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SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before: Judge Pierre Boutet, Designated Judge

Registry: Robin Vincent

Date: 10th day of October 2003

The Prosecutor against

Augustine Gbao
(Case No. SCSL-2003-09-PT)

DECISION ON THE PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE

Office of the Prosecutor:
Luc Côté, Chief of Prosecutions

Defence Counsel:
Girish Thanki
Pr. Andreas O'Shea
Kenneth Carr

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

SITTING AS Judge Pierre Boutet, designated pursuant to Rule 28 of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED of the Prosecution Motion by the Office of the Prosecutor for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure ("the Motion"), filed on the 7th day of May 2003;

CONSIDERING the Response thereto of the 26th day of May 2003 ("the Response), filed by the Defence Counsel on behalf of the Accused **Augustine Gbao** ("the Accused");

CONSIDERING the Prosecution Reply thereto filed on the 29th day of May 2003 ("the Reply");

CONSIDERING FURTHER the Order on the Urgent Request for Direction on the Time to Respond to and/or an Extension of Time for the Filing of a Response to the Prosecution Motion, issued on the 16th day of May 2003 by Judge Bankole Thompson, which partly granted the Defence Request;

CONSIDERING the Prosecution Motion to Allow Disclosure to the Registry and to Keep Disclosed Materials under Seal until Appropriate Protective Measures Are in Place, filed on the 7th day of May 2003 and the Scheduling Order and Order on Disclosure to the Registry, issued by Judge Bankole Thompson on the 23rd day of May 2003;

TAKING INTO ACCOUNT the Response by the Defence thereto filed on the 26th day of May 2003 and the Prosecution Reply thereto filed on the 29th day of May 2003;

COGNISANT OF the Statute of "the Special Court" ("the Statute"), particularly Articles 14, 16, 17 and 20 thereof, and of "the Rules", specifically Rules 45, 53, 54, 66, 69, 73 and 75 thereof;

WHEREAS, acting on the Trial Chamber's instruction, the Court Management Section issued a Memorandum on the 26th day of June 2003 stating that the decision on "the Motion" would be rendered on written briefs;

NOTING THE SUBMISSIONS OF THE PARTIES

The Prosecution "Motion"

1. The Prosecution submits that the persons for whom protection is sought fall into three categories: (1) victims and Prosecution witnesses who presently reside in Sierra Leone

and who have not affirmatively waived their right to protective measures; (2) witnesses who presently reside outside Sierra Leone but in other countries of West Africa or who have relatives in Sierra Leone, and who have not affirmatively waived their right to protective measures; and (3) witnesses residing outside West Africa who have requested protective measures.

2. For these categories of victims and potential Prosecution witnesses, the Prosecution requests "the Special Court" to issue the following orders:

(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 of "the Motion", or any other information which could lead to the identity of such a person, from the Defence until twenty-one (21) days before the witness is due 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 due 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 Special 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 Special 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 aide any person to determine the identity of any such persons;

(d) An order that the names and any other identifying information concerning all witnesses described in paragraph 23 (a) of "the Motion" 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 materials, 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 23 (f) of "the Motion", have access to any information referred to in paragraphs 23 (a) through 23 (e) of "the Motion", and requiring the Defence to advise the Trial 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.

3. The Prosecution submits, on the factual basis presented, that the cases before "the Special Court" depend largely on the ability and willingness of witnesses to give testimony and provide evidence. The threat to potential witnesses exists due to the large numbers of members of the armed factions who were involved in the conflict in Sierra Leone, who are not only present in Sierra Leone but also throughout West Africa. A potential threat further exists in so far as the perpetrators and the potential witnesses and victims live as co-habitants in the same communities. The Prosecution submits that, even at a recent stage, there have been reports of harsh intimidation of potential Prosecution witnesses. As a consequence, the Prosecution is very much concerned that the safety of witnesses, their willingness to testify and the integrity of the proceedings would be substantially jeopardised if the witnesses' identities and statements were prematurely disclosed in circumstances under which they could not be protected.

4. The Prosecution relies mainly on decisions rendered by the International Criminal Tribunal for Rwanda (ICTR) ordering protective measures for potential witnesses for reasons of security. The Prosecution maintains that the arrangement of "rolling disclosure", as exercised by the ICTR as a prevailing practice – meaning that the requirements of Rule 69 (C) of the Rules of Procedure and Evidence of the ICTR are met by disclosure of

identifying information twenty-one (21) days prior to the testimony of the witness at trial, and that, if necessary, the Prosecution can still request specific protective measures in certain cases –, should also be applied by "the Special Court", in so far as the language of the applicable Rules of Procedure and Evidence of the ICTR and of "the Rules" of "the Special Court" are highly similar. Furthermore, the Prosecution argues that such a practice of "rolling disclosure" is an adequate balance between the rights of the Accused and the protection of witnesses, i.e. between Articles 16 and 17 of "the Statute" and Rules 66, 67 and 69 of "the Rules".

The Defence "Response"

5. The Defence submissions having exceeded the page limit indicated in the Registrar's Practice Direction on Filing Documents before the Special Court for Sierra Leone, the Defence requested from the Trial Chamber permission to go beyond the page limit, arguing that the oversizing was required by the importance of the issue.

6. In discussing the circumstances that prevailed at the time of the establishment of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda and those of "the Special Court", the Defence questions the requirement and necessity to follow the jurisprudence of the *ad hoc* Tribunals by indicating that there is no necessity for "the Special Court" to follow the path of their jurisprudence.

7. While recognizing that the jurisprudence of the *ad hoc* Tribunals can provide guidance to "the Special Court", the Defence argues that it is too early in the development of international criminal law to say that it is necessarily always desirable to follow such jurisprudence. The Defence suggests that the best practice to be followed is the one that most faithfully respects established principles of international law and justice.

8. The Defence further submits that the request by the Office of the Prosecutor constitutes an unreasonable infringement upon the right of the Accused to a fair trial. Such right, it is argued by the Defence, consists of three fundamental components of relevance for present purposes:

a) the right to adequate time and facilities to prepare for trial,
b) the right to examine or have examined witnesses against him, and
c) a public trial where justice is seen to be done subject to restrictions that are strictly necessary to preserve the interests of justice.

9. The Defence also submits that international human rights law requires that protective measures for witnesses cannot limit the minimum guarantees contained within the Accused's right to a fair trial; the only permissible derogation is in times of public emergency.

10. Furthermore, the Defence asserts that these minimum guarantees of a fair trial have become an established principle of customary international law, in so far as they can be found in all major human rights instruments, are reflected in the practice of national courts worldwide and are generally accepted in the *opinio juris* of States as custom.

11. Contesting the consistency of the jurisprudence of the *ad hoc* Tribunals for Rwanda and Ex-Yugoslavia, the Defence suggests that the jurisprudence relative to protective measures in the ICTR clearly constitutes an unlawful limitation to the rights of the Accused, and argues that the ICTR does not appropriately consider the question of necessity and proportionality in its decisions.

12. Referring to Rule 69 of "the Rules", the Defence further submits that the burden of proof for exceptional circumstances on the issue of protective measures rests with the Office of the Prosecutor. The Defence therefore suggests that the approach of the ICTY in examining protective measures on a case by case basis is more appropriate and consistent with international human rights standards and should therefore be applied. The ability of the Defence to prepare for trial should only be curtailed to an absolutely necessary extent. The Prosecution should produce a schedule that sets out for each witness the justification for such measures and to which extent they are required. It is further suggested that a blanket rule of non-disclosure of the identity of witnesses would indeed be arbitrary and not proportionate to the needs of particular witnesses. The Defence argues that such a blanket rule shifts the burden of establishing the foundation for protective measures in individual cases from the Prosecution to the Defence.

13. The Defence objects to the orders sought by the Prosecution, and more specifically, requested order (a) of "the Motion", arguing that such a request does not create a fair balance between the rights of the Accused and the protection of victims and witnesses, in so far as their identity is central to the preparation of the Defence case. Indeed, the Defence contends that using the date of testimony rather than the date of trial as a point of departure for the disclosure deadline would be a violation of the Accused's right to adequate time and facilities to prepare for his trial. Therefore, the Defence argues that the date of trial should be used, as this would ensure that the Accused can fully prepare his defence. If it were otherwise – if the materials were only disclosed twenty-one (21) days prior to the testimony –, the Defence Counsel would, at that time, already be fully absorbed, mentally as well as physically, in advocacy and in the conduct of the trial itself. This, in addition, would constitute a breach of the principle of equality of arms, in so far as the Prosecution, when the Defence actually presents its case and receives similar protective measures, will, at that stage, already have presented its case, and will therefore only be reacting to any suggested flaws in the case.

14. Moreover, the Defence submits that - contrary to the Prosecution's allegation -, the disclosure of identification data twenty-one (21) days before testimony is not a prevailing practice in the ICTR, and refers, *inter alia*, to a decision in the case of *The Prosecutor v.*

Kanyabashi, where the disclosure of non-redacted statements within thirty (30) days prior to trial was considered as sufficient time to prepare the defence.

15. The Defence objects to the order sought by the Prosecution to provide to the Chamber and to the Prosecution a designation of all persons working for the Defence team who have access to the disclosed information, stating that it is unnecessary and that there is no reasonable justification for such a request.

16. Although not stated in these terms, the Defence is in fact opposing to requested orders (a) and (h), but does not specifically object to orders (b) to (j). *In fine*, the Defence requests that:

1) the request by the Prosecution as set out in paragraphs (a) and (h) of "the Motion" be rejected;
2) the Prosecution be ordered to destroy all copies of witness statements redacted without prior order and redact the name, address, and specific relation to the Accused; and that it be ordered to reinstate any redacted information from original copies of witness statements, which do not specifically relate to the identification of the witnesses as directed by order;
3) the Prosecution be ordered to ensure that the Prosecution Senior Trial Attorney responsible for the case review all original and redacted witness statements to ensure that nothing that has not been permitted by order is redacted from the copies of statements provided to the Defence;
4) the Prosecution be ordered to provide within seven (7) days a schedule of witnesses identified by pseudonyms to the Trial Chamber and the Defence, identifying in each case specific justification for seeking protective measures and the extent of the protection sought. Further, that the Defence be afforded seven (7) days to comment on the above schedule. Further, that the Prosecution disclose unredacted witness statements to the Defence at least sixty (60) days before the date set for trial, unless otherwise ordered, in cases where it has satisfied the Trial Chamber through its schedule that protective measures are required by exceptional circumstances.

The Prosecution "Reply"

17. The Prosecution objects to the oversized "Response", arguing that an authorization has to be requested in advance to exceed the page limit and that therefore the Defence has not chosen the appropriate means to obtain satisfaction.

18. The Prosecution further submits that the Prosecution's requested measures are in full compliance with Article 17 of "the Statute" and with international human rights standards.

19. The Prosecution contends that the Defence is failing to reflect the development of Rule 69 (C) of the Rules of Procedure and Evidence of the ICTR. After an intense debate on the issue of balancing the rights of the Accused and the protection of victims and witnesses, several decisions of the ICTR now fully recognise that the triggering event for the disclosure of identifying data is the date on which the witness is to be called to testify and not, as suggested by the Defence, the date of the trial. This development is also reflected in the amended ICTR Rule 69 (C). Therefore, the Prosecution rejects the request made by the Defence that witness statements should be disclosed sixty (60) days before the date set for trial, arguing that 21 days are sufficient to conduct a proper and efficient defence.

20. Regarding the disclosure of the identity of the Defence team members, the Prosecution submits that it is in the legitimate interest of the Court and the Prosecution to have precise knowledge of the persons dealing with confidential and sensitive information.

AFTER HAVING DELIBERATED ON THE MATTER OF THE REQUESTS BY THE PROSECUTION FOR IMMEDIATE MEASURES FOR THE PROTECTION AND NON-DISCLOSURE OF THE IDENTITY OF WITNESSES AND VICTIMS;

AND ON THE MATTER OF THE PROTECTION OF ALL NON-PUBLIC MATERIALS DISCLOSED TO THE DEFENCE:

Factual issues

21. Prior to addressing the legal issues and the legal basis for this "Motion", "the Special Court" finds it essential for a proper determination of the necessity, or not, of the protective measures requested to consider and try to assess the security situation which currently prevails in Sierra Leone. In this respect, and based upon the information provided to "the Special Court", it is of importance to first note that "the Special Court" currently sits in Freetown, Sierra Leone. Indeed, Article 10 of the "Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone" provides, *inter alia*, that "*the Special Court shall have its seat in Sierra Leone*".

22. The physical location of "the Special Court", in itself, has a substantial impact on security considerations. In comparison, it should be recalled that the *ad hoc* Tribunals, namely the ICTY and the ICTR, do not have their seat in the States over which they have jurisdiction.

23. In proceeding with the assessment of the security situation, "the Special Court" has given much consideration to the situation that now prevails in Sierra Leone, as such is amply described in the materials produced by the Prosecution in support of its "Motion". It should also be observed that no contradictory materials, information or evidence have

been produced, nor has the nature or content of this information been disputed or challenged by the Defence.

24. As an illustration of what can best be described as a rather precarious situation that appears to exist for witnesses and victims in Sierra Leone at this particular time, "the Special Court" would like to refer to some salient parts of the information contained in Attachments B, C, D and F, provided by the Prosecution:

Attachment B - Declaration by Alan W. White, Ph.D., Chief of Investigations for the Office of the Prosecutor of the Special Court for Sierra Leone:

> *"Based upon the information provided to me by these various sources, I have learned the following about the current situation in Sierra Leone and the neighbouring countries. The security situation in most of Sierra Leone and the neighbouring countries is volatile. The perpetrators, the victims and the witnesses are not separated. They are co-habitants of the same communities. They live and work in a closely-knit setting. In the past weeks, there have been increasing instances involving interference with and intimidation of Prosecutor's witnesses. The situation ranges from witnesses having their lives threatened either individually or by group, to witnesses' general fear and apprehension that they or their families will be harmed or harassed or otherwise suffer if they testify or co-operate with the Court. This is due to the existence throughout West Africa of a large number of members of the armed factions involved in the conflict that happened in Sierra Leone, including the Revolution United Front (RUF), the Civil Defence Forces (CDF) and the Armed Forces Revolutionary Council (AFRC) and other people who collaborated with such factions.*
> *Further, I have first hand information that supporters and sympathisers of former Chief of the CDF are actively attempting to identify and intimidate witnesses of the Special Court. Therefore, witnesses living in Sierra Leone, and also those living in other countries in West Africa, are directly affected by this situation and feel threatened."*

Attachment C - Declaration by Post-conflict Reintegration Initiative for Development and Empowerment (PRIDE):

Declaration of threat to Witnesses

> *"Based on our interactions with ex-combatants from all factions throughout the country, we believe that Sierra Leoneans who give statements to the Special Court are at some degree of risk. Ex-combatants who provide testimony against former commanders or colleagues fear retribution and we have extensive direct experience to suggest that such perceptions are justified. Furthermore, we hear regularly from non-combatants in these communities*

that they fear harm if they speak to the Special Court, and our experience with ex-combatants suggests that this perception as well is justified.

Since we began our work relating to the TRC and the Special Court, ex-combatants have told us fiercely and consistently that they are worried about being called to testify before the Special Court because they fear being hurt or killed by their former commanders. Since the indictments and arrests in early April, the fear has intensified considerably.

All factions express this fear. For the past year, the former RUF fighters have been slightly more concerned, and since the arrests, it is the former members that are the most concerned about being harmed if they testify.

In our survey, we found that willingness of ex-combatants to testify was very low until we told them that the Special Court would be providing witness protection.

We also hear from ex-combatants and from non-combatant residents of the many communities that we visit that they are particularly scared because many former high-ranking perpetrators are still in the army and thus can hurt them. Specifically, some of those who have been indicted still have strong allies in the Army, so all people are afraid that those strong men will punish them for helping to put their friends in prison".

Attachment D - Declaration by Saleem Vahidy, Chief of the Victims and Witnesses Unit, of the Special Court for Sierra Leone:

"The 10 (ten) years of civil war in Sierra Leone has really damaged the whole system of Administration of Justice, and the overall level of protection available to the citizens is generally speaking, less than what it should be, although the Government is making every effort to revamp the Army, Police and the Court System, doubts as to the efficacy of the institutions still remain, more so in the minds of the witnesses. The situation in Sierra Leone was further aggravated by the fact that the Government institutions like the Army and the Police took sides with various parties to the conflict, and their impartiality became questionable.

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 the country where the crimes took place, and the witnesses feel particularly vulnerable. The witnesses do not actually trust anyone except the Court itself, operating through its officers. It should be borne in mind that witnesses either for the Prosecution or the Defence, are always a delicate resource, and always need reassurances, and often times persuasion,

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> *before they are willing to testify. Thus, leaving aside issues of personal safety, even a small incident or a perceived threat may discourage the witness from coming to testify.*
>
> *At present the Unit is already looking after numerous witnesses, and 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 factions to determine their exact locations, probably with a view to carrying out reprisals.*
>
> *Therefore utmost efforts are concentrated on keeping secret and confidential the fact that a person is a potential witness. The longer the witness' identity is withheld, the safer he or she is going to remain.*
>
> *Therefore, it should be remembered that full un-redacted disclosure at the initial stages of the proceedings implies that witnesses will be completely identified to the accused several months or even longer before they are called for testimony. This certainly increases the risk of threats or even more severe actions being taken against them, and would make the work of the Witness Unit, and indeed the Court itself, much more difficult".*

Attachment F - Declaration by Keith Biddle, Inspector-General of the Sierra Leone Police which states in part:

> *"In my assessment, security conditions in Sierra Leone, despite the presence of UNAMSIL, remain volatile. This situation poses a threat to the security of victims and potential witnesses. Based upon the current capabilities of the Sierra Leone Police and the situation in the country, in my view our police system does not have the capacity to guarantee safety of witnesses or prevent them from injury or intimidation".*

25. "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 to the security of potential witnesses and to victims, and accepts the affirmation that, according to the words of Mr. Vahidy, "*in Sierra Leone the protection of witnesses is a far more serious and difficult matter even than in Rwanda*".

Procedural issues: on the oversizing of the Defence "Response"

26. "The Special Court" acknowledges the fact that the Defence exceeded the page limit when filing its "Response", which according to the terms of the Practice Direction on

Filing Documents before the Special Court for Sierra Leone of the 27th day of February 2003, should not exceed ten (10) pages (Article 9 (3) (C)).

27. Leave is hereby granted to exceed the page limit prescribed. However, "the Special Court" wishes to recall to the Defence, and for that matter to all parties, that, unless specifically authorized by "the Special Court", they are compelled to respect the terms of all Practice Directions, in so far as they are an emanation of "the Rules" (Rule 19 (B), Rule 27 (C) or Rule 33 (D)), and can only be deviated from with leave to that effect.

Legal basis for "the Motion"

28. Article 14 of "the Statute" provides that:
"The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis *to the conduct of the legal proceedings before the Special Court".*

Article 16 of "the Statute" provides in paragraph (4) as follows:
"[The Victims and Witnesses] 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".

Article 17 of "the Statute", paragraph (2), provides 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".

Article 20 (3) of "the Statute" reads, *inter alia*:
"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".

Rule 45 of "the Rules" reads, in part, as follows:
"The Registrar shall establish, maintain and develop a Defence Office, for the purpose of ensuring the rights of suspects and accused. The Defence Office shall be headed by the Special Court Principal Defender (...)".

Rule 53 of the "the Rules" provides in paragraph (A) that:
"In exceptional circumstances, a Judge designated pursuant to Rule 28 may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order."

and in paragraph (C) that:
"A Judge may, on the application of the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice".

Rule 69 provides *inter alia* that:
(A) *In 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 victim or witness who may be in danger or at risk, until the Judge or Chamber decides otherwise.*

(B) *In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Unit.*

(C) *Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence.*

and Rule 75 (A) states 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*".

Legal issues

29. Turning now to the legal issues, "the Special Court" would like to acknowledge the fact that the Defence "Response" is indeed very well articulated and constitutes an interesting basis for philosophical or doctrinal arguments. However, it seems to ignore in part the realities of "the Special Court", which sits in Freetown, Sierra Leone, and the factual issues related to the Prosecution "Motion" requesting specific measures of protection for witnesses and victims. In the opinion of "the Special Court", the Defence cannot simply state, as it does in paragraph 18 of "the Motion", without any supporting evidence, that "*the circumstances pertaining in Sierra Leone at the time of the establishment of the Court have not worsened*".

30. "The Special Court", after having recalled the relevant provisions above, is of the opinion that issues raised by the Defence in its "Response" need to be addressed specifically and require particular consideration.

First, on the issue of the necessity to follow the jurisprudence of the ad hoc *Tribunals*

31. From a plain reading of Article 20 (3) of "the Statute", it is clear, to "the Special Court"'s understanding, that the jurisprudence from the two *ad hoc* Tribunals is not binding upon "the Special Court", but can be used as guidance in so far as it is adapted to the specificities of "the Special Court".

32. Furthermore, need it be said that international criminal justice is at a developing stage and that there is a constant need for referral to the International Criminal Tribunals'

jurisprudence, bearing in mind the necessity of judicial coherence of rulings on interpretation and application of the law.

Secondly, on the issue of protective measures constituting an unreasonable infringement upon the right of the Accused to a fair trial

- The right to a fair trial comprising three fundamental intangible components

33. The Defence asserts that the right to a fair trial consists of three fundamental components "*of relevance for present purposes*". "The Special Court" would like to highlight the fact that no human rights instrument defines the right to a fair trial as being composed of three fundamental components. Given Article 14 of the International Covenant on Civil and Political Rights (ICCPR) or Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), it is quite clear that the right to a fair trial is much more comprehensive and is composed of many other fundamental rights. Therefore, in "the Special Court"'s opinion, the Defence cannot simply state, as it does, that the right to a fair trial comprises three so-called fundamental components without providing any evidentiary or authoritative support for such a proposal. In this respect, it is "the Special Court"'s view that the Defence cannot simply extract the three components that it deems are relevant for his contention and exclude the others, as such could lead to perverse conclusions.

34. Furthermore, "the Special Court" takes issue with the Defence's view that the three so-called minimum guarantees are intangible rights and notes that the Defence has not submitted any evidence or authorities to support this contention. The Defence appears to have failed to appreciate the contents of Article 17 (2) of "the Statute". "The Special Court" deems that it is clearly stated in "the Statute" that protective measures in favour of witnesses and victims do constitute a valid reason to limit the right of the Accused to a fair trial. "The Special Court" would like to observe that this does not entail that the trial of the Accused will not be respectful of all due requirements of fairness. It should all the more be remembered, as it is detailed in the *Aleksovski* case[1] before the ICTY, that the concept of fair trial must be understood as fairness to both parties and not just to the Accused.

- The minimum guarantees of a fair trial being a principle of customary international law

35. "The Special Court" has considered the Defence contention that the above-mentioned minimum guarantees of a fair trial have become an established principle of customary international law. It should be noted again that the Defence does not refer to any authority, and has not produced any evidence to support its assertion.

[1] ICTY, *The Prosecutor v. Aleksovski*, Appeals Chamber Decision on Admissibility of Evidence, 16 February 1999, para. 25.

36. In asserting this contention, the Defence refers only to these three components of what it claims is of relevance for present purposes and does not mention, nor consider any of the remaining rights. "The Special Court" is of the view that the right to a fair trial must be understood as a whole, not as a flexible right which can be interpreted by the Defence as it deems best serves its purpose.

37. The rights of the Accused as set out in Article 17 of "the Statute" reproduce *in extenso* Article 21 of the ICTY Statute and Article 20 of the ICTR Statute, which themselves are directly inspired by Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and by Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Moreover, it should also be stated that Article 61 of the Rome Statute of the International Criminal Court (ICC) has relied upon the standards set by other international human rights instruments in dealing with the rights of the Accused.

38. The repetition of the same guarantees in all major international human rights instruments could be viewed as creating a strong presumption that the right of the Accused to a fair trial has acceded to the status of international custom. However, in making such an allegation, it is "the Special Court"'s view that the Defence did not fully consider the criteria that must be fulfilled for a practice to be viewed as an international custom. According to Article 38 (1) (b) of the Statute of the International Court of Justice (ICJ), an international custom is "*a general practice accepted as law*". Therefore, the States must have a common practice of what they believe they are legally compelled to do. It is likely that all democratic States respect the right of the Accused to a fair trial, as it is commonly understood by the said States, not only because it is embodied in their national legislation and in international human rights conventions, but also because, were it not law, they would still believe it to be so.

39. However, "the Special Court" is of the view that the answer to this question is not well established: the various international law instruments do not provide any such indication and there is no doctrinal consensus. Indeed, several learned authors have opposite views on this matter. Christoph J. M. Safferling[2] points out that in American literature, there is "*a strong inclination to include fair trial among customary norms*". He refers to Richard B. Lillich, who considers the whole Universal Declaration of Human Rights as customary[3], and to Theodor Meron, who "*[b]elieve[s] that at least a core number of the due process guarantees stated in Article 14 of the ICCPR have a strong claim to customary law status. Such rights include the right to be tried by a competent, independent and impartial tribunal established by law, the right to presumption of innocence, the right of everyone not to be compelled to testify against himself or to confess guilt, the right of everyone to be tried in his or her presence and to defend himself or herself in person or through legal assistance of his or her own choosing, the right of everyone to examine witnesses against him or her and the right to have one's conviction and sentence*

[2] Christoph J. M. Safferling, *Towards An International Criminal Procedure*, Oxford Monographs in International Law, Oxford University Press, 2001, p. 25.
[3] See Lillich in Meron, *Human Rights in International Law*, Oxford University Press, 1984, p. 116-117.

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reviewed by a higher tribunal according to law."[4] Safferling, however, underlines the fact that these assertions are not supported by any further explanation and that the authors do not examine the elements which constitute custom, i.e. State practice and *opinio juris*. Safferling further cites and agrees with Phillip Alston and Bruno Simma, who have criticized this view and have a different approach to human rights. Human rights would belong to the third category of sources of international law according to Article 38 of the ICJ Statute, namely principles of international law. This view is shared by many European authors, in order not to blur the concept of customary law.[5]

40. Moreover, even if there were absolute certainty as to whether the right of the Accused to a fair trial were indeed part of customary international law, this would still not entail that such a right constitute a *jus cogens* norm, i.e. a peremptory norm which cannot receive derogation. "The Special Court" finds it useful to stress the fact that, in this respect, there is a difference between *jus cogens* and customary norms. Peremptory norms are defined in Article 53 of the Vienna Convention on the Law of Treaties (1969) as norms *"accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"*. It is well recognised that not all customary norms are intangible[6].

41. Based upon the foregoing, "the Special Court" is of the considered view that it has not been established that the right of the Accused to a fair trial has become part of customary international law.

42. "The Special Court" cannot agree with the contention by the Defence that, in such circumstances, protective measures would constitute an unreasonable infringement upon the right of the Accused to a fair trial, and hence, prefers to focus on the matter at stake, i.e. the necessity of protective measures. In this context, what is of more relevance to the present proceedings before "the Special Court" is to determine to which extent the rights of the Accused can reasonably be infringed upon, or limited, for purposes that could be described as being of equal importance, i.e. witnesses and victims protection.

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[4] Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford University Press, 1989, p. 96-97.

[5] Christoph J. M. Safferling, *Towards An International Criminal Procedure*, Oxford Monographs in International Law, Oxford University Press, 2001, p. 25-26.

[6] On the issue of international customary law and *jus cogens* norms, see *Nicaragua v. USA* ICJ Rep 1986 14; and ICTY, *The Prosecutor v. Anto Furundzija*, Judgment, 10 December 1998, para. 153, in which the Trial Chamber held, as regards torture, that *"because of the importance of the values [the principle of prohibition of torture] protects, this principle has evolved into a peremptory norm or* jus cogens, *that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules"*.

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Thirdly, on the issue of the right of the Accused to a fair trial in relation to disclosure of evidence: equality of arms

43. "The Special Court" finds it useful to look into the jurisprudence of the European Court of Human Rights (ECHR), according to which disclosure is based on: (a) the requirement that there be equality of arms between the prosecution and the defence (*Jespers v. Belgium* (1981), 27DR61, ECmHR); (b) the defendant's right to adequate time and facilities to prepare a defence under Article 6 (3) (b) of the ECHR (*Edwards v. The United Kingdom* (1992) 15 EHRR 417, ECtHR); and (c) the requirement in Article 6 (3) (d) that there be parity of conditions for the examination of witnesses (*Edwards v. The United Kingdom*, Commission Report).

44. In *Kaufman v. Belgium* ((1986) 50 DR 98 ECmHR, p.115), the European Commission held that the principle that there should be equality of arms between the parties before a court is fundamental to the notion of a fair trial under Article 6 of the ECHR. The Commission has repeatedly held that the right to a fair hearing in both civil and criminal proceedings entails that everyone who is party to such proceedings shall have a reasonable opportunity of presenting his case to the court under conditions that do not place him at substantial disadvantage *vis-à-vis* his opponent. In particular, each party must know the case being made against him, have an effective opportunity to challenge it and an effective opportunity to advance his own case.

45. The jurisprudence of the European Court of Human Rights can provide guidance as to the possibility of limiting the right of the Accused to a fair trial. In *Rowe and Davies v. the United Kingdom* ((2000) 30 EHRR 1, ECHR, para. 61), the Court states that there may be circumstances in which materials need not be disclosed to the defence on grounds of public interest immunity, but they must be subject to strict scrutiny by the courts. This would be the case when protective measures in favour of witnesses are required by the Prosecution.

46. Having recalled what is meant by equality of arms in the jurisprudence of the European Court of Human Rights, "the Special Court" deems it appropriate, at the present stage, to stress the difference that exists between international human rights law and international criminal law. While international human rights law can provide guidance to judges sitting within international criminal courts, it should be borne in mind that the specificities of international criminal law sometimes require a different approach. As Judge Richard May and Marieke Wierda explain in their authoritative work on international criminal evidence[7], international trials constitute a continuous balancing of interests and rights, and this is why they are so challenging.

[7] Judge Richard May and Marieke Wierda, *International Criminal Evidence*, Transnational Publishers, 2002, p. 298.

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47. As regards international criminal law, "the Special Court" does not view the situation to which the Accused is confronted when protective measures are ordered by "the Special Court" for Prosecution witnesses as constituting a violation of the principle of equality of arms, as is contended by the Defence, in relation to the system in which the departure date of the deadline for disclosure is the date of testimony. The process of granting witness protection entails a balance between "*full respect*" for the rights of the Accused and "*due regard*" for the protection of victims and witnesses[8]. In trying to achieve such a balance, "the Special Court" finds the rolling disclosure system to be fair; the restriction imposed on the right of the Accused to a fair trial in this respect is both necessary and proportionate to the aim of the restriction, i.e. witness and victim protection. The system of rolling disclosure does limit the right of the Accused to a fair trial at the preliminary stage of the proceedings, but, in "the Special Court"'s opinion, only within the boundaries of reasonableness and to the least extent possible in the prevailing circumstances. Furthermore, the contention, according to which it would be unfair to impose disclosure on the Defence at a stage when it is already fully absorbed in advocacy and in the conduct of the trial itself, cannot be accepted by "the Special Court": indeed, at the pre-trial stage, this cannot be the case. Moreover, it should also be borne in mind that although the Defence may not have access to materials which could lead to identification of the witnesses, it nevertheless has access to all other materials, thereby enabling it to prepare adequately for the trial. Moreover, should the Defence lack enough time for preparation, it must be recalled that it is always entitled to apply to the Trial Chamber, in due course, for appropriate remedies.

48. The principle of equality of arms has been frequently referred to in the jurisprudence of the *ad hoc* Tribunals[9]. In several cases before these Tribunals, the Defence has argued that there was not a complete equality of arms between the Prosecution and the Defence. In the *Tadic* case before the ICTY[10], the Appeals Chamber held that a fair trial must entitle the accused to adequate time and facilities to prepare his defence. Therefore, while the European jurisprudence views equality of arms as being a procedural equality between the parties, the Appeals Chamber decided that, given the nature of international tribunals, the approach had to be different and that "*under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case*"[11]. This case dealt with evidence which was difficult for the Defence to obtain, due to the lack of cooperation on the part of the States having custody of the said evidence. This decision nonetheless clearly

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[8] See Separate Opinion of Judge Stephen in ICTY, *Tadic*, Protective Measures for Victims and Witnesses, 10 August 1995.

[9] On the issue of equality of arms before international criminal tribunals, see: Judge Richard May and Marieke Werda, *International Criminal Evidence*, Transnational Publishers, 2002, p. 266-273.

[10] ICTY, *Tadic*, Appeals Chamber Judgment, 15th July 1999, para. 30.

[11] *Id.*, para. 52.

states that the facilities that are to be afforded to the parties include the adoption of protective measures[12].

49. "The Special Court" has considered the *Tadic* jurisprudence in perspective with the *Kayishema and Ruzindana* case before the ICTR, where Counsel for Kayishema were requesting from the Trial Chamber to be afforded the same resources as the Prosecution. In the latter case, the Chamber held that "*the rights of the accused and equality between the parties should not be confused with the equality of means and resources*" and that "*the rights of the accused as laid down in Article 20 and in particular (2) and (4) (b) of the Statute shall in no way be interpreted to mean that the Defence is entitled to the same means and resources as available to the Prosecution*"[13]. "The Special Court" is of the opinion that equality of arms before international criminal tribunals is more than a mere procedural equality, like it is for international human rights law, but does not necessarily entail a strict equality in terms of means and resources.

50. In reaching such a conclusion, "the Special Court" has acknowledged the fact that the Accused is entitled, before international criminal tribunals, to such fundamental rights as the presumption of innocence, the right to remain silent and to not have any negative inference drawn from his choice to exercise this right, and consequently, the Prosecution has the burden of proving that the Accused is guilty beyond reasonable doubt, in compliance with Rule 87 (A), and the Defence does not have to prove the Accused's innocence.

Fourthly, "the Special Court" deems it necessary to recall precedent on the issue of protective measures before this Court: case by case approach to protective measures with a schedule setting out for each witness the justification for such measures and rolling disclosure

51. "The Special Court", with Judge Bankole Thompson ruling, has already had the opportunity to decide on the issue of protective measures in the cases of *The Prosecutor v. Issa Hassan Sesay, The Prosecutor v. Alex Tamba Brima, The Prosecutor v. Morris Kallon* and *The Prosecutor v. Hinga Norman* (Decisions on the Prosecutor's Motions for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, all four filed on the 23rd day of May 2003).

52. It is useful, first of all, to recall the Decision on the Application of the Prosecution Requesting Protective Measures for Witnesses and Victims, dated the 5th November 1996, rendered in the *Blaskic* case, in which the ICTY 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 forth, however, the right of the accused to an equitable trial must*

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[12] *Id.*

[13] ICTR, *Kayishema and Ruzindana*, Order on the Motion by the Defence Counsel for Application of Article 20 (2) and (4) (b) of the Statute of the ICTR, 5th May 1997.

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".

53. After having noted this general principle enunciated by the ICTY, "the Special Court" now wishes to recall the findings made by Judge Bankole Thompson in the above-mentioned four decisions (paras. 14 and 15): "*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 (...)*".

54. "The Special Court" concurs with the findings in the above-cited cases and, therefore, contrary to the arguments submitted by the Defence, does not see any valid reason to order a case by case approach combined with a schedule. Indeed, at this stage of pre-trial proceedings, the measures sought for in the "Motion" being merely of a general nature, it would be inappropriate and unrealistic for "the Special Court" to decide otherwise.

55. Regarding rolling disclosure, Rule 69 (C) of "the Rules", as previously quoted, clearly states that the date of testimony is to be used as a starting point for disclosure.

56. In this respect, Judge Bankole Thompson, in the previously described decision, held that "*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 interests 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 twenty-one (21) days to forty-two (42) days*" (paras. 15 and 16).

57. Given the previously reached finding that rolling disclosure is a fair mechanism which is in compliance with the principle of equality of arms, "the Special Court", in light of the above comments, equally does not see any justification for departing or deviating from the rolling disclosure practice.

58. Therefore, "the Special Court" rules that disclosure shall be made within forty-two (42) days of the date of 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 regard*" for the protection of victims and witnesses[14].

[14] See Separate Opinion of Judge Stephen in ICTY, *Tadic*, Protective Measures for Victims and Witnesses, 10 August 1995.

Fifthly, on the issue of order (h) of "the Motion"

59. Regarding order (h) requested by the Prosecution in its "Motion", "the Special Court" acknowledges that there is no dispute as to the necessity, in the interest of justice, of controlling the identities of all persons working for each Defence team. However, "the Special Court" does not consider it appropriate, nor justified, that the Defence be compelled to provide to the Trial Chamber and to the Prosecution a designation of such persons and to advise the Trial Chamber and the Prosecution in writing of any changes in the composition of the Defence team. The Defence argues that such a designation should rather be made available to the Registrar. "The Special Court" agrees with the Defence and holds that it is a highly necessary step to take. However, as the organisation of the Special Court for Sierra Leone also includes a Defence Office, such a designation, in the opinion of "the Special Court", should more appropriately also be made available to the said Defence Office. Therefore, requested order (h) of "the Motion" shall be modified and is granted in the following form: "the Special Court" orders the Defence to provide to the Registrar and to the Defence Office a designation of all persons working on the Defence team who have access to any information referred to in paragraphs 20 (a) through 20 (e) of "the Motion", and orders the Defence to advise the Registrar and the Defence Office in writing of any changes in the composition of the Defence team.

Finally, and more generally, on the role of the Judge

60. "The Special Court" would like to recall that the role of every judge is to scrutinize the proceedings and make sure that, at all moments, every ordered measure is still appropriate. As the French Constitution nicely puts it, in its Article 66, one should always remember that every judge is the protector of individual freedoms.

FOR ALL THE ABOVE-DESCRIBED REASONS, "THE SPECIAL COURT",

HEREBY

1. GRANTS THE PROSECUTION MOTION REGARDING REQUESTED ORDER (a) OF "THE MOTION" SUBJECT TO THE MODIFICATION WHEREBY ROLLING DISCLOSURE SHALL BE MADE FOURTY-TWO (42) DAYS PRIOR TO TESTIMONY, INSTEAD OF TWENTY-ONE (21) DAYS;

2. GRANTS THE PROSECUTION MOTION REGARDING REQUESTED ORDER (h) OF "THE MOTION" SUBJECT TO THE MODIFICATION WHEREBY DESIGNATION OF ALL PERSONS WORKING FOR THE DEFENCE TEAM SHALL BE MADE AVAILABLE TO THE REGISTRAR AND TO THE DEFENCE OFFICE;

3. GRANTS *IN EXTENSO* THE PROSECUTION MOTION REGARDING REQUESTED ORDERS (b) TO (g) AND (i) TO (k) OF "THE MOTION";

4. DISMISSES, AT THE PRESENT STAGE, REQUESTS (2), (3), AND (4) *AB INITIO* OF "THE RESPONSE".

Done in Freetown, Sierra Leone, this 10th day of October 2003

Judge Pierre Boutet
Designated Judge

Seal of the Special Court for Sierra Leone