimony if: (1) there was real fear for the safety of the witness or his or her family; (2) the testimony of the witness was important to the Prosecution's case; (3) there was no *prima facie* evidence that the witness is untrustworthy; (4) the measures were strictly necessary (see May and Wierda, *International Criminal Evidence*, 2002 at page 282). It is evident that the situation in *Tadic* concerning that of a witness seeking to testify anonymously and that (as in the instant Motion) of an order for delayed disclosure of identifying data in respect of certain categories of prosecution witnesses *at the pre-trial stage* are clearly distinguishable both as a matter of fact and law.

14. Which principle, then, is applicable here? The answer is that it is the general principle propounded by the ICTY, in the case of *The Prosecutor v. Blaskic*, IT-95-14, Decision on the Application of the Prosecution dated 17th October 1996 Requesting of Protective Measures for Victims and Witnesses, 5th November 1996. It states that:

> The philosophy which imbues the Statute and Rules of the Tribunal appears clear: the Victims and Witnesses merit protection, even from the Accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the Accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.

Applying this general principle to the totality of the affidavit evidence before me, it is my considered view that a reasonable case has been made for the prosecution witnesses herein to be granted at this preliminary stage a measure of anonymity and confidentiality. In addition, in matters of such delicacy and sensitivity, it would be unrealistic to expect either the Prosecution or the Defence, *at the pre-trial phase*, to carry the undue burden of having each witness narrate in specific terms or document the nature of his or her fears as to the actual or anticipated threats or intimidation. Such an approach would frustrate, if not, (using a familiar legal metaphor) drive a horse and coach through the entire machinery created by the Founding Instruments of the Court and its Rules for protection of witnesses and victims.

15. Further, as designated Judge under Rule 28 of the Rules, my judicial evaluation of the measures requested by the Prosecution pursuant to Articles 16 and 17 of the Statute and Rules 53, 54, and 75 of the Rules, is also predicated upon the reasoning that even though the Court must, in such matters, seek to balance the right of the Accused to a fair and public trial with the interest of the witnesses in being given protection, such a right is subject to derogating exceptional circumstances (Article17 (2) of the Statute) and that the existing context of the security situation in Sierra Leone does justify, at this point in time, delaying the disclosure of the identities of witnesses *during the pre-trial phase*.

16. As regards the 21 (twenty-one) day time limit prayed for by the Prosecution in sought Order (a), despite the existence of some instructive ICTY and ICTR decisions supporting the 21 day rule limitation for disclosure, it is my considered view that there is no legal logic or norm compelling an inflexible adherence to this rule. In the context of the security situation in Sierra Leone and in the interest of justice, one judicial option available to me, at this stage, in trying to balance the interest of the victims and witnesses for protection by a grant of anonymity and confidentiality with the pre-eminent interest of effectively protecting the Accused's right to a fair and public trial is to enlarge the time frame for disclosure beyond 21 (twenty-one) days to 42 (forty-two) days. And I so order.

AND BASED ON THE FOREGOING DELIBERATION,

I HEREBY GRANT THE PROSECUTION'S MOTION AND IN PARTICULAR SOUGHT ORDERS (a) TO (k) as specified and particularised therein with the necessary modification to Order (a) in respect of the time frame for disclosure prior testimony at trial, which said **ORDERS**, for the sake of completeness, are set out *in extenso* in the annexure hereto.

Done at Freetown

23rd May 2003

Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated Judge Pursuant to Rule 28 of the Rules

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THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated Judge Pursuant to Rule 28 of the Rules

Registrar: Robin Vincent

Date: 23rd May 2003

The Prosecutor Against:

Alex Tamba Brima aka **Tamba Alex Brima**, aka **Gullit**
(Case No. SCSL-2003-06-PT)

ANNEX TO THE DECISION ON THE PROSECUTOR'S MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE:

ORDERS FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON PUBLIC DISCLOSURE

Office of the Prosecutor:
Luc Côté, Chief of Prosecution
Brenda Hollis, Senior Trial Counsel

Defence Counsel:
Terence Terry Esq.

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THE SPECIAL COURT FOR SIERRA LEONE (the "Special Court")

PRESIDED OVER by Judge Bankole Thompson designated in accordance with provisions of Rule 28 of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED of the Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure filed by the Prosecutor on 7th April 2003 ("the Motion") for an order requesting various protective measures to safeguard the security and privacy of victims, witnesses and to safeguard the integrity of the prosecution's evidence and of these proceedings;

CONSIDERING that non-public material is disclosed to the Accused primarily for the purpose of allowing him to prepare to meet the charges against him and for no other purpose;

CONSIDERING FURTHER that the Designated Judge takes very seriously the interests and concerns of victims and witnesses, is genuinely concerned for their safety, protection and welfare, is authorised to take all appropriate measures to ensure their protection and privacy, and is judicially obliged to safeguard non-public materials provided to the Accused in order to enable him to prepare for trial, where the interests of justice so demand;

CONSIDERING ALSO that it is of paramount importance to protect the right of the Accused to a fair and public trial and that only in exceptional circumstances should such a right be derogated from;

HAVING METICULOUSLY EXAMINED the merits of the submissions by the Defence in response to the said Prosecution Motion and sought to balance the interests of the victims and witnesses for protection and privacy with the right of the Accused to fair trial in the context of the specific measures requested;

CONVINCED that despite the Defence submissions, in the specific context of this case, there is clear and convincing evidence submitted by the Prosecution for protective measures for witnesses and victims and for non-public disclosure of the material in this case at the pre-trial stage;

NOTING that Articles 17 (2) and 16 (4) of the Statute of the Special Court for Sierra Leone ("the Statute") envisage that the Trial Chamber shall, where expedient in the interests of justice, issue appropriate orders for the protection of victims and witnesses;

COGNISANT of the provisions of Rules 69 and 75 of the Rules concerning the protection of witnesses;

ACTING IN ACCORDANCE WITH Articles 16 and 17 of the Statute and pursuant to Rules 53, 54, 56, 69, and 75 of the Rules;

I HEREBY GRANT THE PROSECUTION MOTION AND ORDER as follows:

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(a) The Prosecution may withhold identifying data of the persons the Prosecution is seeking protection as set forth in paragraph 16 of the Motion and any other information which could lead to the identity of such a person to the Defence, until 42 (forty-two) days before the witness is to testify at trial; and may not disclose any materials provided to the Defence in a redacted form until 42 (forty-two) days before the witness is to testify at trial, unless otherwise ordered.

(b) That the names and any other identifying information concerning all witnesses be sealed by the Registry and not included in any existing or future records of the Court;

(c) The Prosecution may designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person to attempt to determine the identity of any such persons;

(d) That the names and any other identifying information concerning all witnesses described in order (a) be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with established procedure and only in order to implement protection measures for these individuals;

(e) That the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of Witnesses and Victims, shall not be disclosed to the public or the media and this order shall remain in effect after the termination of the proceedings in this case;

(f) That the Defence shall not share, discuss or reveal, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence;

(g) That the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-public disclosure;

(h) That the Defence provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to order (f) above, have access to any information referred to in order (a) through (e) above(reference herein being made to the Motion), and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

(i) That the Defence ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;

(j) That the Defence return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;

(k) That the Defence Counsel make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witnesses or any relative of such person, and such request shall be timely served on the Prosecution .At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her consent or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.

HEREBY FURTHER ORDER that consistent with Order (a) above, the Prosecutor shall disclose the names and unredacted statements of the witnesses to the Defence in at least 42 (forty-two) days before the witness is to testify at trial to allow the Defence sufficient and reasonable time to prepare effectively for trial, having regard to the gravity of the charges against the Accused persons and the magnitude of the Prosecutor's allegations against them.

For the purpose of this Order:

(a) "the Prosecution" means and includes the Prosecutor of the Special Court for Sierra Leone (the Court) and his staff;

(b) "the Defence" means and includes the Accused, the Defence counsel and their immediate legal assistants and staff, and others specifically assigned by the court to the Accused's trial Defence team in conformity with Rule 44;

(c) "witnesses" means and includes witnesses and potential witnesses of the Prosecution;

(d) "protected witnesses" means and includes the witnesses in the categories as set forth in paragraph 16 of the Motion;

(e) "victims" means and includes victims of sexual violence, torture, as well as all persons who were under the age of 15 at the time of the alleged commission of the crime;

(f) "the public" means and includes all persons, governments ,organisations, entities, clients, associations, and groups, other than the Judges of the Court and the staff of the Registry ,the Prosecution, the Defence, as defined above. "The public" specifically includes, without limitation, family, friends and associates of the Accused, and the Defence in other cases or proceedings before the court;

(g) "the media" means and includes all video, audio, print media personnel, including journalists, authors, television, and radio personnel, their agents and representatives.

Done at Freetown, 23rd May 2003

Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated Judge Pursuant to Rule 28 of the Rules

040 SCSL-2003-10-PT (650-664) 650 7779

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THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated Judge Pursuant to Rule 28 of the Rules

Registrar: Robin Vincent

Date: 23rd day of October, 2003

The Prosecutor Against:

Brima Bazzy Kamara
(Case No. SCSL-2003-10-PT)

DECISION ON THE PROSECUTOR'S MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE

Office of the Prosecutor:
Luc Côté, Chief of Prosecution
James C. Johnson, Senior Trial Counsel
Sharan Parmar, Assistant Trial Counsel

Defence Office:
Ken Fleming QC

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THE SPECIAL COURT FOR SIERRA LEONE ("the Court")

BEFORE JUDGE BANKOLE THOMPSON, sitting as a Designated Judge pursuant to Rule 28 of the Rules of Procedure and Evidence ("the Rules") on behalf of the Trial Chamber;

BEING SEIZED of the Motion by the Office of the Prosecutor for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure ("the Motion") and of the "Briefs" (Written Submissions) with attachments in support of the said Motion, filed on the 11th day of July, 2003;

CONSIDERING also the Response filed by the Defence Office on behalf of the Accused on 22nd day of July, 2003, to the aforementioned Prosecution Motion ("the Response");

CONSIDERING the Prosecutor's Reply filed on 24th day of July, 2003 to the aforesaid Defence Response ("the Reply");

WHEREAS acting on the Chamber's Instruction, the Court Management Section advised the parties on the 20th day of October, 2003 that the merits of the Motion, the Response, and the Reply would be determined on the basis of the "Briefs" (Written Submissions) of the parties **ONLY** pursuant to Rule 73 of the Rules;

COGNISANT OF the Statute of the Court ("the Statute"), particularly Articles 16 and 17 thereof, and specifically Rules 53, 54, 73, and 75 of the Rules;

NOTING THE SUBMISSIONS OF THE PARTIES

The Prosecution Motion

1. By the aforementioned Motion, the Prosecutor seeks orders for protective measures for persons who fall into three categories (paragraph 18 of the Motion):

(a) Witnesses who presently reside in Sierra Leone and who have not affirmatively waived their rights to protective measures;

(b) Witnesses who presently reside outside Sierra Leone but in other countries in West Africa or who have relatives in Sierra Leone, and who have not affirmatively waived their rights to protective measures;

(c) Witnesses residing outside West Africa who have requested protective measures.

2. By the said Motion, the Prosecutor also requests that the Defence be prohibited from disclosing to the public or media any non-public materials which are provided to them as part of the disclosure process.

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3. Further, the Prosecutor requests that the persons categorised in paragraph 18 of the Motion and the prohibition as to non-public disclosure sought in paragraph 20 of the Motion be provided protection and effected respectively by the Orders sought as set out below (Paragraph 24 of Motion):

(a) An Order allowing the Prosecution to withhold identifying data of the persons the Prosecution is seeking protection for as set out in paragraph 18 or any other information which could lead to the identity of such a person to the Defence until twenty-one days before the witness is to testify at trial; and consequently allowing the Prosecution to disclose any materials provided to the Defence in redacted form until twenty-one (21) days before the witness is to testify at the trial, unless otherwise ordered;

(b) An Order requiring that the names and any other identifying information concerning all witnesses, be sealed by the Registry and not included in any existing or future records of the Court;

(c) An Order permitting the Prosecution to designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in the Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person determine the identity of any such person;

(d) An Order that the names and any other identifying information concerning all witnesses described in paragraph 24, be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with the established procedure and only in order to implement protection measures for these individuals;

(e) An Order prohibiting the disclosure to the public or the media of the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of witnesses and victims, and this order shall remain in effect after the termination of the proceedings in this case;

(f) An Order prohibiting the Defence from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any persons or entity other than the Defence;

(g) An Order that the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the

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date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-public disclosure;

(h) An Order requiring the Defence to provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to paragraph 24 (a) above, have access to any information referred to in paragraph 24 (a) through 24 (e) above, and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

(i) An Order requiring the Defence to ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;

(j) An Order requiring the Defence to return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;

(k) An Order that the Defence Counsel shall make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witnesses or any relative of such person, and such request shall be timely served on the Prosecution. At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her consent or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.

The Defence Response

4. On behalf of the Accused, the Defence submits that the Prosecution's Motion must fail. The contentions in support are set out in detail below:

(i) that the Rules provide for the protection of witnesses and victims, "but not as alleged by the Prosecution material";

(ii) that the Rules require that there must be "exceptional circumstances" to justify non-disclosure of the identity of a victim or a victim or a witness who may be in danger or at risk and that the material presented by the Prosecution does not show "exceptional circumstance";

(iii) that Rule 75 authorises the granting of protective measures "consistent with the rights of the accused";

(iv) that "the fundamental error in the application of the Prosecution is to ignore the specific, and concentrate on the general", there is not "a single mention of the Accused in this matter in any of the material...";

(v) that the assertion about "threats, harassment, violence, bribery and other intimidations, interference and obstruction of justice" being "serious problems in paragraph 12 of the Prosecution's Motion is "baseless, presumptuous and offensive";

(vi) that there is no evidence that the Accused in this case has ever indulged in such behaviour or is likely to indulge in such behaviour";

(vi) that the Orders sought by the Prosecution are unworkable, "impractical", "impossible" and "futile"

The Prosecution Reply

5. The Prosecution, in its Reply, filed on the 24th day of April, 2003 to the Response of the Defence in respect of Brima Bazzy Kamara, submits in summary as follows:

> The arguments raised in the Response of Defence Counsel should be rejected as they are either incorrect or are not supported by the jurisprudence of the international tribunals. The assertions fail to realise that it has been accepted by the International Criminal Tribunals for Yugoslavia and Rwanda and the Special Court that the rights of the Accused must be balanced with the need for protective measures for witnesses and victims. Finally the Defence Response is clearly in violation of prescribed time limit for filing of documents which cannot be corrected by bringing an application for extension within the said Response.

ORDER GRANTING LEAVE

6. I take full cognisance of the merit of the Prosecution's submission that the Defence is in clear violation of the prescribed time limit for filing documents. In upholding the Prosecution's submission, I strongly reprimand the Defence for the said procedural irregularity, and caution them against future infringements. It is, however, my considered opinion that no prejudice is caused to the Prosecution by the said infringement. Accordingly, in the interest of justice, leave is hereby granted retroactively to the Defence to file the said Response out of time.

AND HAVING DELIBERATED AS FOLLOWS

7. Pursuant to Article 16 of the Statute, the Court is authorized to provide in its Rules for the protection of victims and witnesses. Such protective measures shall include, without being limited to, the protection of a witness's identity. Rule 75 provides, *inter alia*, that a Judge or a Chamber may, on its own Motion, or at the request of either party, or of the victims or witnesses concerned, or of the Victims and Witnesses Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the Accused.

8. According to Rule 69 of the Rules, under exceptional circumstances, either of the parties may apply to a Judge of the Trial Chamber or the Trial Chamber to order the non-disclosure of the identity of a witness who may be in danger or at risk until the Judge or Chamber otherwise decides.

9. Article 17 of the Statute of the Court sets out the Rights of the Accused including *inter alia*, the right "to have adequate time and facilities for the preparation of his or her defence and the right to examine, or have examined the witnesses against him or her". As designated Judge, I also take cognisance of Rule 69 (C) of the Rules whereby the identity of a witness shall be disclosed in sufficient time before a witness is called to allow adequate time for preparation of the Defence.

10. Pre-eminently mindful of the need to guarantee the utmost protection and respect for the rights of the victims and witnesses, and seeking to balance those rights with the competing interests of the public in the administration of justice, of the international community in ensuring that persons accused of violations of humanitarian law be brought to trial on the one hand, and the paramount due process right of the Accused to a fair trial, on the other, I am enjoined to order any appropriate measures for the protection of the victims and witnesses at *the pre-trial stage* that will ensure a fair determination of the matter before me, deciding the issue on a case-by-case basis consistent with internationally recognised standards of due process. Such orders are to take effect once the particulars and locations of the witnesses have been forwarded to the Victims and Witnesses Support Unit.

11. In determining the appropriateness of the protective measures sought, I have evaluated the security situation affecting concerned witnesses in the light of the available information presented by the Prosecution in support of the Motion, specifically the Affidavit of Thomas Lahun dated the 10th day of June, 2003, the Declaration of Dr. Alan White dated the 10th day of June, 2003, the Declaration of Alan Quee dated the 25th day of April, 2003, and the Declaration of Saleem Vahidy dated the 28th day of April, 2003. In putting the entire situation in its proper context, the Affidavit of Officer Lahun and Mr. Vahidy are pre-eminent and illuminating. I have therefore taken the liberty of highlighting, for the sake of emphasis, certain relevant passages from the aforesaid documents so as to evaluate the merits of the key submissions of the Defence. The Defence submitted (a) that instead of showing "exceptional circumstances" the Prosecution had relied upon material prepared "in a general and vague manner"; (b) that not a single mention is made of the Accused in the Prosecution's papers; and (c) that the Motion is "baseless", "presumptuous" and "offensive".

12. In paragraph 4 of his affidavit, Officer Lahun firsts attests to his area of expertise as an investigator with the rank of Superintendent, and proceeds to depose thus:

> "Since 14th August, 2002, I have been working in the Office of the Prosecutor, Special Court for Sierra Leone, where my duties include investigating crimes against international humanitarian law committed within the territory of Sierra Leone from 30th November 1996, during the period of armed conflict in Sierra Leone. My *investigative duties include conducting interviews of persons who may appear*

as witnesses before the Special Court, and reviewing investigative notes and statements of such persons taken by other investigators in the Office of the Prosecutor" (emphasis added).

13. It is further deposed to at paragraphs 6, 8 and 9 that:

> 6. *"Members of the civilian population of Sierra Leone who may be called upon to appear as witnesses before the Special Court have expressed concern regarding their safety and security if it becomes known that they are co-operating with the Special Court, especially if the identities are revealed to the general public, or to the suspect or accused, before appropriate protective measures can be put in place."*
>
> 8. *"Potential witnesses have expressed fear of reprisals not only from those who are associated with the Accused, and from those who support the causes or factions that the Accused represents."*
>
> 9. *"The fears expressed are genuine, and in my opinion, are well-founded, especially considering that many of the potential witnesses live in remote areas without any police presence or other semblance of security."*

In addition, paragraphs 7 and 10 of the aforesaid affidavit do reinforce the evidence of fear, threats, intimidation, risk and danger to witnesses and potential witnesses.

14. Officer Gbekie's affidavit evidence is corroborated, in material particulars, by paragraphs 5 and 6 of the Declaration of Saleem Vahidy, Chief of the Witness and Victims Unit of the Court. At paragraph 6, Mr. Vahidy states:

> "In my opinion in Sierra Leone the issue of protection of witnesses is a far more serious and difficult matter even than in Rwanda. The trials are being carried out in a country where the crimes took place, and the witnesses feel particularly vulnerable..."

It is further deposed to in paragraph 6 that:

> *"At present the Unit is already looking after numerous witnesses, ad several threat assessments have been carried out. Without going into details, it is a fact that specific threats have been issued against some of the witnesses, to the extent that active efforts are being made by members of interested faction to determine their exact locations, probably with a view to carrying out reprisals."*

15. Consistent with the Court's previous Decisions[1] on the issue of protective measures for prosecution witnesses, I find that the combined effect of the affidavit evidence of Officer Lahun and the declarations of Dr. Alan White, Alan Quee and

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[1] Decisions on the Prosecutor's Motion for Immediate Protective Measures For Witnesses and Victims and for Non- Public Disclosure, dated 23 May 2003 in *Prosecution Against Issa Hassan Sesay*, SCSL-2003-05-PT, *Alex Tamba Brima*, SCSL-2003-06-PT, *Morris Kallon*, SCSL-2003-07-PT, *Samuel Hinga Norman*, SCSL-2003-08-PT and after 13th October 2003, in *Prosecutor Against Moinina Fofana*, SCSL-2003-11-PD.

Saleem Vahidy is to demonstrate, within the bounds of reasonable foreseeability and not absolute certainty, the delicate and complex nature of the security situation in the country and the level of threat from several quarters of the ex-combatant population that participated in the conflict to witnesses and potential witnesses. It would not be judicially prudent to treat such affidavit evidence lightly, as to its probative value, especially in the absence of an affidavit in rebuttal. The irresistible inference, therefore, is that such threats may well pose serious problems to such witnesses and the effectiveness of the Court in the discharge of its international mandate. To the same effect is the finding of the Court *per* Judge Boutet in a recent *Decision On the Prosecution Motion For Immediate Protective Measures For Witnesses And Victims And For Non-Public Disclosure*[2], to wit:

> " "The Special Court", therefore, based upon its examination of the documentation produced, and in particular, of the foregoing, concludes that there exists at this particular time in Sierra Leone, a very exceptional situation causing a serious threat the security of potential witnesses and victims and accepts the affirmation that, according to Mr. Vahidy 'in Sierra Leone the protection of witnesses is a far more serious and difficult matter even than in Rwanda'"

16. Concerning the need for the protection of witnesses' identities at *the pre-trial* phase as distinct from *the trial phase*, I have sufficiently advised myself on the applicable body of jurisprudence. Without meaning to detract from the precedential or persuasive utility of decisions of the ICTR and the ICTY and to diminish the general thrust of the Prosecution's submissions on this point at paragraphs 17 and 19 of the Motion it must be emphasized that the use of the formula "shall be guided by" in Article 20 of the Statute does not mandate a slavish and uncritical emulation, either precedentially or persuasively, of the principles and doctrines enunciated by our sister tribunals. Such an approach would inhibit the evolutionary jurisprudential growth of the Special Court consistent with its own distinctive origins and features. On the contrary, the Special Court is empowered to develop its own jurisprudence having regard to some of the unique and different socio-cultural and juridical dynamics prevailing in the *locus* of the Court. *This is not to contend that sound and logically correct principles of the law enunciated by ICTR and ICTY cannot, with necessary adaptations and modifications, be applied to similar factual situations that come before the Special Court in the course of adjudication so as to maintain logical consistency and uniformity in judicial rulings on interpretation and application of the procedural and evidentiary rules of the international criminal tribunals.*

17. Instructive though, from a general jurisprudential viewpoint, some of the decisions of ICTR and ICTY relied upon by both Prosecution and Defence Office on the subject of delayed disclosure and confidentiality of witnesses and victims may be in terms of the principles therein enunciated, the issue is really one of contextual socio-legal perspective. Predicated upon such a perspective, one can reach various equally valid conclusions applying a comparative methodology on: (a) whether the security situation in Sierra Leone can, at this point in time, in relation to Rwanda, be objectively characterized as really more or less or equally volatile; (b) whether the

[2] *Prosecutor v. Augustine Gbao*, SCSL-2003-09-PT dated 10th October 2003 para. 25.

security situation in Rwanda during the grant or denial of the protective measures sought in those cases, was more or less or equally volatile as the present security situation in Sierra Leone; or (c) whether there is any logical basis for comparison at all, a position rightly taken by the Defence. Evidently, it takes no stretch of the legal imagination to discover that in such matters speculation can be endless and quite fruitless. It depends on one's analytical or methodological approach. They are not matters that can be determined with any mathematical exactitude.

18. Which principle, then, is applicable in determining the merits of the instant Motion? The answer is that it is the ***general principle*** propounded by the ICTY, in the case of *The Prosecutor v. Blaskic*, IT-95-14, Decision on the Application of the Prosecution dated 17th October 1996 Requesting of Protective Measures for Victims and Witnesses, 5th November 1996. It states that:

> The philosophy which imbues the Statute and Rules of the Tribunal appears clear: the Victims and Witnesses merit protection, even from the Accused, *during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself*; from that time forth, however, the right of the Accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.

Applying this ***general principle*** to the totality of the affidavit evidence before me, it is my considered view that a reasonable case has been made for the prosecution witnesses herein to be granted at *this preliminary stage* a measure of anonymity and confidentiality. In addition, in matters of such delicacy and sensitivity, it would be unrealistic to expect the Prosecution, at *the pre-trial phase*, to carry the undue burden of proving, as implied by the Defence, in respect of each accused whether he has, directly or indirectly, threatened or intimidated or caused to be threatened or intimidated any or all of the witnesses or potential witnesses for whom protective measures are sought. Such an approach would frustrate, if not, (using a familiar legal metaphor) drive a horse and coach through the entire machinery created by the Founding Instruments of the Court and its Rules for Protection of witnesses and victims.

19. Further, as designated Judge under Rule 28 of the Rules, my judicial evaluation of the measures requested by the Prosecution pursuant to Articles 16 and 17 of the Statute and Rules 53, 54, and 75 of the Rules, is also predicated upon the reasoning that even though the Court must, in such matters, seek to balance the right of the Accused to a fair and public trial with the interest of the witnesses in being given protection, such a right is subject to derogating exceptional circumstances (Article 17 (2) of the Statute) and that the existing context of the security situation in Sierra Leone does justify, at this point in time, delaying the disclosure of the identities of witnesses during *the pre-trial phase*.

20. As regards the 21 (twenty-one) day time limit prayed for by the Prosecution in Order (a), *despite the existence of some instructive ICTY and ICTR decisions supporting the 21 day rule limitation for disclosure, it is my considered view that there is no legal logic or norm compelling an inflexible adherence to this rule.* In the context of the security situation in

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Sierra Leone and in the interest of justice, one judicial option available to me, at this stage, in trying to balance the interest of the victims and witnesses for protection by a grant of anonymity and confidentiality with the pre-eminent interest of effectively protecting the Accused's right to a fair and public trial is to enlarge the time frame for disclosure beyond 21 (twenty-one) days to 42 (forty-two) days, the Prosecution's submission notwithstanding, in line with the Court's recent decision on the same issue in *Prosecutor v. Augustine Gbao*[3] where Judge Boutet ruled thus:

> "Therefore , "the Special Court" rules that no disclosure shall be made within forty-two (42) days of the date of the testimony of the witness, instead of twenty - one (21) days such disclosure achieving a fair balance between "*full respect*" for the rights of the Accused and "*due respect*" for the protection of witnesses and victims."

And I so order.

AND BASED ON THE FOREGOING DELIBERATION,

I HEREBY GRANT THE PROSECUTION'S MOTION AND IN PARTICULAR THE ORDERS SOUGHT IN (a) TO (k) as specified and particularised therein with the necessary modification to Order (a) in respect of the time frame for disclosure prior to testimony at trial, which said **ORDERS**, for the sake of completeness, are set out *in extenso* in the annexure hereto.

Done at Freetown

23rd day of October, 2003

Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated Judge Pursuant to Rule 28 of the Rules

Seal Of The Special Court

[3] Id. Supra 2; see also Court's earlier decisions referred to already.

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THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated Judge Pursuant to Rule 28 of the Rules

Registrar: Robin Vincent

Date: 23rd day of October, 2003

The Prosecutor Against: **Brima Bazzy Kamara**
(Case No. SCSL-2003-10-PT)

ANNEXURE TO THE DECISION ON THE PROSECUTOR'S MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE:

ORDERS FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON PUBLIC DISCLOSURE

Office of the Prosecutor:
Luc Côté, Chief of Prosecution
Sharan ParmarAssistant Trial Counsel

Defence Office:
Ken Fleming QC

THE SPECIAL COURT FOR SIERRA LEONE (the "Special Court")

PRESIDED OVER by Judge Bankole Thompson designated in accordance with provisions of Rule 28 of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED of the Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure filed by the Prosecutor on the 11th day of June, 2003 ("the Motion") for an order requesting various protective measures to safeguard the security and privacy of victims, witnesses and to safeguard the integrity of the prosecution's evidence and of these proceedings;

CONSIDERING that non-public material is disclosed to the Accused primarily for the purpose of allowing him to prepare to meet the charges against him and for no other purpose;

CONSIDERING FURTHER that the Designated Judge takes very seriously the interests and concerns of victims and witnesses, is genuinely concerned for their safety, protection and welfare, is authorised to take all appropriate measures to ensure their protection and privacy, and is judicially obliged to safeguard non-public materials provided to the Accused in order to enable him to prepare for trial, where the interests of justice so demand;

CONSIDERING ALSO that it is of paramount importance to protect the right of the Accused to a fair and public trial and that only in exceptional circumstances should such a right be derogated from;

HAVING METICULOUSLY EXAMINED the merits of the submissions by the Defence in response to the said Prosecution Motion and sought to balance the interests of the victims and witnesses for protection and privacy with the right of the Accused to fair trial in the context of the specific measures requested;

CONVINCED that despite the Defence submissions, in the specific context of this case, there is clear and convincing evidence submitted by the Prosecution for protective measures for witnesses and victims and for non-public disclosure of the material in this case at the pre-trial stage;

NOTING that Articles 17 (2) and 16 (4) of the Statute of the Special Court for Sierra Leone ("the Statute") envisage that the Trial Chamber shall, where expedient in the interests of justice, issue appropriate orders for the protection of victims and witnesses;

COGNISANT of the provisions of Rules 69 and 75 of the Rules concerning the protection of witnesses;

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ACTING IN ACCORDANCE WITH Articles 16 and 17 of the Statute and pursuant to Rules 53, 54, 56, 69, and 75 of the Rules;

I HEREBY GRANT THE PROSECUTION MOTION AND ORDER as follows:

(a) The Prosecution may withhold identifying data of the persons the Prosecution is seeking protection as set forth in paragraph 18 of the Motion and any other information which could lead to the identity of such a person to the Defence, until 42 (forty-two) days before the witness is to testify at trial; and may not disclose any materials provided to the Defence in a redacted form until 42 (forty-two) days before the witness is to testify at trial, unless otherwise ordered;

(b) That the names and any other identifying information concerning all witnesses be sealed by the Registry and not included in any existing or future records of the Court;

(c) The Prosecution may designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person to attempt to determine the identity of any such person;

(d) That the names and any other identifying information concerning all witnesses described in order (a) be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with established procedure and only in order to implement protection measures for these individuals;

(e) That the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of Witnesses and Victims, shall not be disclosed to the public or the media and this order shall remain in effect after the termination of the proceedings in this case;

(f) That the Defence shall not share, discuss or reveal, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence;

(g) That the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-public disclosure;

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(h) That the Defence provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to order (f) above, have access to any information referred to in order (a) through (e) above (reference herein being made to the Motion), and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

(i) That the Defence ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;

(j) That the Defence return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;

(k) That the Defence Counsel make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witnesses or any relative of such person, and such request shall be timely served on the Prosecution .At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her consent or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.

HEREBY FURTHER ORDER that consistent with Order (a) above, the Prosecutor shall disclose the names and unredacted statements of the witnesses to the Defence in at least 42 (forty-two) days before the witness is to testify at trial to allow the Defence sufficient and reasonable time to prepare effectively for trial, having regard to the gravity of the charges against the Accused person and the magnitude of the Prosecutor's allegations against him.

For the purpose of this Order:

(a) "the Prosecution" means and includes the Prosecutor of the Special Court for Sierra Leone (the Court) and his staff;

(b) "the Defence" means and includes the Accused, the Defence counsel and their immediate legal assistants and staff, and others specifically assigned by the court to the Accused's trial Defence team in conformity with Rule 44;

(c) "witnesses" means and includes witnesses and potential witnesses of the Prosecution;

(d) "protected witnesses" means and includes the witnesses in the categories as set forth in paragraph 18 of the Motion;

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(e) "victims" means and includes victims of sexual violence, torture, as well as all persons who were under the age of 15 at the time of the alleged commission of the crime;

(f) "the public" means and includes all persons, governments ,organisations, entities, clients, associations, and groups, other than the Judges of the Court and the staff of the Registry ,the Prosecution, the Defence, as defined above. "The public" specifically includes, without limitation, family, friends and associates of the Accused, and the Defence in other cases or proceedings before the court;

(g) "the media" means and includes all video, audio, print media personnel, including journalists, authors, television, and radio personnel, their agents and representatives.

Done at Freetown,

23rd day of October, 2003

Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated Judge Pursuant to Rule 28 of the Rules

Seal Of The Special Court

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(1329 – 1342)

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THE TRIAL CHAMBER

Before: His Lordship, the Rt. Hon. Judge Benjamin Mutanga Itoe, (Designated Judge)

Registry: Robin Vincent

Decision of: 24th day of November 2003

The Prosecutor against

Santigie Borbor Kanu
(Case No. SCSL-2003-13-PT)

DECISION ON THE PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS

Office of the Prosecutor:
Luc Côté, Chief of Prosecutions
Robert Petit, Senior Trial Counsel
Boi-Tia Stevens, Assistant Trial Counsel

Defence Counsel:
Geert-Jan Knoops, Defence Counsel

THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court"),

WITH Judge Benjamin Mutanga Itoe, sitting as the Designated Judge pursuant to Rule 28 of the Rules of Procedure and Evidence ("the Rules");

SEIZED of the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure and Urgent Request for Interim Measures until Appropriate Protective Measures are in Place ("the Motion"), filed on the 30th day of September 2003;

CONSIDERING the Response thereto ("the Response"), filed on the 8th day of October 2003 by the Defence Counsel on behalf of the Accused **Santigie Borbor Kanu** ("the Accused");

CONSIDERING the Prosecution's Reply thereto ("the Reply"), filed on the 16th day of October 2003;

CONSIDERING FURTHER the Decision on the Urgent Request for Interim Measures until Appropriate Protective Measures are in Place, rendered by Judge Pierre Boutet on the 15th day of October, 2003;

CONSIDERING the Statute of the Special Court, in particular Articles 16 and 17 thereof, and Rules 7, 53, 54, 66, 68, 69 and 75 of the Rules.

NOTING THE SUBMISSIONS OF THE PARTIES;

AFTER HAVING REVIEWED AND CONSIDERED ALL THE ARGUMENTS;

DECIDES AS FOLLOWS:

1. This Application by the Prosecution/Applicant for the Granting of Immediate Protective Measures for the Witnesses and Victims and for Non-Disclosure, filed in the Registry on the 30th day of September, 2003, is before me for adjudication as a Designated Judge of the Trial Chamber under the provisions of Rule 28 of the Rules of Procedure and Evidence of the Special Court.

2. In reply to the Application, the Respondent filed a Response on the 8th day of October, 2003, and the Applicant followed up by filing a reply to the submissions of the Respondent on the 16th day of October, 2003.

3. In this Motion, the Applicant is seeking an Order for immediate measures to protect the identity of witnesses and the confidentiality of all non-public materials disclosed to the Defence. The Prosecution contends that an Order to this effect is necessary so as to take adequate measures to safeguard the security and privacy of witnesses and victims and the integrity of the evidence as well as that of the instant proceedings.

4. The Applicant submits that providing redacted material consisting of the blackening of any information in witnesses' statements and interview reports which could reveal the identity of witnesses and victims is an appropriate measure for ensuring the privacy and protection of victims and witnesses which, according to them, is consistent with the rights of the Accused.

5. The circumstances that have led to this application are that the Respondent, SANTIGIE BORBOR KANU, in a 17 count Indictment preferred against him by the Prosecutor of the Special Court for Sierra Leone, is alleged to have, in the territory of the Republic of Sierra Leone since the 30th of November, 1996, committed various offences against international humanitarian law as defined in the Geneva Convention of 12th August, 1949, and enshrined in Article 1 of the Agreement dated the 16th day of January, 2002, between the United Nations and the Government of Sierra Leone on the establishment of the Special Court, as well as under Articles 1, 2, 3, 4 and 5 of the Statute of the said Court which is annexed to and forms part and parcel of the aforementioned Agreement.

6. In an accusatorial system of criminal justice that is currently practised in International Criminal Tribunals, the Statute, as does that of the Special Court, provides for adequate protection and safeguards for both the Prosecution on one hand, and the Defence on the other, in the conduct of their cases at all stages of the proceedings.

7. In this regard, Article 17(2) of this Statute stipulates that the Accused shall be entitled to a fair and public hearing subject to measures ordered by the Special Court for the protection of victims and witnesses. In addition, the Accused, under Article 17(4) (b) of the Statute has the right to adequate time and facilities to prepare for his defence and under Article 17(4)(e), he reserves the right to examine or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

8. As regards the Prosecution and the witnesses or victims whose testimony serves to prove their case, Article 17(2) acknowledges the inherent jurisdiction of the Special Court to ordain measures aimed at protecting these victims and witnesses. Indeed, Article 16(4) of the Statute authorises the Registrar to create a Witnesses and Victims Unit which, in consultation with the Prosecutor, shall provide protective measures and security arrangements and other appropriate assistance for witnesses and victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.

9. Still on the protection of witnesses, Rule 69(A)(B) (C) of the Rules, as a follow up and indeed, as a reinforcement of the protection principle provided for in Article 16(4) of the Statute, lays down conditions which protect both the rights of the Prosecution witnesses and victims on one hand, and those of the Accused on the other in relation to what extent and duration these protective measures can be accorded so as not to prejudice the right of the defence to prepare for the trial.

10. On the jurisdiction and competence of the Special Court, Rule 75(A) provides that a Judge or a Chamber may, on its own motion or at the request of either Party or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the Accused.

11. It is in the light of the foregoing institutional legal framework that the Prosecution/Applicant is seeking an Order for the protection of the following group of witnesses who fall under three categories:

    (i) Witnesses who presently reside in Sierra Leone and who have not affirmatively waived their right to protective measures;

    (ii) Witnesses who presently reside outside Sierra Leone but who have relatives in Sierra Leone, and who have not affirmatively waived their rights to protective measures and;

    (iii) Witnesses residing outside West Africa who have requested protective measures.

12. To effectively attain this objective, the Applicant is urging the Court to issue the following Orders:

    (i) An Order allowing the Prosecution to withhold identifying data of the persons the Prosecution is seeking protection for as set forth in paragraph 16 or any other information which could lead to the identity of such person to the Defence until twenty-one (21) days before the witness is to testify at a trial; and consequently allowing the Prosecution to disclose any materials provided to the Defence in a redacted form until twenty-one (21) days before the witness is to testify at a trial, unless otherwise ordered;

    (ii) An Order requiring that the names and any other identifying information concerning all witnesses, be sealed by the Registry and not included in any existing or future records of the Court;

    (iii) An Order permitting the Prosecution to designate a pseudonym for each witness in Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witnesses or encourage or otherwise aid any person to attempt to determine the identity of any such person;

    (iv) An Order that the names and any other identifying information concerning all witnesses described in paragraph 23(a), be communicated only to the Victims and Witnesses Unit personnel by

the Registry or the Prosecution in accordance with established procedure and only in order to implement protection measures for these individuals;

(v) An Order prohibiting the disclosure to the public or the media of the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of witnesses and victims, and this order shall remain in effect after the termination of the proceedings in this case;

(vi) An Order prohibiting the Defence from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence;

(vii) An Order that the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the Order of non-disclosure;

(viii) An Order requiring the Defence to provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to paragraph 23(f) above, have access to any information referred to in paragraphs 23(a) through 23(e) above, and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

(ix) An Order requiring the Defence to ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;

(x) An Order requiring the Defence to return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;

(xi) An Order that the Defence Counsel shall make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witness or any relative of such person, and such request shall be timely served on the Prosecution. At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his consent or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.

13. In seeking these Orders, the Applicant advances the following arguments:

"That the provisions of Rules 69 and 75 of the Rules of the Special Court are similar to those of Rules 69 and 75 of the Rules of the ICTR and of the ICTY and that the jurisprudence of the ICTR and of the ICTY in those matters are convincing precedents for the Special Court to come to the same conclusions."

14. In this regard, the Applicant argues that the said jurisprudence of the ICTR and of the ICTY is settled on the fact that the party seeking protective measures must show the existence of a real fear for the safety of a witness or the witness' family and an objective basis for the fear. It is argued that under Rule 69, there is a need to show the existence of exceptional circumstances and as was decided by the ICTY in the *Tadic* case, the existence of a real fear need not be shown by the witness himself or herself but may be shown by others.

15. The Applicant to justify the application and particularly, the element of "exceptional circumstances" in Rule 69, has submitted the following documentary evidence:

(i) A confidential Declaration by Mr. Lahun, an Investigator dated 19th September, 2003, in which he affirms that the civilian population which may be called upon to appear as witnesses before the Special Court have expressed concern about their safety if it becomes known that they are cooperating with the Court, particularly if their identities are revealed to the general public;

(ii) A Declaration by Dr. White, Chief of Investigations, in which he affirms that the security situation in most of Sierra Leone and its neighbouring countries is volatile. He states that the population live very closely and these include victims, witnesses an sympathisers of the indictees and that there have been instances involving interference with, and intimidation of, the Prosecutor's witnesses, some of who have experienced actual threats and attempts on their lives. He concludes that there is a general state of fear and apprehension amongst the witnesses;

(iii) A Declaration dated 25th April 2003 of Mr. Alan Quee, Director of Post Conflict Reintegration Initiative for Development (PRIDE) an NGO which deals with ex-combatants affirming that Ex-combatants are worried about being called to testify in the Special Court because they fear being killed by their former Commanders. He concludes by saying that "[t]he threat of violence towards those who are seen as being with the Special Court is very real."

(iv) A Declaration dated 27th September 2003 of Saleem Vahidy, Chief of the Witnesses and Victims Unit of the Special Court affirming

that specific threats have been issued against some of the witnesses to the extent that active efforts are being made by members of interested factions to determine their exact locations probably with a view to carrying out reprisals;

(v) A Declaration dated 29th April, 2003 of Keith Biddle, the former Inspector General of Police, affirming that security conditions in Sierra Leone, despite the presence of UNAMSIL, remain volatile. He affirms that this situation poses a real threat to the security of victims and potential witnesses. In his view, the Police system does not have the capacity to guarantee the safety of witnesses or prevent them from injury or intimidation;

(vi) A Declaration dated 19th September, 2003 of Brima Acha Kamara, Inspector General of Sierra Leone Police confirms the entire declaration of his predecessor, Keith Biddle.

16. The Prosecution bases its application for protection of the witnesses and victims and non-disclosure in the case against the Respondent on the well-founded fears and apprehensions expressed in the aforementioned Declarations for the safety of potential witnesses.

17. The Applicant further argues that "the future of this and other cases before the Special Court for Sierra Leone depends on the ability and willingness of witnesses to give testimony and provide the necessary evidence (which for the most part, is geared towards incriminating indictees like the Respondent in this case). Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice, the Applicant argues, are serious problems for both the individual witnesses and the Court's ability to accomplish its mandate. The protective measures requested by the Prosecution would protect witnesses and victims against this kind of misconduct and are designed to ensure their safety as well as that of their families."

18. In reply, the Respondent observes that the protection sought is for all the witnesses in the case without distinction and that this is not in compliance with the provisions of Article 17(4) of the Statute. It is submitted by the Respondent that the protection, if extended to all the witnesses, will be seriously detrimental to the rights of the Accused under Article 17(4)(b) of the Statute.

19. The Respondent submits that the use of the words "a witness" in Rule 69(A) underscores the point that the drafters of the Rules intended that 'non-disclosure of identity is to be assessed on an individual case-by-case basis' and not, as the Applicant contend, to be used as a tool for the systematic protection of all material witnesses or several categories of them from disclosure of identity before hand.

20. The Respondent further argues and adopts Michael Scharf's commentary on the ICTR decisions on Motions for the Protection of Defence Witnesses in the

case of the *Prosecutor v Kayishema and Ruzindana*, where he said that the principle of conducting criminal trial proceedings which are often open to the public and press, should be respected and as the Respondent adds as a buttressing argument, "in the absence of clear and overwhelming particularised grounds for closing the proceedings with respect to *'each witness'*".

21. The Respondent concedes that there are categories of individuals, at least two, in his opinion, who may require protection under Rule 69(A) but argues that notwithstanding this categorisation, they must be particularised on the basis of concrete elements with respect to each individual witness.

22. Replying to the Respondent's insistence on the legal implication of the words "a witness" in Rule 69(A), the Applicant relies on the definition section of the Rules where Rule 2(B) states as follows:

> *'In these Rules, the masculine shall include the feminine and the singular, the plural and vice versa'.*

23. The Applicant argues that it would be a wasteful use of the Court's time and resources for the Prosecutor to bring individual witnesses at this stage of the pre -trial process.

24. Having so far considered the submissions of both parties, I would like to refer to and to recognise the extent of the application of the provisions of Article 20(3) of the Statute of the Special Court which stipulates as follows:

> *'the Judges of the Appeals Chamber of the Special Court shall be guided by decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda'*

and to observe that although not expressly stated, this provision, by a necessary intendment, is also ordinarily applicable to the Trial Chamber of the Special Court where the Judges, without of course losing sight of some legal and factual variables and the environmental realities of Sierra Leone as against or in contrast to the situations in Rwanda and Yugoslavia and their realities, have been inspired by those decisions.

25. In fact, the fast emerging principle of protection of witnesses and victims which today is deeply rooted in the core dynamics of the International Criminal Justice system and procedures, is founded on the understanding that those "protégés" whose testimony is vital in establishing the case for the Prosecution and to some extent, that of the Defence, deserve a cloud of anonymity around them, at least for some time pending their appearance and testimony in Court.

26. This position is even the more so justified because given the gruesomeness of the nature of crimes for which they might be called upon to the feature as victims and/or witnesses, the circumstances surrounding these offences, and the personality of the perpetrators, coupled with the fear of recriminations on them

or on members of their families, this temporary camouflage on their identity, even though it impugns, albeit temporarily, on the rights of the Accused and the proper conduct of his defence, appears plausible after all because it is quite in harmony with the revered objective we are committed to upholding, that is, to safeguard the integrity of the proceedings where some element of secrecy and in-camera procedures form an integral part; this, on the understanding of course, that the veil that would so far have shielded them from the Accused, is lowered at the crucial stage of the trial and in time to permit the Accused to enjoy and fully exercise, amongst others, his statutory right to a fair and public hearing guaranteed to him under Article 17 of the Statute of the Special Court.

27. In the determination therefore of applications on issues relating to the granting of protective measures to victims and witnesses, I think three factors, all of which I consider of public interest, should be borne in mind:

    (i) Firstly, acknowledging that the rights of the Accused as defined by the Statute and the Rules must be respected, and this, subject to measures, if any, ordered by the Court for the Protection of victims and witnesses;

    (ii) Secondly, taking cognisance of the rights and entitlements of victims and witnesses to some shielding and protection during the pre-trial phase and shortly before the trial commences, given the circumstances surrounding the commission of these offences; and

    (iii) Thirdly, recognising, as was observed in the case of *Kayishema v Ruzindana*, 'the need to maintain a perfect balance between, on the one hand, the rights of the Accused to a fair trial, and on the other hand, the right of victims and witnesses as well as the interest of the International Community that justice is done in the most diligent manner possible.'

28. In this regard and in the case of the *Prosecution v Allieu Kondewa*, Case No. SCSL-2003012-PD of 10th October, 2003, also based on an application for Protective Measures for Victims and Witnesses, I had this to say on a related issue and I quote:

> *"This balance is very difficult to strike as the very thin line of demarcation separating the fundamental interests of the Accused to protect his entrenched legal and constitutional entitlements to a fair trial as against the statutorily evolving right of a witness or a victim to protection and non disclosure which is an emanation of International Statutes and Rules of practice in ad hoc and exceptional International Criminal jurisdictions, is too slim, or rather, too faint to ensure the equilibrium of the said balance without violating in one way or the other, one's or the other's legal rights".*

29. What, however, appears certain in my mind is that the doctrine of anonymity and non-disclosure, even though it might appear contradictory to, is not

necessarily inconsistent with the principles of a fair trial that are guaranteed to the Accused under Article 17(2) of the Statute because the lifting of the veil of anonymity before the calling of these shielded witnesses balances the legal claim to a status of and prerogative to protection and anonymity that they might have enjoyed all along with the leave of the Court.

30. Indeed, as Justice Brooking of the Supreme Court of Victoria stated in the case *Jarvie and Another v. The Magistrate's Court of Victoria at Brunswick and Others* [1994] V.R. 84,88, and I quote:

> *"The balancing exercise now so familiar in this and other fields of the law must be undertaken. On the other hand, there is public interest that the Defendant should be able to elicit (directly or indirectly) and to establish facts and matters, including those going to the credit, as may assist in securing a favourable outcome to the proceedings. There is also a public interest in the conduct by the Courts of their proceedings in public."*

31. What further appears to be palpably certain is that the protection given to these Victims and Witnesses is justified because of the role they are expected to, and are in fact called upon to play in the administration of international criminal justice which is in conformity with what I stated, in the Ruling in the case of the *Prosecutor v. Allieu Kondewa*, cited earlier, and I quote:

> *"... One of the goals targeted by the International community is to track down and bring before justice, those who bear the greatest responsibility for a breach of International Humanitarian Law by committing heinous crimes against humanity. In view of the particularly bloody, hostile, and vicious environment in which these gruesome offences were cruelly perpetrated and the necessity to fulfil the procedural imperatives of an adversarial system of justice governing the Courts by providing witnesses to sustain the charges, a mechanism had to be worked out to achieve the targeted objectives. One of this is certainly to create incentives geared towards encouraging victims and witnesses of those crimes to testify, albeit, against those front-line perpetrators and one of these measures is to put in place, a protective wall between the victim or witness and the Accused so that neither the latter nor his sympathisers would identify the former for possible recriminations and eventual eliminations. It is only to this strategy that International Criminal Justice owes its exceptional survival, for, in the absence of these protected witnesses and victims, there will be no trials and consequently, no end to the criminal impunity that the International Community is endeavouring to contain and combat through the International Criminal Courts..."*

32. The issue which the Trial Chamber of the Special Court has addressed all along is that the Applicant in cases of this nature, must show that the disclosure to the Accused and his defence team of the identity to the public of a victim or a witness at this stage would put them in danger or at risk. In fact, there must be some objective foundation for the fear that the witness may be in danger or at

risk: Archbold's *International Criminal Courts: Practice, Procedure and Evidence* (2003) at Paragraph 8-64c.

33. The Applicant has, through the Declarations of some personalities who are actively involved in the investigations and post-war management structures and activities, shown that the risk and danger to the witnesses and the probability of their being tampered with is real if a Protection and a Non-Disclosure Order were not made to shield their identities pending the commencement of the trial during which time the rights of the Accused to a fair trial would be fully guaranteed.

34. The Respondent has raised objections to this application in so far as it seeks to globally protect all the witnesses and argues that this should rather be done on a case-by-case examination and appreciation so as to determine whether the measures are necessary for all the witnesses.

35. The Respondent has also raised and sustained the argument all along that the provisions of Rule 69(A) of the Rules of Procedure and Evidence talk of "a witness" and not "witnesses" and that this provision was not supposed to be used to shield all witnesses without a justification being furnished by the Prosecution as to why they are seeking protection for all the witnesses they intend to use for purposes of establishing their case.

36. In a situation where the Trial Chamber, as at now, is estranged from the scenery and secrecy of the investigations, I cannot in advance, at least not before the commencement of the Pre-Trial Conferences, say, nor do I know, how many witnesses either the Prosecution or the Defence would call to make their cases. It is a question which at this moment, is entirely and only exclusively within the competence of the Prosecutor, and to some extent, the Defence, to provide a response.

37. This said however, I find that the argument based on the mention of "a witness" to exclude other witnesses who are, or may equally be entitled to the measures stipulated under Rule 69(A), cannot stand in view of the provisions of Rule 2(B) of the Rules. Besides, Rule 69 is made pursuant to the provisions of the Statute which is the enabling instrument. In this regard, Article 16(4) of the Statute provides as follows:

> *"The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide in consultation with the office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses..."*

38. Besides, Rule 69(B) of the Rules of stipulates that in the determination of protective measures for victims and witnesses, the Judge or the Trial Chamber may consult the Victims and Witnesses Unit. If the Respondent as he has done, raises the issue of singularity as far as the interpretation of the words 'a witness'

in Rule 69(A) is concerned, Rule 69(B) is in plural terms. In any event, Article 16(4) of the Statute talks of Victims and Witnesses (in plural terms) and therefore, impliedly renders, only to the extent of the words 'or witness' in the regulatory text, if it could ever be construed in singular terms, null and void, because the Regulatory Authority (The Plenary), which drafted the Rules of Procedure and Evidence, was not supposed to, and could not of course have allowed itself to act *ultra vires* since it had neither the powers nor the mandate to modify or to limit the scope of the application of Article 16(4) of the Statute, an integral part of the Enabling Act, that is the Agreement dated 16th January , 2002, on the Establishment of the Special Court for Sierra Leone, signed by Two High Contracting Parties, namely, the United Nations Organisation and the Government of Sierra Leone.

39. In order to attempt to get out of the dilemma of a case-by-case examination so strongly canvassed by the Respondent at this stage of the proceedings, it would be interesting to find answers to the following questions. How many witnesses is the Prosecution holding for this trial? How many will they call to prove their case? Which of these witnesses is entitled to protection on a case-by-case basis as argued by the Respondent?

40. I find it difficult to answer any of these questions at the moment without prematurely delving into the trial process of examining the witnesses and their statements even before the trial begins. I indeed decline to encourage such an exercise which to my mind is complex, time consuming, and capable of unnecessarily protracting and complicating the proceedings and the process, in addition to the premature disclosure of even those witnesses who deserve the protection much more than others. I accordingly have no hesitation therefore in dismissing this argument for want of any remedial merit of fostering the interest of a fair and expeditious trial.

41. From the foregoing, I find that unless exceptional cause to the contrary is shown by a Respondent in cases of this nature to warrant creating an exception, the option of globally protecting witnesses and victims, if chosen, instead of justifying such measures on a case-by-case basis, is legally well-founded and should be the rule, particularly so because as has been pointed out by the Trial Chamber in applications of this nature, it would be unrealistic to expect the Prosecution to carry the undue burden of having each witness narrate in specific terms in a document, the nature of his or her fears as to the actual or anticipated threats or intimidation before the Chamber rules on the substantive application.

42. In the present case, I find as a matter of fact that the Sierra Leonean society is still volatile and fragile as all indications are that it has not quite recovered from the memories, the ravages and the damage done by the devastating civil war. As a result, the witnesses, victims and their families are very vulnerable and should they fail to benefit from protective measures, they would be exposed to all forms of risks and recriminations from the indictees or their sympathisers.

43. In this regard, I accord a lot of credence to the solemn, convincing, and uncontradicted individual Declarations by the core group of responsible Officials. I find that their revelations and other issues which are highlighted in the submissions of the Applicant, coupled with the overall circumstances surrounding the case of this Respondent and that of other indictees of the same category, rise up to the standards required to sufficiently demonstrate, *inter alia*, the prerequisite of "exceptional circumstances" enshrined in Rule 69(A) as an element to be demonstrated or shown in other to justify the granting of the measures envisaged under this Rule following the principle in the *Tadic* case.

44. I accordingly grant the Application and do make the following Orders:

(a) The Prosecution should withhold identifying data of the persons the Prosecution is seeking protection for as set forth in paragraph 16 or any other information which could lead to the identity of such person to the Defence until twenty-one (21) days before the witness is to testify at a trial; and consequently allowing the Prosecution to disclose any materials provided to the Defence in a redacted form until twenty-one (21) days before the witness is to testify at a trial, unless otherwise ordered;

(b) The names and any other identifying information concerning all witnesses, shall be sealed by the Registry and not included in any existing or future records of the Court;

(c) The Prosecution shall designate a pseudonym for each witness in Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witnesses or encourage or otherwise aide any person to attempt to determine the identity of any such person;

(d) The names and any other identifying information concerning all witnesses described in paragraph 23(a), shall be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with established procedure and only in order to implement protection measures for these individuals;

(e) The disclosure to the public or the media of the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of witnesses and victims, is prohibited and this order shall remain in effect after the termination of the proceedings in this case;

(f) The Defence is prohibited from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence;

(g) The Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-disclosure;

(h) The Defence shall provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to paragraph 23(f) above, have access to any information referred to in paragraphs 23(a) through 23(e) above, and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

(i) The Defence shall ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;

(j) The Defence shall return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;

(k) The Defence Counsel shall make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witness or any relative of such person, and such request shall be timely served on the Prosecution. At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his consent or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.

45. **THAT THESE ORDERS BE CARRIED OUT.**

Done in Freetown, this 24th day of November 2003

Judge Benjamin Mutanga Itoe

Seal of the Special Court

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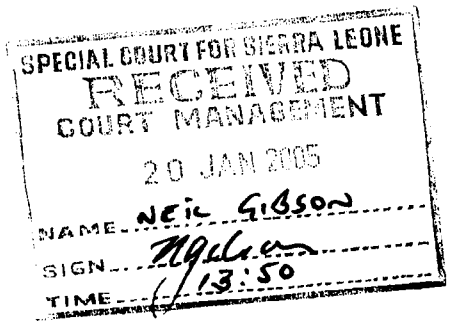
TRIAL CHAMBER II

Before:	Judge Teresa Doherty, Presiding Judge Judge Richard Brunt Lussick Judge Julia Sebutinde
Registrar:	Robin Vincent
Date:	20 January 2005

PROSECUTOR	**Against**	**Alex Tamba Brima** **Brima Bazzy Kamara** **Santigie Borbor Kanu** (Case No.SCSL-04-16-PT)

INTERIM ORDER ON MODIFICATION OF PROTECTIVE MEASURES FOR WITNESSES

Office of the Prosecutor:
Luc Côté
Robert Petit



Defence Counsel for Alex Tamba Brima:
Kevin Metzger
Glenna Thompson
Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Wilbert Harris
Pa. Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Knoops
Carry Knoops-Hamburger
Abibola E. Manley-Spaine

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Judge Teresa Doherty, Presiding, Judge Richard Brunt Lussick and Judge Julia Sebutinde; 7808

NOTING the Order to the Prosecution for Renewed Motion for Protective Measures of 1 April 2004 ("Order") by Trial Chamber I, composed of Judge Bankole Thompson, Presiding, Judge Pierre Boutet and Judge Benjamin Mutanga Itoe;

SEIZED of the Renewed Prosecution Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures Dated ("Motion") filed on 4 May 2004 by the Office of the Prosecutor ("Prosecution");

NOTING the Responses to the Motion filed by Defence Counsel for the Accused Kanu and by Defence Counsel for the Accused Brima, on 14 May 2004;

NOTING further that no Response was filed on behalf of the Accused Kamara;

NOTING the Consolidated Reply to the Responses filed by the Prosecution on 18 May 2004 ("Consolidated Reply");

NOTING the Decisions for protective measures[1] rendered in each individual case prior to being joined as Case No. SCSL-04-16-PT by an order of Trial Chamber I;[2]

NOTING in particular the decision by Judge Itoe on the Prosecution's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure on 24 November 2003 in the case of the Accused Kanu, which under reference (a) ordered that: "The Prosecution should withhold identifying data of the persons the Prosecution is seeking protection for as set forth in paragraph 16 or any other information which could lead to the identity of such person to the Defence until twenty-one (21) days before the witness is to testify at trial; and consequently allowing the Prosecution to disclose any materials provided to the Defence in a redacted form until twenty-one (21) days before the witness is to testify at trial, unless otherwise ordered;"

CONSIDERING Articles 16 and 17 of the Statute of the Special Court ("Statute") and Rules 53, 69 and 75 of the Rules of Procedure and Evidence ("Rules");

CONSIDERING the commencement of the Trial on 7 March 2005 pursuant to the Order of this Trial Chamber on 20 January 2005;

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[1] *Prosecutor v. Alex Tamba Brima*, SCSL-03-06-PT, Decision on the Prosecution's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003; *Prosecutor v. Brima Bazzy Kamara*, SCSL-03-10-PT, Decision on the Prosecution's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 October 2003; *Prosecutor v. Santigie Borbor Kanu*, SCSL-2003-13-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 24 November 2003 ("Protective Measures Decisions").

[2] Decision and Order on Prosecution Motions for Joinder, 27 January 2004, SCSL-2003-06-PT; SCSL-2003-10-PT; SCSL-2003-13-PT.

MINDFUL of the need to guarantee the protection for the rights of the victims and witnesses, while ensuring the respect of the rights of the Accused to a fair and public hearing, and seeking to balance those rights with the competing interests of the public in the administration of justice;

MINDFUL that several witnesses will testify on facts that affect all Accused in this case;

HEREBY ORDERS that until final deliberation on the Motion and Order by the Trial Chamber:

1) The "rolling disclosure period" of unredacted witness statements to the Defence in the case of the Accused Kanu pursuant to Paragraph 44 of the Protective Measures Decision[3] order (a) shall be modified from 21 (twenty-one) to 42 (forty-two) days prior to the testimony of the witnesses at trial;

2) The Prosecution commence with such disclosure procedure in all cases on 24 January 2005;

3) a) The Prosecution may file supplementary submissions, if any, on the Motion by 4:00 p.m. on Monday, 24 January 2005;

   b) The Defence may file any supplementary submissions by 4:00 p.m. on Thursday, 27 January 2005; and

   c) Any further Reply is to be filed by the Prosecution by 4:00 p.m. on Monday, 31 January 2005;

FURTHER ORDERS the Court Management Section of the Registry to serve this Order by electronic means to all parties exceptionally on this public holiday, Thursday 20 January 2005.

Done at Freetown this 20th day of January 2005

Doherty J.

Judge Teresa Doherty
Presiding Judge
Trial Chamber II

[Seal of the Special Court for Sierra Leone]

[3] *Prosecutor v. Santigie Borbor Kanu*, SCSL-2003-13-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 24 November 2003, para. 44.

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IN THE APPEALS CHAMBER

Before:
Judge Lal Chand Vohrah, Presiding
Judge Rafael Nieto-Navia
Judge Patricia Wald
Judge Fausto Pocar
Judge Liu Daqun

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
26 September 2000

PROSECUTOR

v.

TIHOMIR BLASKIC

DECISION ON THE APPELLANT'S MOTIONS FOR THE PRODUCTION OF MATERIAL, SUSPENSION OR EXTENSION OF THE BRIEFING SCHEDULE, AND ADDITIONAL FILINGS

The Office of the Prosecutor:

Mr. Upawansa Yapa

Counsel for the Appellant:

Mr. Anto Nobilo
Mr. Russell Hayman
Mr. Andrew M. Paley

I. INTRODUCTION

A. Procedural Background

1. On 3 March 2000, Trial Chamber I of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the Tribunal") convicted Tihomir Blaškic ("the Appellant") of crimes against humanity, violations of the laws or customs of war and the grave breaches the Geneva Conventions of 1949, under the Statute of the Tribunal, and sentenced him to a term of 45 years' imprisonment ("the Judgement"). On 17 March 2000, the Appellant filed a Notice of Appeal against the Judgement. Pending the filing of the Appellant's Brief, on 4 April 2000 the Appellant filed two motions ("the Motions"):

(1) "Appellant's Motion for the Production by the Office of the Prosecutor of

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Improperly Withheld Discovery Material, and Production by the Registrar of Trial Transcripts and Exhibits from other Lasva Valley Cases" (confidential) ("the Production Motion");[1] and
(2) "Appellant's Motion to Suspend Briefing Schedule, or Alternatively, for Extension of Time to File Appellate Brief" ("the Motion to Suspend or for Extension").

2. On 14 April 2000, the Office of the Prosecutor ("the Prosecution") filed its confidential response to the Appellant's two motions ("the Prosecution Response").[2] On 18 April 2000, the Appellant filed his replies to the Prosecution Response.[3] On 20 April 2000, the English translation of the Judgement was filed.

B. The Production Motion

3. By the Production Motion, the Appellant seeks an order from the Appeals Chamber directing the Prosecution to produce to the Appellant:[4]

1) all witness statements of witnesses who testified in his trial in the form of trial transcripts from other cases and accompanying exhibits as required under sub-Rule 66 (A) (ii) of the Rules of Procedure and Evidence ("the First Request" and "the Rules", respectively);

2) all exculpatory material and/or evidence that affects the credibility of Prosecution witnesses, including trial transcripts, witness statements, notes and the substance of all other verbal information ("the Second Request"); and

3) a signed certificate, within 14 days of the issuance of an order on the First and Second Requests, that the Prosecution has complied with the First and Second Requests and is furthermore aware of its *continuing* obligations under Rules 66 and 68 ("the Third Request").

4. Further, in the Production Motion, the Appellant also seeks an order directing the Registrar to produce to the Appellant any and all public transcripts and exhibits from the other Lasva Valley cases[5] as such transcripts become available in unofficial form, and to disclose all non-public transcripts and exhibits from those cases to the Appellant subject to any protective measures required by the Tribunal ("the Fourth Request").

C. The Motion to Suspend or for Extension

5. In conjunction with his Production Motion, the Appellant seeks, by the Motion to Suspend or for Extension, an order pursuant to sub-Rule 127 (B) from the Appeals Chamber to temporarily suspend the time-limit imposed by Rule 111 of the Rules, until such time as the Prosecution complies with any order granting the Production Motion, and/or pending the translation of the Judgement into English and Bosnian-Croatian-Serbian ("the B/C/S"), whichever is later. In the alternative, the Appellant requests that he be granted an additional 90 days to submit his Appellant's Brief, allowing him a total of 180 days, due to the need for the disposition of the Production Motion, translation of the Judgement, and the voluminous trial record and the complexities of the case.[6]

D. Suspension of the Briefing Schedule

6. By order of 19 May 2000, the Appeals Chamber suspended the filing schedule imposed by Rule 111 pending its decision on the Motions.

E. Supplemental Filing

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7. On 27 June 2000, the Appellant filed a confidential document, entitled "Appellant's Supplemental Filing re: Motion to Suspend Briefing Schedule, or Alternatively, for Extension of Time to File Appellate Brief" ("the Supplemental Filing"), wherein he requested the Appeals Chamber to suspend the briefing schedule until 1) the date that the Prosecution certified that it had produced to the Appellant all witness statements and exculpatory evidence as required by sub-Rule 66 (A) (ii) and Rule 68, or 2) the date of the completion of translation of certain new documents turned over by the Croatian authorities to the Appellant since the suspension of the briefing schedule by the Appeals Chamber on 19 May 2000, whichever was later. The Prosecution filed a confidential response on 7 July 2000.[7] Considering that the Supplemental Filing supplements the Motions, the Appeals Chamber will consider it in this decision.

F. Additional Supplemental Filing and the Corrigendum

8. On 20 July 2000, the Appellant filed under seal the "Appellant's Additional Supplemental Filing re: Motion to Suspend Briefing Schedule, or Alternatively, for Extension of Time to File Appellate Brief" ("the Additional Supplemental Filing"). He requested the Appeals Chamber to suspend the briefing schedule till either the date when the Prosecution certified that it had produced to the Appellant all relevant materials as required by sub-Rule 66 (A) (ii) and Rule 68, or the date when the translation of a second group of documents turned over by the Croatian authorities to the Appellant was completed, whichever date was later.

9. On 1 August 2000, the Appellant filed under seal a Corrigendum to the Additional Supplemental Filing.

10. There has been no response from the Prosecution to these two filings.

II. APPLICABLE PROVISIONS

11. Rule 66 (A) of the Rules provides, in part:

> 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)...
>
> (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 the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

Rule 68 provides:

> The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

Rule 75 (D) provides:

> Once protective measures have been issued in respect of a victim or witness, only the Chamber granting such measures may vary or rescind them or authorise the release of protected material to another Chamber for use in other proceedings. If, at the time of the request for variation or release, the original Chamber is no longer constituted by the same Judges, the President may authorise such variation or release.

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Rule 107 provides:

> The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.

Rule 115 provides:

> (A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it during the trial. Such motion must be served on the other party and filed with the Registrar not less than fifteen days before the date of the hearing.
>
> (B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.

Rule 127 provides, in part:

> (A) Save as provided by Sub-rule (B), a Trial Chamber may, on good cause being shown by motion,
>
> (i) enlarge or reduce any time prescribed by or under these Rules;
>
> (ii)...
>
> (B) In relation to any step falling to be taken in connection with an appeal or application for leave to appeal, the Appeals Chamber or a bench of three Judges of that Chamber may exercise the like power as is conferred by Sub-rule (A) and in like manner and subject to the same conditions as are therein set out.

III. THE PRODUCTION MOTION

A. The First Request

1. Submissions of the Parties

(a) The Appellant

12. It is the argument of the Appellant that, where a witness who testified in the *Blaskic* case subsequently gives evidence in another case before the Tribunal, the Prosecution is obliged to disclose the transcript of the subsequent testimony and any exhibits admitted through that witness, pursuant to its duties under sub-Rule 66 (A) (ii) of the Rules. He submits that the Tribunal's case-law has affirmed the principle that a witness's testimony in another Tribunal case constitutes a "witness statement" under sub-Rule 66 (A) (ii).[8] He points out that at least 15 witnesses who testified against him at trial have subsequently testified in the *Kordic/Cerkez* case alone, but despite being repeatedly requested to disclose the trial transcript containing their testimony, the Prosecution has failed to produce a single page of transcript.[9] He requests that the Appeals Chamber order the Prosecution to produce to him all such witness statements and any evidentiary exhibits admitted through the witnesses, and he agrees to abide by any appropriate protective measures.

(b) The Prosecution

13. The Prosecution Response submits that the First Request is based on a premise that the Prosecution's disclosure obligation is a "continuing" one, to which the Prosecution remains subject

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even after the end of the trial proceedings.[10] The Prosecution argues that the first obligation of the Prosecution under sub-Rule 66 (A) (ii) is to disclose copies of the statements of all witnesses whom the Prosecution "intends to call to testify at trial". Once a witness has testified, he or she is no longer one whom the Prosecution "*intends* to call to testify". Disclosure of witness statements is only required *prior* to the time at which the witness testifies.[11] The second obligation of the Prosecution under the Rule, in the view of the Prosecution, is to disclose copies of statements of additional Prosecution witnesses "when a decision is made to call those witnesses." Nothing in the wording of the Rule suggests that it imposes a continuing obligation.

(c) The Appellant in Reply

14. The Appellant contends that Rule 66(A) retains its utility even after a particular witness testified in his trial, and that the Prosecution has voluntarily undertaken to produce to him testimony given in a related proceeding by witnesses who have testified in this case.[12]

2. Discussion

15. Before considering what the Prosecution's duty of disclosure is under sub-Rule 66 (A) (ii) of the Rules, it is necessary to consider whether the testimony given by a witness in a case can constitute a "witness statement" within the meaning of the sub-Rule. The Rules do not define what constitutes a witness statement. The usual meaning of a witness statement in trial proceedings is an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime. The Appeals Chamber is of the view that when a witness testifies during the course of a trial before the Tribunal, the witness's verbal assertions recorded by the Registry's technical staff through contemporaneous transcription, are capable of constituting a witness statement within the meaning of sub-Rule 66 (A) (ii). The testimony will constitute such a witness statement and therefore be subject to disclosure, only if the witness is intended to be called, in accordance with the sub-Rule, to testify in subsequent proceedings in relation to the subject-matter of the testimony. In other words, the testimony is a witness statement for the subsequent proceedings.

16. It follows that the Prosecution does have a duty to disclose such witness statements to the Defence under certain conditions. Whether or not they should be "made available" pursuant to sub-Rule 66 (A) (ii) depends upon the stage of the proceedings that a case has reached. The Prosecution's argument is correct that the sub-Rule should be given its plain meaning that, once a witness has given evidence in court, the Prosecution can no longer *intend* to call that witness to testify, and that there is therefore no obligation to make available any subsequent statements from the witness, unless the witness will be recalled as an additional Prosecution witness in the sense of the sub-Rule. In the present case, the witnesses that the Appellant refers to had concluded providing testimony before the *Blaškic* Trial Chamber before they gave evidence before the Trial Chamber in the *Kordic/Cerkez* case. Following the giving of their testimony in the *Blaškic* case, the witnesses ceased to be "witnesses whom the Prosecutor intends to call to testify at trial" in that case within the meaning of sub-Rule 66 (A) (ii), and there was no obligation on the part of the Prosecution to disclose to the Appellant transcripts of their subsequent testimony provided in the course of a different case. Had the testimony in the other case or cases been given prior to the tendering of it by those same witnesses in the *Blaškic* trial, the Prosecution would have been obliged under the sub-Rule to disclose that testimony in the latter trial.

17. The Appeals Chamber is also of the view that sub-Rule 66 (A) (ii) can be applied, *mutatis mutandis*, in appeals, pursuant to Rule 107. Additional evidence may be admitted on appeal by way of Rule 115, and prior to the presentation of such evidence through witnesses under the rule, the presenting party shall follow the procedure of sub-Rule 66 (A) (ii) to disclose witness statements to the other party.

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3. Conclusion

18. For the foregoing reasons and in the circumstances of this case, the First Request is denied.

B. The Second Request

1. Submissions of the Parties

(a) The Appellant

19. The Appellant submits that Rule 68, which obliges the Prosecution to disclose to the Defence exculpatory evidence, places a *continuing* obligation on the Prosecution. He contends that the Tribunal's case-law suggests that the Prosecution is under an obligation at all times to disclose to the Defence any material which might exculpate the accused or infringe on the credibility of inculpatory material.[13]

20. He argues that this continuing obligation extends to include potentially exculpatory material arising in other proceedings before the Tribunal. Having accessed media reports on the *Kordic/Cerkez* case,[14] the Appellant submits that, in that case, the Prosecution presented evidence that was exculpatory to the case of the Appellant.

(b) The Prosecution

21. The Prosecution argues that the Second Request of the Appellant should be rejected for four reasons. First, the Prosecution avers that Rule 68 does not impose a "continuing" obligation to which the Prosecution remains subject even after the end of the trial proceedings.[15] It submits that if, after a trial had concluded, the Prosecution became aware of the existence of such evidence as casts serious doubt on the correctness of the Trial Chamber's judgement, it would inform the Defence. It explains that this would not be due to the operation of Rule 68, but by virtue of the Prosecution's role as an organ of the Tribunal and of international criminal justice, and that this view has been reflected in the Standards of Professional Conduct for Prosecution Counsel, issued by the Prosecutor. The Prosecution also submits that the types of evidence that it would be expected to inform the Defence of, after the conclusion of the trial, would be such that might justify review of the Trial Chamber's judgement under Article 26 of the Statute and Rules 119-120.[16]

22. The Prosecution submits that Rule 68 may apply to evidence which would not of itself be likely to affect the verdict in the case but which may be material to the Defence for the reason that it may affect the credibility of some part of the Prosecution evidence or is inconsistent with some aspect of the Prosecution case. So long as the trial proceedings are still pending there will be an obligation to disclose such material to the Defence. However, once the judgement has been given, the principle of finality applies.

23. The Prosecution accepts that after the conclusion of the trial, an appellant may seek leave to present additional evidence under Rule 115. It submits that the Appeals Chamber in the *Tadic* case made it clear that, to enable new evidence to be admitted on appeal under Rule 115, the additional evidence "must be such that it would probably show that the conviction was unsafe."[17] The Prosecution submits that not every item of evidence which would have fallen under Rule 68 at trial and which was not known at trial would be admissible in appellate proceedings under Rule 115, or would justify review under Article 26 of the Statute.

24. Secondly, the Prosecution submits that the material referred to in the Second Request is not exculpatory within the meaning of Rule 68 and is not so important that, had it been proved at trial, it would have been likely to have resulted in a different verdict.[18] The Prosecution points out that the

testimony of certain witnesses referred to by the Appellant relates to the question of authority over HVO special units operating in Central Bosnia Operative Zone. It argues that both Blaskic and Kordic bear criminal responsibility for the crimes committed by the HVO in Central Bosnia and that, as every one of the witnesses testified in open session, the Prosecution did not withhold their testimony from the Defence.

25. Thirdly, the Prosecution argues that even if Rule 68 were applicable, the Production Motion fails to specify the particular material sought by the Defence. In the *Celebici* case, it was held that "any request for disclosure of information should clearly specify the material desired."[19] The Prosecution suggests that the Second Request is inconsistent with this requirement of specificity.

26. Fourthly, the Prosecution also argues that even if Rule 68 were applicable, the Second Request would impose obligations going beyond the requirements of the Rule as it would require the Prosecution "to disclose this information through written witness statements, witness summaries, trial transcripts and/or other forms". However, Rule 68 only requires the Prosecution to disclose to the Defence "the *existence* of evidence", but does not require the Prosecution to actually provide the Defence with all of the evidence in question.

(c) The Appellant in Reply

27. In his Reply, the Appellant argues that at the *Blaskic* trial, the Prosecution unambiguously stated "the Prosecutor acknowledges her continuing obligations before, during, and after trial to disclose to the Defence the existence of any exculpatory evidence pursuant to Rule 68. Exculpatory material would include testimony of any *Blaskic* witness given in a different proceeding at the Tribunal (at whatever time) which 'in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.'"[20] The Appellant argues that the Prosecution should be estopped from arguing a contrary position.

28. Furthermore, the Appellant emphasises that the witness summaries cited by him in the Production Motion all bear directly on the question of the actual chain of command over paramilitary and independent units that were responsible for most of the crimes committed in the Lašva Valley. He further explains that in the *Blaskic* case, the trial proceedings concluded on 30 July 1999 and the Judgement was issued on 3 March 2000, and that the several witnesses in question gave their evidence during this period. He submits that the Appeals Chamber should order the Prosecution to produce forthwith to him any and all evidence that "tends to suggest" the innocence of or mitigates the guilt of the Appellant, or that "may affect" the credibility of Prosecution witnesses against him.

2. Discussion

29. The issue raised by the Second Request is as to whether there is a continuing obligation for the Prosecution to disclose exculpatory evidence at the post-trial stage. The Appellant relies on the language of Rule 68, the relevant case-law of the Tribunal, and a statement by the Prosecution made at the trial in this case that the Prosecution "acknowledges" the continuing obligations "before, during, and after trial to disclose to the Defence the existence of any exculpatory evidence pursuant to Rule 68".[21] The effect of this undertaking of the Prosecution to continue to honour its obligation under Rule 68 is a matter additional to the resolution of the issue raised by the Second Request. Even assuming that this statement could be held against the Prosecution in appeals, the issue raised by the Second Request remains to be resolved. The reason is that the statement was made at the trial in this case but the issue raised by the Second Request is of general importance.

30. Rule 68 of the Rules provides:

> The Prosecutor shall, as soon as practicable, disclose to the defence the existence of

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> evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

In respect of the Second Request, there may be four possible results from the application of the rule:

1) the obligation continues until the close of the presentation of evidence stage;
2) the obligation continues until the Trial Chamber delivers its Judgement in the case;
3) if a judgement is appealed against, the obligation continues until the Appeals Chamber delivers its Judgement on Appeal; or
4) the Prosecution is always under an obligation to disclose under this Rule.

31. The first question is what constitutes the close of trial proceedings: whether it is the situation envisaged in result 1) or 2). The preferred answer is that the close of trial proceedings means the close of all proceedings before a Trial Chamber, ending with the delivery of the judgement. This is result 2). The first result does not comport with the practice of the Tribunal, in that evidence disclosed after the close of hearings but before judgement may lead to the re-opening of a case at first instance.[22] The situation could arise where, following the close of the presentation of evidence, but prior to the delivery of the judgement of the Trial Chamber, exculpatory evidence relating to the accused has come to the possession of the Prosecution. A Trial Chamber is entitled to have the benefit of all relevant evidence put before it in order to reach an informed and well-balanced judgement, and its ability to accept evidence late prior to judgement is in conformity with the requirement of a fair trial under the Statute and the Rules. In such a situation, it would be open to the Defence to move before the Trial Chamber, right up to the date of judgement, to seek permission to re-open the trial proceedings to enable the Defence to present the new exculpatory evidence that has come to light. The Appeals Chamber therefore takes the view that the duty of the Prosecution to disclose to the Defence the existence of such evidence pursuant to Rule 68 continues at least until the date when the Trial Chamber delivers its judgement.

32. Should the Prosecution's duty under Rule 68 continue, either after the close of trial proceedings and up until the Appeals Chamber delivers its Judgement on Appeal which is described as result 3), or always as envisaged by result 4)? Contrary to the position of the Appellant, the Prosecution argues that, at the stages corresponding to result 3) or 4), it has a duty to continue to disclose evidence by virtue of its being an "organ" of the Tribunal and of international criminal justice, but not due to Rule 68. The Appeals Chamber is of the view that the Appellant is in effect seeking to rely possibly on a general interpretation of Rule 68 by this Chamber to the effect that, the Prosecution is at all times required by Rule 68 to disclose exculpatory evidence. On the other hand, the Appeals Chamber takes note, with appreciation, of the position of the Prosecution which, in its view, conforms with the mandate of the Tribunal to dispense justice on behalf of the international community and with the status of the Prosecutor and her staff being, as it were, "ministers of justice assisting in the administration of justice".[23] However, the Appeals Chamber also believes that the Prosecution is under a *legal* obligation to continually disclose exculpatory evidence under Rule 68 in proceedings before the Appeals Chamber. The application of Rule 68 is not confined to the trial process. Like sub-Rule 66 (A) (ii), Rule 68 provides a tool for disclosure of evidence. In the context of the Rules, admission of evidence on appeal can be effected through either Rule 115 or Rule 89, but the Rules do not specify means of disclosure in appeals. This is where Rule 107 has a role to play: to enable the Appeals Chamber to import rules for trial proceedings to fill a lacuna in appellate proceedings, subject to appropriate modifications. With this principle in mind, the Chamber will proceed to deal with the Second Request in substance.

33. The Appeals Chamber considers that the factual circumstances surrounding the filing of the Production Motion, uncontested by both parties, are that, in November and December 1999, the Appellant's counsel were put on notice of certain media reports of several witnesses testifying in the *Kordic/Cerkez* case, who presented a version of the events in the Lasva Valley that the counsel considered to be somewhat different from what was described by their evidence given in the *Blaskic*

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trial. This information was not brought to the attention of the Trial Chamber, which was in the process of drafting the Judgement. It first came to light in the Production Motion filed before the Appeals Chamber.

34. The Appeals Chamber is aware that the Appellant does not expressly rely on Rule 107 in his argument and the Chamber cannot but assume Rule 107 to be one of the reasons for the Second Request, since it is obvious that Rule 68 with its specific reference to the accused cannot be directly applicable in appeals.

35. The Appeals Chamber considers that the admission of evidence on the appellate level is a necessarily limited exercise due to the corrective nature of the appellate proceedings.[24] The Chamber refers to the provisions of Rule 109 of the Rules which define the record on appeal as being "the parts of the trial record, as certified by the Registrar, designated by the parties", and to those of Rule 117 which require the Chamber to "pronounce judgement on the basis of the record on appeal with such additional evidence as has been presented to it".

36. Following the conviction of an accused, there are three ways of bringing new information before the Appeals Chamber: by way of Rule 115 to introduce additional evidence; by way of Rule 89 to present evidence in respect of issues which were not litigated at trial; or by way of Rule 119 to present a new fact for the purpose of review. In this appeal, the Appeals Chamber cannot consider the evidence sought by the Second Request unless it is admitted pursuant to Rule 115 which governs additional evidence. The reason is that the examples of evidence given in the Production Motion pertain to facts already litigated at trial.[25] The Appeals Chamber thus disposes of the first reason given by the Prosecution in its Response.

37. The Appeals Chamber notes that, in respect of the Prosecution's second reason, the Appellant's counsel knew of the existence of the evidence that might exculpate the Appellant soon after the evidence was given in open court at the Tribunal. Yet he remained silent before the Trial Chamber until the Production Motion was filed on appeal. There has been no explanation from the Appellant as to why he remained reticent in spite of this information. A fact concerning the question as to whether the Appellant was capable of ordering certain units of the HVO to attack villages and towns should have alerted any diligent counsel so that he or she would bring it to the attention of the Trial Chamber which might be persuaded to reconsider the evidence. However, this Chamber is not prepared to say that the Appellant has effectively waived his right to complain about non-disclosure. As this Chamber considers that Rule 68 continues to be applicable at the appellate stage of a case before this Tribunal, the Prosecution continues to be under a duty to disclose by virtue of the Statute and the Rules, being thus bound to do so as a matter of law. Further, the Chamber takes note that counsel for the Appellant renewed a request for discovery under, inter alia, Rule 68, in a letter dated 10 February 2000 addressed to the Prosecution, which was sent some time before the delivery of the judgement by the Trial Chamber.[26] The delayed reaction by the Defence in this case cannot alter the duty of the Prosecution to comply with Rule 68.

38. However, the Appeals Chamber considers that the Prosecution may still be relieved of the obligation under Rule 68, if the existence of the relevant exculpatory evidence is known and the evidence is accessible to the appellant, as the appellant would not be prejudiced materially by this violation. In this case, the Appellant knew that the several witnesses in question, who allegedly gave exculpatory evidence in other trials, all did so in public sessions. There was no difficulty for him to seek access to their testimony with the assistance of the Trial Chamber, if necessary. He did not.

39. The Appeals Chamber notes the Prosecution's reasoning that the evidence referred to by the Appellant was not exculpatory because, in its view, both the Appellant and Mr. Kordic shouldered criminal responsibility for the events in the Lasva Valley. Under Rule 68, the initial decision as to whether evidence is exculpatory has to be made by the Prosecutor. Without further proof that the Prosecution abused its judgement, the Appeals Chamber is not inclined to intervene in the exercise

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of this discretion by the Prosecution. It is for the Appellant to seek out the transcript of the testimony of the several witnesses referred to in the Production Motion to show this Chamber that the evidence is exculpatory. The second reason given by the Prosecution is rejected, because the Prosecution is under a legal duty to continually disclose exculpatory evidence in appeals. The failure in discharging this duty does not necessarily require the Appeals Chamber to grant relief to the Appellant if the Appellant himself has no difficulty to access such evidence.

40. In relation to the third reason of the Prosecution, it is true that the Production Motion seeks production of "all exculpatory evidence relating to Appellant from all investigations and prosecutions conducted by the Tribunal".[27] The Appeals Chamber recalls an early decision in the *Celebici* appeal which states:[28]

> In the present case, the Appellant is seeking a copy of the video recording on the basis of the alleged observations of his counsel asserted in the Motion and Reply. The Respondent is disputing the Appellant's right of access. Under these circumstances, first-hand and detailed evidence citing specific instances is necessary in affidavit form in accordance with the law and procedure of the State in which such affidavits are signed before access can be granted.

The Appeals Chamber considers that the Second Request will not fall within the category of requests for production in that it seeks the production of all exculpatory evidence which it has not specified. It is in the nature of a request seeking assistance for disclosure. A request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request.[29] It is to be noted, however, that a request based on Rule 68 is not required to be so specific as to precisely identify which documents shall be disclosed. The third reason is not persuasive.

41. With regard to the fourth reason of the Prosecution, the Appeals Chamber is of the view that it is misconceived, in that it does not make sense that the Prosecution can stop short of providing exculpatory evidence in its possession, having pointed out to the Defence that it possesses such evidence. If the evidence is in the sole possession of the Prosecution, it is obvious that if the fourth reason were upheld, the Defence would be hindered from discovering it, thus frustrating the principle of a fair trial. The fourth reason cannot stand.

3. Conclusion

42. For the foregoing reasons, the Second Request is granted to the extent that the Appeals Chamber finds that the Prosecution is under a continuing obligation under Rule 68 to disclose exculpatory evidence at the post-trial stage, including appeals.

C. The Third Request

1. Submissions of the Parties

(a) The Appellant

43. The Appellant submits that the Appeals Chamber should order the Prosecution to submit a signed, sworn affidavit to certify that it is aware of its continuing obligations under sub-Rule 66 (A) (ii) and Rule 68 and has produced to the Appellant all material requested in the First and Second Requests.[30] He points out that such an order has been made before in *Prosecutor v. Krnojelac*.[31] He suggests that certification is required so that the Appellant and the Appeals Chamber can be assured that the Prosecution has discharged its obligations before the appeal process may proceed. He also asks that the Prosecution be required to review the material, produce it to the Appellant, and provide

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certification within 14 days of the issuance of an order by the Appeals Chamber on the Motions.

(b) The Prosecution

44. The Prosecution argues that if the First and Second Requests are rejected, the Third Request must also be rejected. It also suggests that the decision of *Prosecutor v. Krnojelac*, as a decision of a pre-trial Judge, is not binding on the Appeals Chamber. The Prosecution is aware of its disclosure obligations, and as officers of the court, they will discharge these obligations in good faith.[32]

2. Discussion

45. This type of order is one that should only be made by a Chamber in very rare instances. The Prosecution is expected to fulfil its duties in good faith. This has been acknowledged in the document known as the Standards of Professional Conduct for Prosecution Counsel, issued by the Chief Prosecutor on 14 September 1999. Only where the Defence can satisfy a Chamber that the Prosecution has failed to discharge its obligations should an order of the type sought be contemplated.

3. Conclusion

46. As the Appellant has not satisfied the Appeals Chamber that during this appeal, the Prosecution has failed to discharge its obligations under sub-Rule 66 (A) (ii) and Rule 68, the scope of the application of which has been clarified only in this decision, the Third Request is denied.

D. The Fourth Request

1. Submissions of the Parties

(a) The Appellant

47. The Fourth Request seeks an order directing the Registrar to produce to the Appellant any and all public and non-public transcripts and exhibits from other Lasva Valley cases as soon as they become available, even if in unofficial form.[33] He submits that he has a reasonable belief that the evidence presented in the *Kupreskic, Aleksovski, Furundžija* and *Kordic/Cerkez* trials concerning events in the Lasva Valley may include evidence helpful to his appeal.

48. Concerning public transcripts and exhibits, while the Registrar has provided the Appellant with such items upon request, the Appellant asks that the Appeals Chamber direct the Registrar to make all public transcripts and exhibits available on an expedited basis, even in unofficial form.

49. With regard to non-public transcripts, such as closed session transcripts, the Appellant submits that they should be made available to him on the same terms. The Appellant agrees to abide by any protective measures imposed by the Tribunal.

50. In his Production Motion Reply, the Appellant states there is a considerable time lag between the creation of a public transcript and/or exhibit, and its availability to the Appellant. The Appellant asks that he be permitted the earliest possible access to the material to review it prior to submitting his appeal.[34]

(b) The Prosecution

51. The Prosecution states that this Request should be denied. It argues that there is no provision in the Rules or Statute requiring the Registrar to provide transcripts and exhibits from one case to a

party in another case. The Prosecution submits that in respect of the request for non-public materials, the Appeals Chamber will be without the power to make such an order due to sub-Rule 75 (D) which provides that only the Chamber granting protective measures may vary or rescind them or authorise the release of protected material to another Chamber for use in other proceedings.

2. Discussion

52. There are two aspects to the Fourth Request. The first aspect concerns the production by the Registrar to the Appellant of testimony given by witnesses during the course of open session hearings before the Tribunal. It must be emphasised that only the Prosecution and the Defence (through the requirement of reciprocal disclosure under Rule 67 of the Rules) are required to disclose evidence or material in connection with proceedings before the Tribunal. The functions of the Registry are defined in Rule 33 of the Rules. However, the Tribunal is bound, above all, by its Statute. Article 21 (2) of the Statute provides for the right of an accused (who may become an appellant subsequently) to a fair and public hearing, subject to protective measures in respect of victims and witnesses. Article 21 (4) (b) guarantees the accused the right to have adequate time and facilities to prepare his defence. It follows that there is a duty on the part of the Registry to make available to the public and in particular, the accused or appellant, Tribunal materials, subject to appropriate protective measures indicated by Chambers, to facilitate the preparation of defence or appeal. It also follows that the Registrar through the Registry is required to assist counsel who seek access to testimony given in open session.

53. The Registry does, however, provide assistance in two ways. First, it maintains a computer web-site for the Tribunal that can be accessed by the public, including Defence counsel. On the web-site, the Registry normally posts an electronic version of the official transcript of testimony given by witnesses in cases before the Tribunal. There is a time-delay between a witness giving testimony in a case and the transcript of the testimony appearing on the web-site. A party wishing to obtain access to the testimony of a certain witness in a particular case may have to wait some while from the date the testimony was given until it can be read on the web-site.

54. The second type of assistance provided by the Registry is an arrangement whereby counsel may contact the Registry and request certain public documents such as transcripts and the Registrar may, where possible, grant the request. In this appeal, if such a request were made to the Registry, and the Registry was unable to comply with it, it would be open to the Appellant to apply to the Appeals Chamber by way of motion for assistance to obtain access to the documents. The Fourth Request falls within this category of motions. Such motions should provide information about the measures taken by the Defence to obtain the documents from the Registry and the problems arising from non-compliance, and the Appeals Chamber may also hear from the Registry as to why the information sought cannot be provided. The Appeals Chamber may then act accordingly.

55. So far as non-public transcripts are concerned, sub-Rule 75 (D) specifically provides that once protective measures have been issued in respect of a victim or witness, only the Chamber granting such measures may vary or rescind them. The Appeals Chamber may, at the request of a party, confer with a particular Trial Chamber that imposed the protective measures and request assistance in obtaining such materials subject to the existing protective measures. The onus however is on the requesting party to identify exactly what material it seeks and the purpose the material would be used for.

3. Conclusion

56. For the preceding reasons, the Fourth Request is denied.

IV. THE MOTION TO SUSPEND OR FOR EXTENTION

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A. Submissions of the Parties

57. Pursuant to sub-Rule 127 (B), the Appellant seeks an order from the Appeals Chamber temporarily suspending the timing requirement for the filing of the Appellant's Brief, i.e. within 90 days of the filing of the Notice of Appeal, or alternatively, an order granting an extension of time of 90 days to submit the Appellant's Brief after the expiry of the time-limit set by Rule 111.

58. With regard to the suspension of the filing deadline, the Appellant submits that his inability to proceed with the appeal effectively prior to the Prosecution complying with the Production Motion and prior to the translation of the Judgement constitutes "good cause" for the Appeals Chamber to suspend the filing schedule pursuant to sub-Rule 127 (B). He requests that the suspension be in effect until the Prosecution complies with any order made in connection with the Production Motion.[35]

59. The Prosecution responds that because the Production Motion should be rejected in its entirety, there cannot be "good cause" for extending the time-limit within the meaning of sub-Rule 127 (A).[36]

60. The Appellant also requests that the time-limit for the filing of the Appellant's Brief should not run pending the translation of the Judgement into English and the B/C/S, whichever is the later. In respect of this request, the Prosecution does not oppose an order that the time-limit should not run until the Judgement is made available in English.

61. In the alternative, the Appellant requests that he be granted 90 days to submit his Appellant's Brief, allowing him a total of 180 days, due to the complexity of the Appellant's trial. The Prosecution agrees that the complexity and size of a case may constitute good cause for the granting of an extension of time for the filing of briefs. Accordingly, it does not oppose the granting of the requested extension.

B. Discussion

62. The Judgement was delivered in French. In the Motions, the Appellant asked for the time-limit for the filing of the Appellant's Brief to run from the date on which the Judgement was issued in both English and the B/C/S. The Prosecution did not object to this request. The English version of the Judgement was filed with the Registry on 20 April 2000, and the B/C/S translation was filed on 6 June. Counsel for the Appellant ought to have been able to commence the preparation of the appeal case from the date that the English translation of the Judgement was filed. However, as the Appeals Chamber has yet to decide on the Production Motion which is one of the three reasons for the filing of the Motion to Suspend or for Extension, and as one other reason for this latter motion regarding translation is moot, it would not serve any useful purpose in ordering the parties to resume the briefing schedule as from 20 April 2000, when the English translation of the Judgement became available.

63. As the Appeals Chamber has suspended the briefing schedule in this case by its Order of 19 May 2000 and other issues in this Motion have since become moot, there is no need to consider this Motion any further.

C. Conclusion

64. For the foregoing reasons, the Motion to Suspend or for Extension is rejected in regard to the specific extension request contained therein; its good cause has already been recognised by the order of this Chamber of 19 May 2000 that suspended the briefing schedule under Rule 111.

V. SUPPLEMENTAL FILING, ADDITIONAL SUPPLEMENTAL FILING, AND

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CORRIGENDUM ("THE ADDIONAL FILINGS")

65. The Appellant has received certain new documents from the Croatian authorities since the order of the Appeals Chamber of 19 May 2000. The documents came in two batches, and each one has given rise to a supplemental filing. The documents are currently being translated by the Registry of the Tribunal. Given the confidential nature of these additional filings by the Appellant, wherein the Appellant describes the relevance of a number of sample documents in relation to his case, the Appeals Chamber simply notes that the Appellant in all three filings requests the Chamber to suspend the briefing schedule until: (1) the date when the Prosecution certifies that it has produced to the Appellant all witness statements and exculpatory evidence as required by sub-Rule 66 (A) (ii) and Rule 68; or (2) the completion of translation of the newly produced documents by the Registrar, whichever is later. In so requesting, the Appellant joins the Additional Filings to the Motions.

66. The Appeals Chamber also notes that the Prosecution argues, in its confidential Response to the Supplemental Filing, that the Appellant has not attached the sample documents referred to in the filing nor indicated the relevance to the case of any of the documents produced, and that therefore it cannot respond to the filing properly. Accordingly, the Prosecution asks the Chamber to reject the filing.

67. The Appeals Chamber refers to paragraph 46 of this decision in respect of the first request raised by the Appellant in the Additional Filings. It sees no reason to order the Prosecution to certify the production of evidence pursuant to sub-Rule 66 (A) (ii) and Rule 68 in the absence of proof of failure of the Prosecution to comply with the Rules as interpreted by the Appeals Chamber in this decision.

68. In respect of the second request of the Appellant through the Additional Filings, the Appeals Chamber notes that Article 25 (1) (b) of the Statute provides for appeals from errors of fact, which may arise in light of additional evidence, and that the Appellant relies on the newly produced documents to formulate at least some of his grounds of appeal. On the basis of the description given by him of the sample documents, it seems that the documents, if admitted, may affect his appeal. This Chamber will therefore exercise its power under sub-Rule 127 (B) to continue the suspension of the briefing schedule in this appeal, as imposed by Rule 111, until the translation of the documents which have been submitted to the Registry by the Appellant through the Additional Filings is completed.

VI. DISPOSITION

69. For the foregoing reasons, THE APPEALS CHAMBER, UNANIMOUSLY,

1) grants the Production Motion to the extent that the Prosecution is under continuing obligations of disclosure as required by sub-Rule 66 (A) (ii), Rule 68, and Rule 107;

2) dismisses the Motion to Suspend or for Extension;

3) grants the Additional Filings to the extent that the briefing schedule imposed by Rule 111 of the Rules shall remain suspended;

4) orders the Appellant to indicate by motion to this Chamber, within seven days of his receipt of all of the translated documents, as to whether he intends to rely on Rule 115 of the Rules to seek the admission of some or all of the documents as additional evidence; and if so, to specify, within 14 days of the motion, which documents he will submit under Rule 115 and why the documents are admissible under the rule;

5) orders the Prosecution to respond within 14 days of the filing of any such motion by

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the Appellant and the documents attached thereto; and

6) allows the Appellant to reply to any such Prosecution response within 10 days of the filing of the response.

The resumption of the briefing schedule will then be decided by further order of this Chamber.

Done in both English and French, the English text being authoritative.

Done this twenty-sixth day of September 2000,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

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1. Reference to confidential filings in this decision is made with the nature of those filings being fully taken into account.
2. "Prosecution Response to the Defence Motions for Production of Discovery Material and for an Extension of Time", 14 April 2000.
3. "Appellant's Reply to Prosecutor's Response to Appellant's Motion for the Production by the Office of the Prosecutor of Improperly Withheld Discovery Material, and Production by the Registrar of Trial Transcripts and Exhibits from Other Lasva Valley Cases" (confidential), 18 April 2000 ("the Production Motion Reply"); and "Appellant's Reply to Prosecutor's Response to Appellant's Motion to Suspend Briefing Schedule, or Alternatively, for Extension of Time to File Appellate Brief", 18 April 2000 ("the Second Reply").
4. Production Motion, p. 9.
5. The other Lasva Valley cases are the *Prosecutor v. Zoran Kupreskic and Others,* Case No.: IT-95-16-T; *Prosecutor v. Zlatko Aleksovski,* Case No.: IT-95-14/1-T; *Prosecutor v. Anto Furundzija*, Case No.: IT-95-17/1-T; and *Prosecutor v. Dario Kordic/Mario Cerkez,* Case No.: IT-95-14/2-T.
6. Motion to Suspend or Extend, p. 6.
7. "Prosecution Response to Appellant's Supplemental Filing of 27 June 2000 to Suspend Briefing Schedule (confidential)", 7 July 2000.
8. In support of this proposition the Appellant cites "Opinion Further to the Decision of the Trial Chamber Seized of the Case of the Prosecutor v. Dario Kordic and Mario Cerkez Dated 12 November 1998", *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, 16 December 1998, p. 4. The Decision referred to in the Opinion was issued in *The Prosecutor v. Dario Kodic and Mario Cekez*, Case No. IT-95-14/2-PT.
9. Production Motion, p.3, referring to letters sent by defence counsel to the Prosecution both during and after the trial.
10. Prosecution Response, para. 5.
11. Ibid., para. 8.
12. The Production Motion Reply, p.11.
13. The Appellant cites the *Opinion further to the Decision of the Trial Chamber Seized of the Case The Prosecutor v. Dario Kordic and Mario Cerkez Dated 12 November 1998* in *Prosecutor v. Tihomir Blaskic*, Case No.: IT-95-14-T, 16 December 1998, p.5; and the *Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68* in *Prosecutor v. Milorad Krnojelac*, Case No.: IT-97-25-PT, 1 November 1999, p.4, reaffirming an earlier order.
14. The source of the Appellant's information is the London-based Institute for War & Peace Reporting website: http://www.iwpr.net (Tribunal Update 151, 155, and 161).
15. Prosecution Response, para. 14.
16. Article 26 of the Statute provides that where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement. The two Rules are based on this article.
17. *Prosecutor v. Dusko Tadic*, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, Case No. IT-94-1-A, A. Ch., 15 October 1998, para. 71 (c).
18. Prosecution Response, para. 28.
19. *Prosecutor v. Zejnil Delalic et al.* ("the *Celebici* case"), Decision on the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information, Case No. IT-96-21-T, 24 June 1997, paras. 14-15.
20. *Prosecutor v. Tihomir Blaskic*, Prosecutor's "Response to Defence Motion for Access to Trial Testimony of Witnesses Given Under Pseudonym or in Closed Session in Related Proceedings", 23 June 1998.
21. *Ibid.*
22. *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgement, para. 22.
23. Not to rely solely on a few domestic cases, it is nonetheless felt that this expression used therein is apt in this regard:

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R. v. Banks S1916C 2 K.B. 621 at 623 (*per* Avory J.). Also see *R. v. Brown (Winston)* S1998C A.C. 367 at 374, HL.
24. *Prosecutor v. Dusko Tadic,* Case No.: IT-94-1-A, A. Ch., Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, para. 42.
25. *Ibid.*, para. 32.
26. Production Motion, Annex B.
27. Production Motion, p.1.
28. *Prosecutor v. Zejnil Delalic and Others*, Case No.: IT-96-21-A, A. Ch., Decision on Motion to Preserve and Provide Evidence, 22 April 1999, p.4.
29. See *Prosecutor v. Tihomir Blaskic*, Case No.: IT-95-14-AR108*bis*, A. Ch., Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 20 Oct. 1997, para. 32; the same, Case No.: IT-95-14-T, Decision on the Production of Discovery Materials, 27 Jan.1997, para. 49.
30. Production Motion, p. 6.
31. *The Prosecutor v. Milorad Krnojelac*, Case No.: IT-97-25-PT, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, 1 November 1999, pp. 4-5.
32. Prosecution Response, paras. 39-41.
33. Production Motion, p. 7.
34. Production Motion Reply, p. 13.
35. Motion to Suspend or Extend, p. 3.
36. Prosecution Response, para. 50.

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(6071 - 6073)

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TRIAL CHAMBER II

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

Registrar: Robin Vincent

Date: 9 February 2005

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-PT)

ORDER TO PROSECUTION TO PROVIDE ORDER OF WITNESSES AND WITNESS STATEMENTS

Office of the Prosecutor:
Luc Côté
Lesley Taylor
Boi-Tia Stevens
Marc Wallbridge

Neil Gibson
11:54.

Defence Counsel for Alex Tamba Brima:
Kevin Metzger
Glenna Thompson
Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Wilbert Harris
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
Carry J. Knoops
Abibola E. Manley-Spaine

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Judge Teresa Doherty, Presiding Judge, Judge Richard Lussick and Judge Julia Sebutinde;

NOTING the Order of the Trial Chamber for the Commencement of Trial of 20 January 2005;

NOTING the Oral Decision on Prosecution's Motion for Renewed Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures Dated 2 April 2004, dated 3 February 2005;

NOTING the forthcoming Status Conference on 1 March 2005;

CONSIDERING that the Trial Chamber pursuant to Article 17 of the Statute of the Special Court ("the Statute") and Rule 26*bis* of the Rules of Procedure and Evidence ("the Rules") shall ensure that the trials are conducted in a fair and expeditious way with full respect for the rights of the Accused and due regard for the protection of victims and witnesses;

CONSIDERING that it is in the interest of justice to disclose to the Defence and the Trial Chamber the continuous order of witnesses the Prosecutor intends to call, with sufficient time available for the case preparation and investigation;

CONSIDERING that the Trial Chamber would benefit from having access to witness statements in advance of each witness testifying at trial, for the purpose of promoting comprehension of the issues and for the effective management of the trial;

CONSIDERING that this is an accepted practice within the Special Court[1] and international criminal tribunals[2];

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[1] *Prosecutor v. Sam Hinga Norman et al.*, SCSL-04-14-PT, Order to Prosecution to Provide Order of Witnesses and Witness Statements, 28 May 2004; *Prosecutor v. Issa Hassan Sesay et al.*, SCSL-04-15-T, Order to Prosecution to Produce Witness List and Witness Summaries, 7 July 2004.

[2] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Decision by the Tribunal on its Request to the Prosecutor to Submit the Written Witness Statements, 28 January 1997; *Prosecutor v. Darko Kordic and Mario Cerkez*, Case No. IT-95-14/2-PT, Order for Disclosure of Documents and Extension of Protective Measures, 27 November 1998; *Prosecutor v. Dokmanovic*, IT-95-13a-PT, Order, 28 November. 1997; See *Prosecutor v. Vidoje Blagojevic, Dragan Jokic, Momir Nikolic*, Decision in the Appeals Chamber, 8 April 2003.

PURSUANT to Rule 54 of the Rules;

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HEREBY ORDERS the Prosecution for all trial sessions in this case:

(1) To provide the Defence and the Trial Chamber with a list of the next 10 witnesses to be called at trial and a copy of all their witness statements, and to file these 14 days prior to the testimony of the first witness of each group;

(2) To ensure that the list identifies the following information:

(a) the order in which the Prosecution intends to call the witnesses;
(b) the pseudonym or his/ her name if the witness is not protected;
(c) the category of protective measures to be applied for the testimony of each of these witnesses;
(d) the language spoken by the witness;
(e) the date of her/ his witness statements;
(f) the number of pages of the witness statements;
(g) the estimated length of time required for each witness; and
(h) which count the witness is going to testify on;

FURTHER ORDERS the Prosecution to file a revised list, divided into "core " and "back-up" witnesses, of all the witnesses it is intending to call to testify at trial by Monday, 21 February 2005.

Done at Freetown this 9th day of February 2005

Doherty J.

Judge Teresa Doherty
Presiding Judge
Trial Chamber

[Seal of the Special Court for Sierra Leone]

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(6910-6912)

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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 28 May 2004

PROSECUTOR Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-PT)

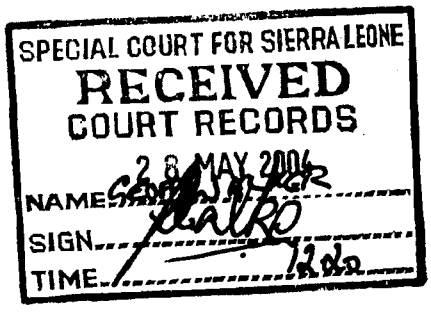
ORDER TO PROSECUTION TO PROVIDE ORDER OF WITNESSES AND WITNESS STATEMENTS

Office of the Prosecutor:
Luc Côté
James Johnson

Defence Counsel for Sam Hinga Norman:
James Jenkins-Johnston

Defence Counsel for Moinina Fofana:
Michiel Pestman

Defence Counsel for Allieu Kondewa:
Charles Margai



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

NOTING the Trial Chamber "Order for Commencement of Trial", delivered on 11 May 2004, whereby the Trial Chamber ordered the Prosecution to disclose the identifying data of the first 10 witnesses it intends to call for trial by 12 May 2004;

NOTING that at the Pre-Trial Conference held on 28 April 2004, the Prosecution submitted that it was not at that time in a position to indicate to the Chamber which order its witnesses would be called at trial;

NOTING the "Materials filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the commencement of Trial of 1 April 2004", filed by the Prosecution on 26 May 2004, that provided a list of pseudonyms of each witness it intends to call at trial, together with a report indicating the number of witnesses for whom witness statements or summaries have been disclosed and the count or counts of the Indictment to which the witness will testify;

CONSIDERING that the Trial Chamber shall ensure that a trial is fair and expeditious and that the proceedings before the Special Court are conducted in accordance with the Rules of Procedure and Evidence of the Special Court ("Rules"), with full respect for the rights of the accused and due regard for the protection of victims and witnesses;

CONSIDERING Article 17 of the Statute of the Special Court for Sierra Leone ("Statute"), that provides *inter alia* that the Defence should have sufficient notice and adequate time to prepare for trial;

CONSIDERING that it is in the interests of justice for the Prosecution to disclose to the Defence the order of witnesses it intends to call, with sufficient time available for case preparation and investigation;

CONSIDERING that the Trial Chamber would benefit from having access to witness statements in advance of each witness testifying at trial, for the purpose of promoting comprehension of the issues and for the effective management of the trial;

CONSIDERING that it is an accepted practice within international criminal tribunals to request the filing of witness statements prior to trial;[1]

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PURSUANT TO Rules 54 and Rule 73 *bis* of the Rules;

HEREBY ORDERS the Prosecution:

For the first trial session that runs from 3 June to 22 June 2004:

(1) Concerning the first ten witnesses called to give testimony, to provide the Trial Chamber with a list of the order it intends to call witnesses by Tuesday, 1 June 2004, and for the remaining witnesses called in the first trial session, to provide each Defence Team and the Trial Chamber with a list of the order it intends to call witnesses to testify, 14 days in advance of their testimony;

(2) Concerning the first ten witnesses called to give testimony, to provide the Trial Chamber with a confidential copy of their unredacted witness statements by Tuesday, 1 June 2004, and for the remaining witnesses called in the first trial session, to provide the Trial Chamber with a confidential copy of their unredacted witness statements one week prior to their testimony.

Done at Freetown this 28th day of May 2004

Judge Bankole Thompson

Presiding Judge,
Trial Chamber

[Seal of the Special Court for Sierra Leone]

[1] *Prosecutor. v. Jean-Paul Akayesu*, ICTR-96-4-T, Decision by the Tribunal on its Request to the Prosecutor to Submit the Written Witness Statements, 28 January 1997; *Prosecutor v. Darko Kordic and Mario Cerkez*, Case No. IT-95-14/2-PT, *Order for Disclosure of Documents and Extension of Protective Measures*, 27 November 1998; *Prosecutor v. Dokmanovic*, IT-95-13a-PT, Order, 28 November. 1997, p.2; See *Prosecutor v. Vidoje Blagojevic, Dragan Jokic, Momir Nikolic*, Decision in the Appeals Chamber, 8 April 2003.

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TRIAL CHAMBER I

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

Registrar: Robin Vincent

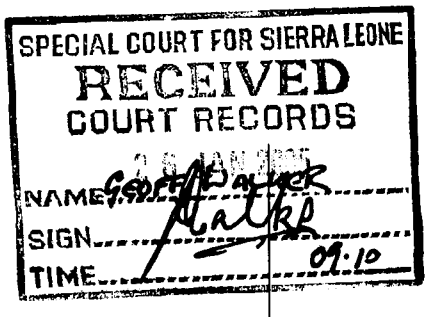
Date: 25th of January, 2005

PROSECUTOR Against **Sam Hinga Norman**
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14)

ORDER TO PROSECUTION TO PROVIDE ORDER OF WITNESSES AND WITNESS STATEMENTS

Office of the Prosecutor:

Luc Côté
James Johnson



Court Appointed Counsel for Sam Hinga Norman:
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Tim Owen, Q.C.

Court Appointed Defence Counsel for Moinina Fofana:
Michiel Pestman
Arrow Bockarie
Victor Koppe

Court AppointedDefence Counsel for Allieu Kondewa:
Charles Margai
Yada Williams
Ansu Lansana

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

NOTING the Trial Chamber's "Order to Prosecution to Provide Order of Witnesses and Witness Statements", delivered on the 29th of July, 2004;

PURSUANT TO Rules 54 of the Rules of Procedure and Evidence of the Special Court;

HEREBY ORDERS the Prosecution for all future sessions of the CDF trial:

(1) To provide each Defence Team and the Trial Chamber with a list of the order it intends to call witnesses to testify, 14 days in advance of their testimony;

(2) To provide the Trial Chamber with a confidential copy of their unredacted witness statements one week prior to their testimony.

Done at Freetown this 25th day of January, 2005

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]

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IN THE TRIAL CHAMBER

Before: Judge Florence Ndepele Mwachande Mumba, Presiding

Judge Antonio Cassese

Judge Richard May

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Order of: 29 April 1998

PROSECUTOR

v.

ANTO FURUNDZIJA

SCHEDULING ORDER

The Office of the Prosecutor:

Mr. Michael Blaxill

Ms. Patricia Viseur-Sellers

Counsel for the Accused:

Mr. Luka Misetic

THE TRIAL CHAMBER, *proprio motu,*

NOTING the Decision of the Trial Chamber of today's date disposing of the Defence Motion to Dismiss Counts 13 & 14 Of The Indictment Based On Defences In The Form Of the Indictment (Vagueness), Lack Of Subject Matter Jurisdiction, And Failure to Establish A Prima Facie Case ("Decision on the Defence Motion on the Indictment"),

NOTING the Decision of the Trial Chamber of today's date disposing of the Motion Of Defendant Anto Furundzija To Preclude Testimony Of Certain Prosecution Witnesses ("Decision on the Defence Motion on Testimony"),

NOTING the Decision of the Trial Chamber of today's date granting the Prosecutor's Motion For Special Protective Measures For Witnesses Under Tribunal Ordered Confidentiality and the

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Prosecutor's Motion To Protect Victims And Witnesses,

NOTING ALSO that the trial of Anto Furundzija is scheduled to commence on Monday 8 June 1998,

NOTING WITH CONCERN that the Office of the Prosecutor ("Prosecution") failed without justifiable cause to comply with the time-limit imposed by the Trial Chamber for the filing of its response to the Defence Motion on the Indictment,

NOTING FURTHER WITH GRAVE CONCERN AND DEPLORING THAT the Prosecution has failed to comply with its obligation under Rule 66 (A)(ii) of the Rules of Procedure and Evidence to disclose to the Defence "no later than sixty days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial",

CONSIDERING THAT, at the hearing and closed session status conference held today, the Trial Chamber set additional dates for filings by the parties and now wishes to make public those dates and the reasons therefore,

PURSUANT to Rule 54 of the Rules of Procedure and Evidence of the International Tribunal ("Rules")

HEREBY ORDERS AS FOLLOWS:

1. the Prosecution shall provide full disclosure to the Defence pursuant to Rule 66 (A)(ii) of the Rules no later than Friday 1 May 1998;

2. the Prosecution shall by Monday 4 May 1998 file a supplementary document which:

> a. whilst respecting the Order for Non-Disclosure of the Indictment issued at the time of confirmation by Judge McDonald on 10 November 1995 which is still in force, identifies the persons whom Anto Furundzija is alleged to have aided and abetted, either by name or by pseudonym,
>
> b. specifies the acts or omissions that are alleged against Anto Furundzija, and
>
> c. specifies the legal grounds upon which the Prosecution will rely at trial;

3. the Defence shall inform the Trial Chamber by Friday 15 May 1998 whether it will be in a position to waive its right to timely disclosure under Rule 66 (A)(ii) in consideration of the need to provide for an expeditious trial, and to proceed with the trial on Monday 8 June 1998, or whether it needs the full period allowed by Rules 66 and 72 (A) of the Rules in order to prepare for trial and will therefore seek a postponement of the trial date, IT BEING UNDERSTOOD that, in those circumstances, postponement of the trial date will not be attributed to the Defence;

4. the Prosecution is required to comply strictly with this and any future Orders.

Done in English and French, the English text being authoritative.

Florence

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Ndepele
Mwachande
Mumba

Presiding
Judge

Dated this twenty-ninth day of April 1998

At The Hague

The Netherlands

[Seal
of
the
Tribunal]