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SESC-2004-15-T
(10221-10447)

10221

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

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

Registrar: **Mr. Robin Vincent**

Date filed: **7th February 2005**

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 04 – 15 – T

APPLICATION FOR LEAVE TO APPEAL – RULING (3RD FEBRUARY 2005) ON ORAL APPLICATION FOR THE EXCLUSION OF STATEMENTS OF WITNESS TF1 – 141 DATED RESPECTIVELY 9TH OCTOBER 2004, 19TH OCTOBER 2004, 19TH AND 20TH OF OCTOBER 2004 AND 10TH JANUARY 2005

Office of the Prosecutor

Lesley Taylor
Peter Harrison

Defence

Wayne Jordash
Sareta Ashraph
Chloë Smythe

SPECIAL COURT FOR SIERRA LEONE
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NATURE OF THE APPLICATION

1. This is an application for leave to appeal the Trial Chamber's Ruling (dated 3rd February 2005) on the oral application for the exclusion of Statements of Witness TF1 – 141 dated respectively 9th October 2004, 19th and 20th of October 2004 and 10th January 2005 ("the Ruling").

2. It is the respectful submission of the Defence that the Trial Chamber erred in law in concluding that the "Defence has failed to demonstrate or substantiate by prima facie proof the allegations of breach by the Prosecution of Rule 66(A) (ii) of the Rules, Article 17(4) of the Statute and the Chamber's Order for Disclosure"[1].

3. It is the submission of the Defence that the Ruling is a breach of the spirit and purpose (if not the letter) of Rule 66 and more fundamentally of the Accused's right's pursuant to Article 17(4) namely:
   (a) To be informed promptly and in detail.... the nature and cause of the charge against him (4(a));
   (b) To be presumed innocent until proved guilty (4(3);
   (c) To have adequate time and facilities for the preparation of his defence (4(b));
   (d) To be tried without due delay (4(c)).

BACKGROUND

4. On the 18th January 2005 the Defence for Mr Sesay ("the Defence") (and Augustine Gbao) made an oral application for the exclusion of evidentiary material contained in the statements of Witness TF1 – 141. The Defence application sought to exclude allegations contained in statements made by Witness TF1 – 141 on the 9th October 2004, the 19th and the 20th October 2004 and the 10th January 2005.

5. It was contended that the additional pieces of evidence embodied in the aforementioned statements ought to have been disclosed pursuant to Rule 66 by the 26th April 2004, the date set by the Trial Chamber for service on the Defence of the Prosecution evidence[2]. It was submitted that any evidence to be served after that date should be subject to the Prosecution showing good cause pursuant to Rule 66. The submissions (including those argued on behalf of the co – accused Gbao) are set out in detail in the Ruling (see paras. 2 – 15). The Defence agree with the summary but highlight that the thrust of the complaints (as summarised in paragraph 9 of the Ruling) was:
   (a) The Defence submission that all the evidence contained in the statements of TF1-141 could be properly categorised as new when compared with the original statement. A finding that it could be categorised as congruent (or not new) would give the Prosecution carte blanche to rely upon witness statements, covering a large area of Sierra Leone, with little indication of direct participation in events *and thereafter to adduce (through later statements) evidence of direct*

[1] Paragraph 25 of the Ruling
[2] Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial, dated 1st April 2004

participation; justifying its admission (and late disclosure) by reference to its congruency with the original generalised statement[3].

(b) The Defence submission that an interpretation of Rule 66 which permitted the Prosecution to serve the bulk of their case in relation to any witness, only, in the case of the October 2004 disclosure, within three months of the live evidence (but in the case of the disclosure on the 10th January 2005 barely a week before) must amount to a breach of Article 17 of the Statute... "and the real force (of the submissions) is that on any analysis, whether number of allegations, number of locations, support of counts, gravity of the allegations, on any analysis of those factors, the bulk of the evidence that this witness will give against Mr Sesay has been served after the date set by this chamber"[4]. *In other words The Defence were submitting that the preponderance of incriminatory evidence had been served in breach of Rule 66.*

THE IMPUGNED RULING

6. The Defence do not dispute the restatement of the applicable law (as outlined in paragraph 19 of the decision). In particular the Defence accept the applicability of the reasoning in the case of the Prosecutor v. Bagosora[5] to the effect "that in determining whether to exclude additional or supplemental statements of prosecution witnesses within the framework of prosecutorial disclosure obligations, a comparative evaluation should be undertaken designed to ascertain (i) whether the alleged additional statement is new in relation to the original statement (ii) whether there is any notice to the Defence of the event that the witness will testify to in the indictment or Pre-trial Brief of the Prosecution and (iii) the extent to which the evidentiary material alters the incriminating quality of the evidence of which the Defence already had notice"[6].

Undisputed findings

7. The Defence do not dispute:
   a. That the allegations are germane to the *general* allegations as set out at pages 2- 8 of the Amended Consolidated Indictment and also the charges as specified and particularised in Counts 1- 18 thereof (para.22 (i)[7].
   b. That the allegations in the said statements are germane to the *basic* factual allegations as specified and particularised in the Amended Consolidated Indictment and at pages 8-22 of the Prosecution's Pre – trial Brief and pages 6-94 of the Prosecution's Supplemental Pre –trial Brief (para. 22(ii))[8].

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[3] See Annex A: Transcript of 18th January 2005 pg 60 lines 1 – 10.
[4] Ibid, pg 60 lines 10 – 22.
[5] Prosecutor v. Bagosora, ICTR-98-41-T, Decision on the Admissibility of Evidence of Witness DP, 18 November 2003 ("the Bagosora Decision")
[6] See Paragraph 19 of the Ruling
[7] Emphasis added
[8] Emphasis added

c. That the aforesaid statements are "congruent in material respects with matters deposed to in the entire original statements about the various roles and alleged criminal activities of the Accused persons during the hostilities in Sierra Leone forming the general subject- matter of the Amended Consolidated Indictment" (para.22 (iv)) (provided that this expression reflects a finding that there is a *similarity* between the roles and activities alleged in the disputed statements and those alleged in the original statements).

PROPOSED GROUNDS OF APPEAL **Errors of Law alleged.**

THAT THE DISPUTED STATEMENTS CAN NOT BE CHARACTERISED AS ENTIRELY NEW (para.22(iii))

SUBMISSION ONE - summary

8. The Defence will submit that the Trial Chamber erred when deciding the disputed statements "do not constitute statements that could be considered to be of the nature of, or similar or akin to, statements of additional witness statements within the meaning and contemplation of Rule 66(A)(ii). It will be submitted that this conclusion was the result of an erroneous assessment that the "disputed statements cannot be characterised as entirely new statements having regard to the original statements of the witness which were disclosed to the Defence"[9].

SUBMISSION TWO - summary

9. It will be submitted that the Trial Chamber erred by concluding that (i) the allegations embodied in the respective statements, taken singly or cumulatively, are not new evidence *but* rather separate and constituent different episodic events or, as it were, building blocks constituting an integral part of, and connected with, the same res gestae forming the factual substratum of the charges in the Indictment[10] and (ii) that, in any event a finding that the allegations embodied in the respective statements are integral building blocks connected with the res gestae forming the factual substratum of the charges does not preclude a finding that the allegations are new, *when the test contained in the Bagosora Decision is correctly applied*[11].

SUBMISSION ONE

10. The Defence will submit that the test of whether evidence is new (as laid down in the Bagosora Decision[12] and adopted in principle by the Trial Chamber) envisaged "a comparison with the witness's own prior statement; any other indication in the indictment or Pre-trial Brief of the event in question, combined with the period of notice to the Defence that the particular witness will testify on that event; and the extent to which the new evidence alters the incriminating quality of the evidence of which the Defence already has notice"[13].

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[9] See Paragraph 22(iii) of the Ruling
[10] See Paragraph 22(vi) of the Ruling
[11] Ibid at footnote 5
[12] Ibid at footnote 5
[13] Ibid at footnote 5

11. It will be the submission of the Defence that the Trial Chamber failed to give any, or any proper, weight to (i) the degree in which the incriminating quality of the evidence had been altered (ii) the lack of notice given to the Defence and (iii) the relationship between the two aforesaid criteria.

12. The only issue which could reasonably have provided support for the conclusion that the evidence was *not* new was that (apart from the allegations that (i) Sesay trained forcibly conscripted children at Bunumbu (19th October 2004) and (ii) the killing of a child soldier at Kuiva (10th January 2005), which were mentioned for the first time *ever* in the disputed statements) the remainder of the allegations in the disputed statements had been referred to, obliquely at least, in either the Indictment or the Prosecution's Pre-trial Brief.

13. Moreover the original statements of TF1 – 141 made no mention of:
    a. An attack by any rebel group, led by Sesay *or anyone else*, on Makeni;
    b. Sesay being responsible for the conscription and subsequent use of children into the armed forces *at any time*;
    c. An attack on Koidu or Mile 91 in which Sesay was the Battlefield Commander *at any time*;
    d. Sesay being involved in training and forcible conscription of children at the Bunumbu training ground or *any other location*;
    e. Sesay being involved in the administration of drugs *of any kind to anyone;*
    f. Sesay shooting a "child soldier" in Kuiva.

14. It will further be submitted by the Defence that, as per the Bagosora Decision[14], the Trial Chamber erred by failing to include in its analysis the extent to which the new evidence altered the incriminating quality of the evidence already disclosed in relation to TF1 – 141[15]. In the alternative it will be submitted that any analysis erred by failing to give this aspect of the comparative analysis due weight. The degree in which the disputed statements altered the incriminatory nature of the original statements was substantial.

The degree of change of incrimination

15. The first statements effectively implicated Mr Sesay in (i) one murder (Fonti Kanu) (ii) one assault (Johnny Paul Koroma's wife) and (iii) giving the order for "Operation Spare No Soul" in relation to some operations around the Makeni area - with little indication of any indirect liability. **The disputed statements added to those allegations (a) the use of children in armed combat in Makeni (Sesay being the mission commander) (b) an attack on Koidu (Sesay being the mission commander) (c) an attack on Mile 91 (Sesay being the mission commander) (d) the use of children as security (e) the training of forcibly conscripted children at the Bunumbu training ground (f) being the commander of a group of rebels in Koidu town responsible for the kidnap of women and their subsequent sexual violation (g) the administration of drugs to forced conscripts (including children) (h) the killing of a child (who was his security) (i) ordering (as**

[14] Ibid at footnote 5
[15] This aspect of the analysis is not dealt with explicitly in the Ruling.

commander) the instruction to capture Koidu town, kill the civilians and burn the town.

16. The statements (dated 9th October 2004; 19 – 20th October 2004 and the 10th January 2005) were served giving the Accused insufficient notice (and in the case of the latter only about 7 days) given the gravity and scope of the allegations embodied therein and the degree of change in the incriminatory nature of the allegations.

17. It will be the submission of the Defence that no reasonable tribunal, properly directing itself, could have concluded (i) that the incriminatory nature of the evidence had not altered and (ii) that the degree of change and the lack of notice was of such a degree that, notwithstanding the limited notice identified, the evidence ought to be considered as new[16].

SUBMISSION TWO

18. It will be submitted that the Trial Chamber erred by concluding (and in any event giving any weight to the conclusion) that the allegations embodied in the respective statements, taken singly or cumulatively, are "separate and constituent different episodic events or, as it were, building blocks constituting an integral part of, and connected with, the same res gestae forming the factual substratum of the charges in the indictment"[17]. The Defence will submit that this categorisation is irrelevant to the issue of whether the allegations are new or additional.

19. It will be the respectful submission of the Defence that (i) only some of the events described in the disputed statements could conceivably be described in this way and (ii) in the context of an ongoing war (rebel or otherwise) involving chronological events (lawful or otherwise) some of the events are likely to be linked in the way suggested but this ought not to impact upon an assessment of whether the events alleged are new in the context of a particular witness and his testimony.

CONCLUDING SUBMISSIONS

20. The Defence will submit that the Trial Chamber's approach in paragraphs 22(i) – (vi) of the Ruling has (in the context of this indictment) effectively reduced the test contained within the Bagosora Decision to one question: Is the evidence, alleged to be new, relevant to the charges already notified to the Accused (through the Indictment or the Pre-trial Brief)? In other words, providing the evidence is relevant (that is to say, it is an integral part of the factual substratum of the charges in the indictment) it becomes admissible

[16] The force of this submission is even more apparent when considered alongside the question "Do the will – say statements merely provide additional details of matters already disclosed in the original witness statements or in other materials provided to the Defence?" (see Prosecutor v. Bagosora, ICTR-98-41-T, Decision on the Admissibility of Evidence of Witness DP, 18 November 2003. See also Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA, 5 December 2003). In relation to all the matters listed in 19 (a) to (i) none of these matters were alleged in the original statement of TF1-141. In relation to (a) and (c) these have never been *specifically* alleged elsewhere (although it is accepted they are referred to obliquely in the indictment and/or pre – trial brief. The Defence have not previously been given notice of allegations (e) and (h).

[17] See para. 22(vi) of the Ruling.

irrespective of whether it (i) was not included in the original statements of the witness (or in the case of the two allegations outlined in para. 19(e) and (h) not included in *any* prior disclosure); ((ii) was served only one week before the evidence was to be adduced and (iii) substantially alters the incriminating quality of that evidence (and to such a degree that the preponderance of incriminatory evidence was disclosed *after* the minimum requirements of Rule 66).

21. It will be respectfully submitted that, as set out in detail below, the errors of law invalidate the Ruling. Moreover the Ruling erodes the overriding purpose of Rule 66 to a degree which substantially deprives the Accused of the minimum fundamental guarantees contained within Article 17 of the Statute.

RULE 73(B) of the Rules of Procedure and Evidence of the Special Court

22. Rule 73(B) states that:
    a. "In exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal."

23. The Defence submit, for the reasons set out below, that the Ruling of the Trial Chamber will cause irreparable prejudice to the Defence and the circumstances are exceptional.

EXCEPTIONAL CIRCUMSTANCES

24. It is submitted that the Ruling (irrespective of the correctness of the substance of the Defence complaints concerning the issue of whether the evidence was new) disavows the legislative intent of Rule 66 and makes substantial inroads into the intended restriction on the ongoing service of incriminatory evidence as embodied in Rule 66(A)(ii). The Ruling qualifies the Prosecution disclosure obligations to allow continual disclosure of (and reliance upon) corroborative and cumulative incriminating evidence, provided that it (i) emerges from existing witnesses (ii) is a "building block constituting an integral part of, and connected with, the same res gestae forming the factual substratum of the charges in the indictment" and (iii) was disclosed 7 days (or thereabouts) prior to the evidence being called.

25. It is a Ruling which, at a minimum, arguably creates a new two stage disclosure regime pursuant to Rule 66. The first stage is the disclosure of the witness statements pursuant to Rule 66(A)(ii). The second stage is the service of further witness statements from the existing witnesses, containing allegations *corroborative* of the existing case (as revealed in the Indictment, the Prosecution Pre- trial brief and/or the Rule 66(A)(ii) disclosure). In other words it obliges the Prosecution to serve only the evidence which forms the skeleton (or bare outline) of its case in the first instance. Thereafter the Prosecution are permitted to disclose any corroborative (or cumulative) evidence (as long as this evidence arises from the existing witnesses) without any procedural or evidential framework to restrict this disclosure.

26. In the context of witnesses such at TF1–141 who give evidence spanning a large part of indictment (both temporally and factually) any number of allegations might fall within this category. It might therefore mean,

(irrespective of the correctness of the Defence submissions concerning alleged errors of law) that the vast majority of the corroborative details of the Prosecution case are presently unknown to the Defence. TF1–141 is a good example of how this might continue to operate. The majority of the allegations of direct participation of crime emerged only three months before the witness was expected to give evidence. This is plain on the face of the statements of TF1-141 (irrespective of whether the later allegations can be categorised as new). In other words the Ruling would appear to sanction a disclosure regime where the vast majority of the supporting evidence (in relation to the charges and the evidence already disclosed) presently remains undisclosed.

27. This Ruling appears to conclude that the Prosecution (at a minimum) are entitled to serve 8 supplemental allegations as regards the 77 remaining witnesses (616 in total) within three months of the testimony of each witness. This number of "supplemental" allegations (consisting of (and similar to) such single allegations as attacking named towns with small boys units; ordering the burning and killing of civilians in Koidu and the murder of a child at Kuiva) would represent a significant increase in the evidential support (and the attendant increased effort required by the Defence to rebut the corroborative evidence) for the Prosecution case. This will have a substantial impact on both the management of the trial[18]as well as the nature of the case the Accused presently faces.

28. It is respectfully submitted that this Ruling (even if the Defence submissions are found to be without merit) has far reaching implications for this trial process which are exceptional and which ought to be considered by the Appeals Chamber.

Irreparable Prejudice

29. In the event that the Defence are correct (in either their submissions on the impact the decision might have on the number of supplemental corroborative allegations, which from herein arise, from existing witnesses or as regards the alleged errors of law) there is a significant possibility that there remains undisclosed at this time a large number of corroborative details and evidence in support of the Prosecution case. It is respectfully submitted that this Ruling impacts significantly on the Accused's rights pursuant to Article 17 of the Statute.

Right to be informed promptly....of the nature and cause of the charge against him (Article 17(4)(a)

[18] A useful comparison might be TF1 – 012 who gave evidence on Wednesday to Friday (2nd - 4th February 2005). The witness gives evidence of three direct allegations against Mr Sesay: attending two meetings and responsible for forced mining at Tombodu. Cross examination for the first accused lasted one day. Whilst it is difficult to extrapolate from past experience to estimate the effect of supplemental allegations on the length of the trial it is reasonable to assume that, in the event that there might be around 600 more allegations (and that they might involve single but significant allegations from individual witnesses such as the ordering and participating in the burning of whole towns) one can reasonably estimate that the addition to the trial length will be in the region of six months or more. This would logically follow from an assessment of the supplemental evidence of TF1 – 141 which in terms of gravity and number of allegations would involve a substantial amount of additional court time to test *each* within the confines of cross examination.

30. The right to be informed promptly of the nature and cause of the charge against an accused has been interpreted to mean both a right to be informed of the "charges" against him and secondly the right to be promptly informed of the "information he requires in order to prepare his defence"[19]. This means that the Accused has a right to all the evidence "which forms the basis of the determination of the charges against" him[20]. The only way in which the Defence "can properly prepare for trial is by having notice in advance of the material on which the Prosecution intends to rely"[21]. It is submitted that the Ruling (irrespective of whether the evidence is new or otherwise) permits the Prosecution to adduce corroborative details of their case from existing witnesses from hereinafter. This right to continue to disclose is qualified only by the caveat that (i) notice has been given of the incident and (ii) it forms the building block of the res gestae[22]. In these circumstances it is arguable that (as in TF1 – 141) the majority of the supporting allegations against the Accused remain presently undisclosed. In these circumstances the Defence are unable to know the case against them and the strength of it.

31. In the event that the Defence are correct in their analysis of the errors of law the prejudice arising is irreparable. The Defence will be required to meet a case which grows stronger by the witness. The only means of challenging this evidence will be to challenge the admissibility of it before each witness is called. This will cause irreparable prejudice to case management and the ability of the Defence to properly advise the Accused and thereafter conduct its case. Moreover, in the event that this issue is not considered by the Appeal Chamber at this stage it will be impossible to assess the overall impact upon the trial process at the end of the trial.

32. The Defence submit that this decision breaches the fair trial rights envisaged by Article 17(4)(a). The Accused may (as in the case of TF1 – 141) know the outline of the case he must meet but not the strength of it. The Accused may know the nature of it but not the cause. It is not possible to make an informed plea to any of the charges since the strength of the evidence is as yet unknown. It is not possible to assess (and advise on) the legal elements of the alleged offences since much of the alleged factual support for the legal elements may be unknown. It is not possible to cross reference to the totality of evidence to allow focused and comprehensive cross examination. It is not possible to conduct effective investigations into discrete evidential areas. It is not possible to allocate Defence resources (financial or otherwise) according to the evidence and the case the Accused must meet. It is not possible to request expert opinion unless the full facts (and support) of the allegation are known

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[19] Prosecutor v. Barayagwiza, Appeal Chamber Decision 3rd November 1999.
[20] Prosecutor v. Naletilic; Trial Chamber 1. Decision on Defence's Motion concerning Translation of all documents, 18th October 2001.
[21] Prosecutor v. Krajisnik, Decision on Prosecution Motion for Clarification in respect of Application of Rules 65 *ter*, 66(B) and 67(C), August 1, 2001 *para.* 7 Also to be effective disclosure has to be done at the earliest possible time to allow the accused to prepare thoroughly his reply to the charge in his defence (State v. Scholtz (1997) 1 LRC 67; Namibia, Supreme Court 6th February 1996).
[22] As outlined above this would appear to allow the Prosecution to rely upon TF1 – 141 to provide corroborative evidence in relation to at least 6 allegations and evidence of 2 incidents never before disclosed.

Right to be presumed innocent until proved guilty (Article 17(3).

33. The Defence submit that the decision reverses the burden of proof. It permits the Prosecution to elicit corroborative and supporting evidence from each witness who attends Freetown. In the event that the Prosecution consider that the evidence they intended to rely upon has been effectively challenged by the Defence they can simply remedy the situation by adducing supplemental evidence from the witness about to be called to give evidence thus placing a continual burden upon the Defence to keep rebutting the supplemental allegations.

Right to be tried without undue delay (Article 17(4)(c)

34. The Ruling may well prolong the trial for another six months[23]. In addition the only remedy available to the Trial Chamber in the event that the Prosecution adduce a number of supplemental allegations (whether corroborative or otherwise) from intended witnesses (which the Defence have insufficient time to address) is to adjourn the witness to allow the Defence the opportunity to investigate. It is submitted that the impact of this Ruling is far reaching insofar as the opportunity it provides the Prosecution to continually bolster its case. The Defence must be given an opportunity to meet this case which will delay the trial.

Right to have adequate time and facilities (Article 17(4)(b)

35. The potential increase in the Prosecution case must be matched with an increase in the Defence time and facilities. It is logical to assume – as in the case of TF1 – 141 - that the time and effort required by the Defence to meet this strengthened case will be substantial. At this time (given the time restraints) it is not possible to provide data to demonstrate this effectively. The Defence submit, however, that whilst there might have been suggestions that the facilities and time provided to the Defence are adequate there has never been a suggestion that they were plentiful. In the event that there is an increase in the Prosecution case (as the decision permits) the Defence will be unable to meet this additional work within the time and financial restraints that the limited mandate of this court has imposed.

CONCLUSION

36. It is submitted that the Ruling of the Trial Chamber has far reaching ramifications for the ongoing trial of the RUF. It appears to allow for ongoing disclosure of the Prosecution case to a degree *never* permitted in any of the previous International Tribunals and unknown to most (if not all common law) national jurisdictions[24]. It is a decision which will undoubtedly affect the course of the trial and therefore ought to be considered by the Appeals Chamber as exceptional. It is the submission of the Defence that it will cause the Defence irreparable prejudice irrespective of whether the decision was based on errors of law.

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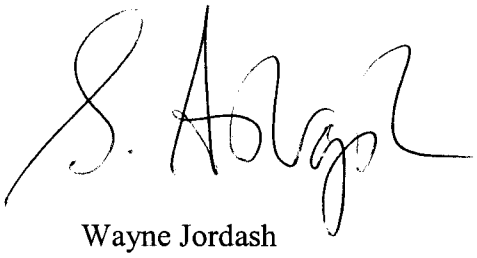
[23] See footnote 18.

[24] Disclosure in the United Kingdom is governed by the Criminal Procedure and Investigations Act 1996 which rigidly controls disclosure obliging the Prosecution to disclose the totality of its case before the commencement of the trial. There is no provision permitting the Prosecution to disclosure supplemental or corroborating evidence during the trial.

10. The Defence respectfully request leave to appeal the Ruling.

Dated this 7th day of February 2005



Wayne Jordash
Sareta Ashraph
Chloë Smythe

BOOK OF AUTHORITIES

1. Ruling on the Oral Application for the Exclusion of Statements of Witness TF1-141 dated respectively 9th of October 2004, 19th and 20th October 2004 and 10th January 2004, dated 3rd February 2005.

2. Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial, dated 1st April 2004.

3. Prosecutor v. Bagosora, ICTR-98-41-T, Decision on the Admissibility of Evidence of Witness DP, 18th November 2003.

4. Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA, 5th December 2003.

5. Prosecutor v. Barayagwiza, Appeal Chamber Decision 3rd November 1999.

6. Prosecutor v. Naletilic; Trial Chamber 1. Decision on Defence's Motion concerning Translation of all documents, 18th October 2001.

7. Prosecutor v. Krajisnik, Decision on Prosecution Motion for Clarification in respect of Application of Rules 65*ter*, 66(B) and 67(C), 1st August, 2001

8. State v. Scholtz (1997) 1 LRC 67; Namibia, Supreme Court 6th February 1996.

1. Ruling on the Oral Application for the Exclusion of Statements of Witness TF1-141 dated respectively 9th of October 2004, 19th and 20th October 2004 and 10th January 2004, dated 3rd February 2005.

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TRIAL CHAMBER I

Before:	Hon. Justice Benjamin Mutanga Itoe, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet
Registrar:	Robin Vincent
Date:	3rd of February, 2005

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

RULING ON ORAL APPLICATION FOR THE EXCLUSION OF STATEMENTS OF WITNESS TF1-141 DATED RESPECTIVELY 9TH OF OCTOBER, 2004, 19TH AND 20TH OF OCTOBER, 2004, AND 10TH OF JANUARY, 2005.

Office of the Prosecutor:
Luc Coté
Lesley Taylor
Peter Harrison

Defence Counsel for Issa Hassan Sesay
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Shekou Touray
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao:
Andreas O'Shea
John Cammegh

NEIL GIBSON
16:52

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

SEIZED of an oral application by the Defence Counsel for Issa Hassan Sesay, and Augustine Gbao ("the Defence") and their supporting grounds and submissions during the trial proceedings on the 18th of January, 2005 for the exclusion of evidentiary material contained in the statements of Witness TF1-141.

MINDFUL of the Prosecution's Response to the said Application, and the Defence Reply thereto;[1]

CONSIDERING the Oral Ruling of the Chamber dated the 18th of January, 2005 on this application;

CONSIDERING Rule 66(A)(ii) of the Rules of Procedure and Evidence ("Rules"), Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and the Order of this Chamber to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial on the 1st of April, 2004 ("Order for Disclosure");

AFTER DELIBERATION

HEREBY ISSUES THIS UNANIMOUS RULING:

1. During the course of the trial of this case on the 18th of January, 2005, learned Counsel for the First Accused and Third Accused sought from this Court an order to exclude statements made by Witness TF1-141 on the 9th of October, 2004, the 19th and the 20th of October, 2004, and the 10th of January, 2005 respectively.

2. Mr. Jordash, for the First Accused, contended that the additional pieces of evidence embodied in the aforementioned statements ought to have been disclosed pursuant to Rule 66 by the 26th of April, 2004, the date set by the Trial Chamber for service on the Defence of the Prosecution evidence.[2] He submitted that any evidence to be served after that date would be subject to the Prosecution showing good cause pursuant to the provisions of said Rule 66.

[1] Transcript of Trial Proceedings, 18 January 2005, p. 52ff.
[2] See Order for Disclosure, p. 6.

3. Citing the Ruling of this Trial Chamber in this case dated the 23rd of July, 2004,[3] Counsel submitted further that in essence the ruling was that any new statement alleging entirely new facts would fall into the category of additional witness statements, and that in respect of the application which was the subject of that Ruling, the Trial Chamber decided that the evidence whose exclusion was sought was in fact supplemental. Mr. Jordash, however, argued that the evidence in the instant application is different from that sought to be excluded in that application and can be categorised as entirely new.

4. Specifically referring to paragraph 9 of the said Ruling, Mr. Jordash recalled that the Trial Chamber set out what the Defence needs to show to prove a breach of Rule 66, and that the Chamber observed thus:

> "It is evident that the premise underlying the disclosure obligations is that the parties should act *bona fides* at all times. 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."[4]

5. Citing further paragraph 11 of the Chamber's Ruling, and our reasoning in applying the criteria or procedure set out in the case of *Prosecutor v. Bagosora*,[5] Learned Counsel for the First Accused, Mr Jordash, argued strenuously that upon an analysis of the sort done in *Bagosora*, the Defence has shown that the evidence in the statements in question is clearly new and additional, and that the Prosecution ought to have shown some good cause. The Defence submitted that the evidence should be excluded for having failed to meet that requirement.

6. In addition, Counsel submitted that the *prima facie* proof required by the Defence in an application of this nature is embodied in a Table distributed in Court during his oral submissions, containing columns and illustrations of the alleged new evidence. Mr. Jordash further contended that from the Prosecution's Compliance Report, the evidence of TF1-141 would relate to Counts 1-13. He proposed, by way of a methodology for understanding how the alleged new evidence has altered the witness' statement as proposed in the statement of the 31st of January, 2003, that TF1-141 would have given direct evidence of the killing of a man called Fonti Kanu attributed to Sam

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[3] *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060, 23 July 2004 ("Ruling of the 23rd of July, 2004")
[4] Id., para. 9.
[5] *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DP, 18 November 2003 ("*Bagosora* Decision").

Bockarie with the First Accused being present and, using Mr. Jordash's own words, "so arguably participating in some way such as by encouragement,"[6] and that would have been direct evidence implicating First Accused as regards counts 3-5.

7. Continuing, Mr. Jordash noted that the evidence would also have related to the assaulting of Johnny Paul Koroma's wife, and that there would have been direct evidence supportive of counts 10-11 implicating First Accused in respect of the charges of physical violence. He forcefully argued that as the evidence shifts towards the 23rd of February, 2003, there is again a repetition of the allegation against First Accused but now as that of him killing Fonti Kanu, as charged in counts 3-5. Learned Counsel also referred to an allegation of First Accused giving an order for "Operation Spare No Soul" which, again, in his submission, would have been direct evidence of physical violence in respect of counts 10 and 11. He also referred to the evidence of TF1-141 up till the 24th of February, 2003 especially the portion indicating that he "cannot say anything indirectly about Mr. Sesay".

8. Mr. Jordash then proceeded to highlight certain other pieces of evidence which, in his submission, amount to new pieces of evidence and which, for ease of reference, are set out here below:

i. allegation in the statement of the 9th of October 2003 of an attack by First Accused in Makeni using small boys;
ii. an attack in Koidu and Mile 91 by First Accused using small boys;
iii. allegation in the statement of the 19th and the 20th of October, 2004 that First Accused was at the Bunubu training grounds (giving orders) where, according to TF1-141, he was first captured by rebels;
iv. allegation in the statement of the 10th of January, 2005 that the First Accused was in Koidu Town when he TF1-141 was first captured and that he had his own group of small boys;
v. allegation in the statement of the 10th of January, 2005 that First Accused was based in Koidu town, and his boys would take women and stay with them in their houses, that is, evidence of abductions supporting count 13;
vi. a new allegation that First Accused came before the witness' group attacking Daru, and that he went to Quiva where he shot a small boy who was his security because he did not show him respect;

[6] Transcript, *supra* note 1, p. 55.

vii. that First Accused, from the statement of the 10th of January, 2005, ordered the burning of Koidu Town.

9. Counsel finally submitted that all the evidence contained in the statements of TF1-141 could not be properly characterised as congruent in material respects with the original statement, and that such a finding would give the Prosecution a *carte blanche* to effectively serve witness statements covering a large area of Sierra Leone, with little indication of evidence of direct participation in events. Consequently, Mr. Jordash contended that any interpretation of Rule 66 which allows the Prosecution to serve the bulk of their case in relation to any witness, only, in the case of the October disclosure, barely three months ago, but in the case of the disclosure on the 10th of January, 2005 barely a week ago, must in effect be a breach of Article 17 of the Statute. Finally, Learned Counsel urged that the proper remedy is not an adjournment but the exclusion of the evidence in question.

10. Counsel for the Second Accused indicated that his Defence team had no similar application to make.

11. Counsel for the Third Accused, Mr. O'Shea indicated that as regards the application on behalf of the First Accused, he had nothing to add to the forceful and persuasive arguments of Mr. Jordash, but that he had quite a different application though he was associating himself with Mr. Jordash's submissions on the law. Articulating his position, Mr. O'Shea referred to the portion of the statement of TF1-141 made on the 10th of January, 2005, implicating, as Counsel contends, the Third Accused for the first time by describing him as a G5. Counsel argued that this reference was highly significant in that there had been no prior references by the witness to Third Accused, and that the allegation puts Third Accused in a position, as Counsel put it, where "he becomes a direct participant in the mistreatment of the civilians in Kailahun according to the witness".[7]

12. In support of his arguments, Mr. O'Shea stated that he was relying on the right to a fair trial as provided for in Article 17(4)(a) of the Statute. He further indicated that he was relying on the right to adequate time and facilities for the Defence to prepare their case as provided for in Article 17(4)(b) of the Statute. In Counsel's view, those two provisions must be given not a plain but purposive meaning consistent with Article 31 of the Vienna Convention and that in this regard, there has been a violation by the Prosecution of Rule 66(A)(i) in that the new statement of the witness effectively confronts the Defence with a new witness.

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[7] *Id.*, page 71.

13. Continuing, Mr. O'Shea put forward what, in the Chamber's view, seems to be a mixed package of submissions incorporating various Articles and Rules (some specific, others not quite specific). Counsel submitted that Article 67(D) that which provides for the continuing disclosure obligation requires that reasonable efforts will be made to adduce the essentials of a witness' testimony at an early stage. Counsel then relied on various statutory provisions and the ruling of this Chamber on joinder in order to assert that the Chamber must take into consideration the position of each Accused as if he were being tried separately in assessing whether supplemental statements are new evidence. With regard to Witness TF1-141, Mr. O'Shea submitted that the Prosecution would not have chosen to call him as a witness without knowledge of the supplemental statement or, if they had called him, then the Court would have excluded the supplemental statement as it was the first to mention the Accused Gbao.[8]

14. Concluding, Learned Counsel for the Third Accused invited the Court to be mindful of the fact that their defence team is operating without instructions which, in his submission, imposes some obligation on the Court to act with extreme caution in the context of the exercise of the Prosecution's disclosure obligations. However, even though Counsel later admitted and apologised for what he described as an administrative error as regards the service upon his team of the supplemental statement of the witness dated the 9th of October, 2004 which, allegedly, for the first time implicated the Third Accused, Mr. O'Shea submitted that the Prosecution may well have acted without due diligence in this matter.

15. The Prosecution responded to the applications urging the Chamber to reconcile the principle of disclosure and the principle of orality. Quoting para. 25 of the Decision in *Prosecutor v. Norman et al.*,[9] the Prosecution submits that due to the very nature of the oral testimony a witness can expand on matters mentioned in a previously disclosed written statement. Therefore, the proper and traditional remedy for the Defence in these circumstances is to highlight any discrepancy between the witness' testimony and the statements during cross-examination rather than seeking exclusion of the supplemental statements. As an alternative remedy, the Prosecution submitted that the Chamber could order the Prosecution not to lead any evidence with respect to the statement of the 10th of January, 2005.

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[8] *Id.*, p. 72, l. 11ff.

[9] *Prosecutor v. Norman, Fofana and Kondewa*, Case No SCSL-04-14-T, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004 ("*Norman* Decision").

16. The Defence Application confronts us again with the judicial task of determining the proper interpretation of Rule 66(A)(ii) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone on the issue of the statutory obligation of disclosure of witness statements to the Defence, and, in this instance the three statements made by TF1-141 embodying, in the Defence submission, not only entirely new allegations, but also confronting them with a new witness testifying to new facts.

17. We have recently, in two of our key Decisions on the issue,[10] expounded on the true and proper interpretation of Rule 66, the rationale behind the statutory framework for disclosure obligations, and the principle to be applied in determining issues of this nature. Firstly, in *Prosecutor v. Norman et al*; as to the true and proper interpretation of Rule 66, the Chamber stated that:

> "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."[11]

18. Explaining the rationale behind Rule 66 and enunciating the applicable principle we observed as follows:

> "It is evident that the premise underlying the disclosure obligations is that the parties should act *bona fides* at all times. 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."[12]

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[10] See Ruling of the 23rd of July, 2004 and *Norman* Decision. See also *Prosecutor v. Brima, Kamara and Kanu*, Case No SCSL-04-16-PT, Kanu - Decision on Motions for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Statements. See also Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, paras 21-22. See also Ruling on the Oral Application of the Exclusion of Part of the Testimony of Witness TF1-199, 26 July 2004, para. 7

[11] *Norman* Decision, para 5.

[12] *Id.*, para 7.

19. Secondly, as regards the Ruling of the 23rd of July, 2004, consistent with the aforementioned statement of the law, we adopted and applied the reasoning in the case of the *Prosecutor v. Bagosora*[13] to the effect that in determining whether to exclude additional or supplemental statements of prosecution witnesses within the framework of prosecutorial disclosure obligations, a comparative evaluation should be undertaken designed to ascertain (i) whether the alleged additional statement is new in relation to the original statement, (ii) whether there is any notice to the Defence of the event the witness will testify to in the Indictment or Pre-Trial Brief of the Prosecution, and (iii) the extent to which the evidentiary material alters the incriminating quality of the evidence of which the Defence already had notice. In adopting this reasoning, we were underscoring the judicial function of the Chamber to ensure "that the parties act *bona fides* at all times."[14]

20. Consistent with the above case-law, and guided by the reasoning in the said cases and the principles enunciated therein, the key question for determination by the Chamber in disposing of the issue raised is whether the Defence has demonstrated or substantiated with *prima facie* proof that the Prosecution is in breach of its disclosure obligations under Rule 66(A)(ii) and that it is in violation of Article 17(4) (a) and (b) statutory rights of the Accused persons on the grounds of disclosing at this stage witness statements containing, as alleged, entirely new allegations.

21. In order to determine if there has been such a breach, as alleged, and an attendant violation of Article 17(4) (a) and (b) of the Statute, the Chamber has carefully reviewed the original statements dated the 31st of January 2003, the 23rd of February 2003 and the 24th of February 2004, respectively, of witness TF1-141 alongside the respective statements dated the 9th of October, 2004, the 19th and the 20th of October, 2004, and the 19th of January, 2005, as well as the charges in the Amended Consolidated Indictment, the Prosecution's Pre-Trial[15] and Supplemental Briefs,[16] and the various materials filed by the Prosecution in preparation for the commencement of the trial.[17]

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[13] See *Bagosora* Decision, para. 6; See also *Id.*, Decision on Admissibility of Evidence of Witness DBQ, 18 November 2003. See also *Id.*, Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA, 5 December 2003.

[14] See *Norman* Decision, para 7.

[15] Prosecution Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (Under Rules 54 and 73bis) of 13 February 2004, 1 March 2004.

[16] Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 30 March 2004 as Amended by Order to Extend the Time for Filing of the Prosecution Supplemental Pre-Trial Brief of 2 April 2004, 21 April 2004.

[17] Materials Filed Pursuant to "Order to Prosecution to Produce Witness List and Witness Summaries", 12 July 2004; Prosecution Chart Indicating Documentary and Testimonial Evidence by Paragraph of Consolidated Indictment Pursuant to Trial Chamber Order Dated 1 April 2004; 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, 26 April 2004. The Chamber notes that the Compliance Report contained therein appears erroneously refering to a single statement for

22. Accordingly, we find as follows:

(i) That the allegations in the disputed statements are germane to the general allegations as set out at pages 2-8 of the Amended Consolidated Indictment and also the charges as specified and particularised in Counts 1-18 thereof;

(ii) That the allegations in the said statements are germane to the basic factual allegations as specified and particularised in the Amended Consolidated Indictment and at pages 8-22 of the Prosecution's Pre-Trial Brief and pages 6-94 of the Prosecution's Supplemental Pre-Trial Brief;

(iii) That the disputed statements cannot be characterised as entirely new statements having regard to their contents in relation to the original statements of the witness which were disclosed to the Defence;

(iv) That the aforesaid statements are "congruent in material respects with matters deposed to in the entire original statements"[18] about the various roles and alleged criminal activities of the Accused persons during the hostilities in Sierra Leone forming the general subject-matter of the Amended Consolidated Indictment;

(v) That the allegations embodied in the respective statements, taken singly or cumulatively, are not new evidence but rather separate and constituent different episodic events or, as it were, building-blocks constituting an integral part of, and connected with, the same *res gestae* forming the factual substratum of the charges in the Indictment;

(vi) That by reason of our findings in (i), (ii), (iii), (iv), and (v) above the disputed statements of Witness TF1-141 do not constitute statements that could be considered to be of the nature of, or similar or akin to, statements of additional witness statements within the meaning and contemplation of Rule 66(A)(ii).

23. At this stage we reiterate, in reply to the submission of Mr Jordash on our Ruling dated the 23rd of July, 2004, from which he made extensive citations, that we held that the evidence sought to be excluded in that instance was in fact supplemental and not new, and that our reasoning in that instance left no room for any implication that we were giving "supplemental" a fixed meaning in the context of an antonym of the word "new". Our reference to "supplemental" was by definition,

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witness TF1-141, dated the 6th of April, 2003, disclosed at that point in time to the defence. In addition, the Updated Compliance Report filed on the 10th of January, 2005 does not refer to the supplemental statement dated the 9th of October 2004.

merely to characterise the witness's second statement in relation to the original statement. Nothing in our Ruling suggests that we were using those terms as contradictory or mutually exclusive.

24. As a matter of law, this Chamber would like to reassert, as we did in our Ruling on the admissibility of the statement of prosecution witness TF1-060, that Rule 66 does, in explicit legislative language, impose upon the Prosecution, the obligation to continuously disclose to the Defence, copies of all statements of all witnesses who they intend to call and which include new developments in the investigation in the form of "will-say" statements, interview notes, or in any other forms, obtained from a witness at any time prior to the witness giving evidence at the trial. To interpret Rule 66 otherwise would be contrary to the legislative intent and to thwart its purpose of full and complete disclosure as evidenced by its ordinary and plain meaning.

25. Predicated upon the foregoing considerations and our specific findings, the Chamber is of the opinion that the Defence has failed to demonstrate or substantiate by *prima facie* proof the allegations of breach by the Prosecution of Rule 66(A)(ii) of the Rules, Article 17(4) of the Statute, and the Chamber's Order for Disclosure.

26. Accordingly, the application for the exclusion or suppression of the evidence contained in the three supplemental statements of TF1-141 which are the subject-matter of the application is denied, on the understanding however, that the Defence reserves its right to cross-examine this witness on all issues raised including those that feature in the statements.

Done at Freetown, Sierra Leone, this 3rd day of February, 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]

[18] See Ruling of the 23rd of July, 2004, para. 14(iii).

2. Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial, dated 1st April 2004.

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SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 1 April 2004

PROSECUTOR Against Issa Hassan Sesay
Morris Kallon
Augustine Gbao
(Case No.SCSL-04-15-PT)

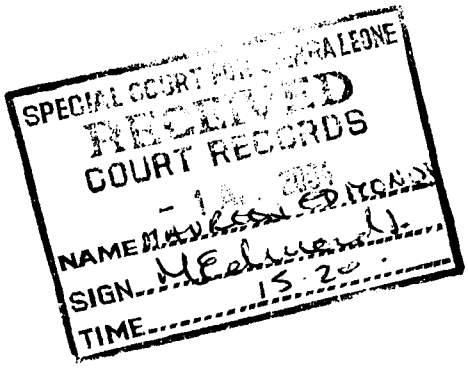
ORDER TO THE PROSECUTION TO FILE DISCLOSURE MATERIALS AND OTHER MATERIALS IN PREPARATION FOR THE COMMENCEMENT OF TRIAL

Office of the Prosecutor:
Luc Côté
Robert Petit

Defence Counsel for Issa Hassan Sesay:
Timothy Clayson
Wayne Jordash

Defence Counsel for Morris Kallon:
Shekou Touray

Defence Counsel for Augustine Gbao
Andreas O'Shea



THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

NOTING the Status Conference held in this case on 2-3 March 2004, and the extensive discussions therein on, *inter alia*, compliance with disclosure obligations under Rule 66 of the Rules of Procedure and Evidence of the Special Court ("Rules"), the number of witnesses to be called by the Office of the Prosecutor ("Prosecution") during the presentation of its case, and the state of preparedness for trial of the Prosecution and the defence counsel ("Defence") for Issa Hassan Sesay, Morris Kallon and Allieu Kondewa ("Accused");[1]

CONSIDERING that Rule 66 ("Disclosure of materials by the Prosecutor") of the Rules in force at the time of the Status Conference provided:

> (A) Subject to the provisions of Rules 53, 69 and 75, the Prosecutor shall:
>
> (i) Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial. Upon good cause being shown, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time.
>
> (ii) 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 the 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.
>
> [...]

CONSIDERING that Rule 66 of the Rules currently in force[2] provides:

> (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

[1] The Trial Chamber recalls that Morris Kallon was represented by Duty Counsel from the Defence Office at the Status Conference. Accordingly, references to the "Defence" throughout this Order is generally related to Defence Counsel for Issa Hassan Sesay and Augustine Gbao. In order that Mr. Kallon suffers no adverse effects, the Trial Chamber has considered the rights of Mr. Kallon in light of the submissions made by Defence Counsel for Mr. Sesay and Mr. Gbao.
[2] The Rules of Procedure and Evidence of the Special Court were amended at the 5th Plenary Session held in Freetown 11-14 March 2004.

intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial. Upon good cause being shown, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time.

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

(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 or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to 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.

CONSIDERING that the Trial Chamber seeks to ensure that the rights of the Accused are not infringed, but rather are enhanced, by the amendment of Rule 66 of the Rules;

NOTING that Rule 73 *bis* of the Rules outlines materials which the Trial Chamber may order the Prosecution to file at a Pre-Trial Conference, which include *inter alia* (1) a list of witnesses the Prosecutor intends to call with: (a) The name or pseudonym of each witness, (b) A summary of the facts on which each witness will testify, (c) The points in the indictment on which each witness will testify, and (d) The estimated length of time required for each witness; and (2) (v) A list of exhibits the Prosecutor intends to tender in evidence stating, where possible, whether or not the defence has any objection as to authenticity;

RECALLING the submissions of the Prosecution at the Status Conference on the issue of its compliance with disclosure obligations under the former Rule 66(A)(i) of the Rules, including *inter*

alia (a) that it has disclosed witness statements in compliance with Rules 66 and 68 of the Rules; (b) that it provided the Defence with witness summaries or redacted witness statements in accordance with the Rules, which, it asserts, is in compliance with Decisions for protective measures issued by this Trial Chamber which permits the Prosecution to withhold "identifying data" of the persons for whom protective measures have been granted;[3] and (c) that disclosure has been ongoing, as it has a "continuing disclosure" obligation and that "rolling disclosure" is permitted;

RECALLING the submissions of the Defence at the Status Conference, including *inter alia* that under Rule 66(A)(i), as in force at the time of the Status Conference, that the Prosecution should not be allowed to call those witnesses for whom witness statements or summaries were disclosed after the initial "30 day" disclosure, and that the disclosure of summaries or heavily redacted witness statements is not in compliance with the disclosure obligation on the Prosecution provided for in Rule 66(A)(i);

RECALLING the submissions of the Prosecution at the Status Conference in relation to the number of witnesses it intends to call in this case, namely that the Prosecution intends to call over 100 witnesses, to testify *viva voce*, indicating that the Prosecution may require more than 150 witnesses to testify *viva voce*;

RECALLING the submissions by the Defence at the Status Conference in relation to the alleged impact of the Decisions for protective measures issued in this case, and the Prosecution's interpretation thereof, on its ability to prepare its defence;

RECALLING the Prosecution's submissions on the issue of protective measures, namely that witness protection remains a primary concern, and for that reason, the Prosecution has yet to disclose the identity of any witness whom it intends to call to the Defence;

CONSIDERING that Article 17(4) ("Rights of the Accused") of the Statute prescribes certain minimum guarantees that must be afforded to each accused, including the right to be informed

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[3] See, e.g., *Prosecutor v.Issa Hassan Sesay*, SCSL-03-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003; *Prosecutor v. Augustine Gbao*, SCSL-03-09-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 10 October 2003; and *Prosecutor v. Morris Kallon*, SCSL-03-07-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003. The Prosecution sought, and was granted, protective measures for: (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.

promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her; the right to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing; the right to be tried without undue delay; the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and the right not to be compelled to testify against himself or to confess guilt;

CONSIDERING the fundamental right of each Accused to a fair and expeditious trial;

CONSIDERING the rights and protections afforded to victims and witnesses under the Statute of the Special Court, as recognised in Article 17(2) of the Statute and as provided for through Rules 69 and 75 of the Rules;[4]

CONSIDERING that one of the primary purposes of placing disclosure obligations upon the Prosecution, as prescribed by the Rules – and indeed ensuring its compliance with those obligations – is to ensure that the rights of the accused are respected;

CONSIDERING 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;

FINDING that the rights of the Accused in this case would be enhanced by requiring the Prosecution to provide to the Defence certain materials forthwith, as well as to provide the Defence and Trial Chamber with concrete information in relation to the case it intends to present;

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[4] Rule 69 ("Protection of Victims and Witnesses") provides: (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.

Rule 75 ("Measures for the Protection of Victims and Witnesses") provides, in part: A) 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. (B) A Judge or a Chamber may hold an in camera proceeding to determine whether to order: (i) Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as: (a) Expunging names and identifying information from the Special Court's public records; (b) Non-disclosure to the public of any records identifying the victim or witness; (c) Giving of testimony through image- or voice- altering devices or closed circuit television, video link or other similar technologies; and (d) Assignment of a pseudonym; (ii) Closed sessions, in accordance with Rule 79; (iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television. (C) A Judge or a Chamber shall control the manner of questioning to avoid any harassment or intimidation.

CONCLUDING that, upon review of the materials and information detailed in this Order, the Trial Chamber will be better positioned to set a date for the commencement of trial proceedings in this case and to make any subsequent orders to the Prosecution to reduce its witness list, if deemed necessary, pursuant to Rule 73 *bis* (D) of the Rules, thereby promoting the right of each Accused to a fair and expeditious trial;

PURSUANT TO Article 17 of the Statute of the Special Court, and Rules 54, 66, 67, 68, 73 *bis* and 92 *bis* of the Rules;

HEREBY ORDERS that the Prosecution file, by 26 April 2004:

1. A witness list for all the witnesses the Prosecution intends to call at trial with the name or the pseudonym of each witness. Should the Prosecution seek to add any witnesses to this list after 26 April 2004, it shall be permitted to do so only upon good cause being shown;
2. A compliance report indicating: the number of witnesses for whom witness statements or summaries have been disclosed; the date upon which each statement or summary was disclosed; and the total number of pages of each statement or summary;
3. A summary for each witness on the witness list specified in (1), indicating the exact paragraph and/or count in the Indictment to which the witness will testify, as well as an estimated length of time required for each witness;
4. A list of exhibits the Prosecution intends to tender in evidence trial. Should the Prosecution seek to add an exhibit to this list after 26 April 2004, it shall be permitted to do so only upon good cause being shown; and
5. A copy of each exhibit which appears on the list as indicated in (4). The Prosecution is permitted to file the proposed exhibits either in paper form or on CD-ROM.

AND FURTHER ORDERS that the Prosecution file, by 3 May 2004:

6. A chart which indicates, for each paragraph in the Indictment, the testimonial evidence and primary documentary evidence upon which the Prosecution will rely to establish the allegations contained therein.

AND FURTHER ORDERS that the Prosecution, by 26 April 2004, disclose to the Defence:

7. Any statements in full, with redactions as necessary pursuant to the Decisions for protective measures, that have not yet been disclosed for each witness that appears on the witness list indicated in (1) above.

Done at Freetown this 1st day of April 2004

Judge Bankole Thompson
Presiding Judge,
Trial Chamber

Judge Benjamin Mutanga Itoe

Judge Pierre Boutet

[Seal of the Special Court for Sierra Leone]

3. Prosecutor v. Bagosora, ICTR-98-41-T, Decision on the Admissibility of Evidence of Witness DP, 18th November 2003.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER I

Before:
Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 18 November 2003

THE PROSECUTOR
v.
Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON ADMISSIBILITY OF EVIDENCE OF WITNESS DP

The Office of the Prosecutor
Barbara Mulvaney
Drew White
Segun Jegede
Alex Obote-Odora
Christine Graham
Rashid Rashid

Counsel for the Defence
Raphaël Constant
Paul Skolnik
Jean Yaovi Degli
David Martin Sperry
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion for the Exclusion of the Anticipated Testimony of Witness DP", filed by the Defence for Aloys Ntabakuze on 3 October 2003;

CONSIDERING oral argument heard on 2 October 2003; the Prosecution "Response" to the motion, filed on 21 October 2003; and the Defence "Reply" thereto filed on 5 November 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 30 September 2003, the Prosecution filed a will-say statement indicating two "additional details" to which its witness, DP, would testify. At oral argument, the Defence made clear that it was only objecting to one of the two items, that concerning the witness's observation of two soldiers on 9 or 10 April, together with *interahamwe*, loading rifles into the back of a military jeep. When queried by the witness, one of the soldiers allegedly indicated that Aloys Ntabakuze had ordered that the *interahamwe* be brought into the camp and given the weapons.

SUBMISSIONS

2. The Defence argues that notification of new witness testimony at this stage contravenes the Prosecution's disclosure obligations under Rule 66(A)(ii). That Rule should be interpreted either as requiring full disclosure of any and all statements to be introduced sixty days before commencement of trial, or as imposing an implicit continuing duty of disclosure that requires, at a minimum, that the Defence be given an adequate opportunity to prepare for the new testimony. The extent of notice in this case violates either interpretation of the Rule. The Prosecution's frequent recourse in recent weeks to notification of newly discovered testimony threatens to undermine Rule 66(A)(ii) and the Chamber's Decision on the timing of disclosure of unredacted witness statements. Further, the Defence argues that this new testimony constitutes an entirely new accusation, the introduction of which at this stage of proceedings would violate the right of the Accused to be informed promptly and in detail of case against him, and Rule 73*bis* (B) governing the Pre-trial Brief. The Defence also notes that Witness DP had been in Arusha for three weeks prior to his appearance, and that there is no reason why notice of the new testimony could not have been given earlier. The Defence asks the Chamber to exercise its discretion to exclude the evidence.

3. The Prosecution argued orally that this new testimony is simply a detail of evidence contained in the witness's prior statement and that, in any event, it does not even describe criminal conduct as such. In its written submissions, the Prosecution argued that the motion was "moot", and the that Defence fees should be withheld by the Registrar, as the Chamber had already ruled on the motion orally on 2 October 2003. The Defence argued that the Chamber's ruling was only provisional and did not preclude further submissions on whether the evidence should be excluded.

DELIBERATIONS

5. The Chamber has set out the principles applicable to the admission of testimony disclosed in will-say statements in its recent Decision on Admissibility of Evidence of Witness DBQ.[1] That Decision sets out a two-step approach. First, is the disclosed evidence actually new? Second, if the evidence is new, what period of notice is required in order to give the Defence adequate time to prepare?

6. Whether evidence is new requires comparison with the witness's own prior statement; any other indication in the Indictment or Pre-Trial Brief of the event in question combined with the period of notice to the Defence that the particular witness will testify on that event; and the extent to which the new evidence alters the incriminating quality of the evidence of which the Defence already has notice. If the evidence is not new, but is merely a detail supplementing evidence which

has previously been disclosed in accordance with the Rules, then it is immediately admissible. If, on the other hand, the evidence is characterized as new, then the Chamber assesses the extent of the new evidence, how incriminating it is, and its remoteness from any other incidents of which the Defence has notice, to determine what period of notice is adequate to give the Defence time to prepare.

7. The Chamber takes the view that this is new evidence. The Prosecution has not pointed to any prior disclosure that the Accused Ntabakuze is alleged to have distributed weapons to the *interahamwe*, whether at the Kanombe Camp or elsewhere, on or about 10 April 1994 or on any other date. That type evidence could have serious implications for the nature of the case to which the Defence must respond.

8. The Chamber is of the view that, under the circumstances, the two days was a sufficient period of notice for the Defence to be prepared to confront this new testimony. First, the evidence is of a single event, unlike the numerous elements of testimony sought to be introduced in respect of the Witness DBQ. Second, the newly incriminating evidence is based on hearsay and there are limited avenues for testing the reliability of this particular evidence. Accordingly, the possible investigations to be carried out by the Defence to test this testimony are rather narrow. Third, as hearsay, the evidence has limited probative value standing alone. The reliability of the testimony and its probative value are likely to depend primarily on corroborative or contradictory evidence to be presented later by the Defence or Prosecution. These factors together indicate that only a short period of notice for this evidence is required.

9. The Prosecution did not respond to the Defence assertion that Witness DP had been in Arusha for three weeks and that notice of this evidence could have, and should have, been given earlier. Without clearer indications, the Chamber is unsure how long the witness was in Arusha and readily available to the Prosecution. However, the Chamber again expresses its concern that there is no systematic practice of interviewing witnesses well in advance of their testimony, particularly where it may be evident from the date of their witness statements or other factors that new evidence is likely to be forthcoming.

10. The request for denial of costs is rejected. The Chamber's ruling was clearly intended to be preliminary and not to foreclose further submissions on an issue that had been a matter of ongoing contention in respect of this and other witnesses.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion;

DENIES the request for withholding fees.

Arusha, 18 November 2003

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[1] 18 November 2003.

4. Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA, 5th December 2003.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER I

Before:
Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 5 December 2003

THE PROSECUTOR
v.
Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON CERTIFICATION OF APPEAL CONCERNING WILL-SAY STATEMENTS OF WITNESSES DBQ, DP and DA

The Office of the Prosecutor:
Barbara Mulvaney
Drew White
Segun Jegede
Alex Obote-Odora
Christine Graham
Rashid Rashid

Defence Counsel:
Raphaël Constant
Paul Skolnik
Jean Yaovi Degli
David Martin Sperry
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Defence "Application for Certification for Appeal" in respect of the Chamber's two written decisions filed on 18 November 2003 concerning testimony of Witnesses DBQ (the "DBQ Decision") and DP; and an oral decision of 19 November concerning the testimony of Witness DA;

CONSIDERING that there has been no submission by the Prosecution;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 18 November 2003, the Chamber issued written decisions concerning the admissibility of, or the need for an adjournment prior to, the admission of testimony disclosed by the Prosecution shortly before the testimony of Witness DBQ, and Witness DP. The Chamber issued an oral decision on the same issue on 19 November 2003 in respect of Witness DA. Certification of appeal is sought for all three decisions. The Defence argues that the remedy fashioned by the Chamber, requiring a postponement of the witness's testimony to give the Defence further time to prepare, is inadequate and that the new evidence should have been excluded.

2. In the DBQ Decision, the Chamber decided that the will-say statements contained new evidence and that three of the four will-say statements, disclosed eight days, four days, and one day, respectively, prior to the witness's appearance on 23 September 2003, did not provide the Defence with sufficient notice of the new testimony. The issue before the Chamber was whether, as of 18 November 2003, when the decision was rendered, sufficient time had elapsed to permit recall of the witness and admission of the testimony or, rather, whether the testimony should be excluded. The Chamber found that "given the number of new incidents raised in the will-say statements, the seriously incriminating nature of the conduct alleged, and the remoteness of the factual allegations from any incidents of which the Defence had notice", the evidence in the three will-say statements could be introduced no earlier than the subsequent trial session, commencing on 3 November 2003.

3. Relying on the same principles, the Chamber permitted the Prosecution to lead testimony of Witness DP revealed in a will-say statement two days before his appearance. The Chamber distinguished the DBQ Decision, finding that the new evidence concerned but a single event; that it was hearsay evidence, the reliability of which was not likely to be significantly tested by further investigations that the Defence could carry out and which could be put to the witness; and that the hearsay evidence in question had limited probative value standing alone whose reliability would be determined based on other corroborative or contradictory evidence.

4. The same issue arose again in respect of a will-say statement of Witness DA provided some eight days before the witness's appearance, to which the Defence for Bagosora objected. The Chamber required that the witness's cross-examination be delayed for two weeks to give the Defence further time to prepare.

SUBMISSIONS

5. The Defence argues that the remedy of postponement adopted by the Chamber is inadequate, and that the only proper remedy in the circumstances is the total exclusion of the evidence. The two-week period granted in respect of Witness DA is specifically mentioned as not sufficient, and the bifurcation of examination and cross-examination is said to be impractical and unmanageable. The Defence points to an alleged error of law in the DBQ Decision in respect of the meaning of Rule 89 (C), in that there is an obligation, not a "power", to exclude evidence that is either not relevant or not

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probative. The Defence also finds the decisions to be vague, and contends that there is contradictory caselaw which should be resolved by the Appeals Chamber. Further, the admission of this new evidence is highly prejudicial to the Accused and could affect the outcome of the trial.

6. The Defence also recapitulates its argument that the Rules do not permit the introduction of new evidence discovered after the commencement of trial, based on the disclosure obligations set forth in Rules 66, 67(D) and 73bis (B).

DELIBERATIONS

7. Rule 73(B) of the Rules of Procedure and Evidence ("the Rules") provides that Decisions on motions are without interlocutory appeal unless certified by the Trial Chamber:

which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. The Chamber has not been shown in what respect the principles articulated in the various ICTR and ICTY decisions are contradictory or divergent. Different remedies were adopted in different cases, depending on the particular circumstances confronting the Chambers, including the nature of the evidence, when it was disclosed, and its relation to other evidence in the case. Indeed, those decisions show that the appropriate remedy requires a particular factual inquiry into the evidence in question. Nothing in the three decisions issued by the Chamber excludes the possibility of recourse to exclusion of evidence, as was adopted in other cases; nor do those other cases require exclusion where the requirements of Article 20 of the Statute can be met by the remedies of adjournment or postponement of testimony.

9. As to the alleged error of law concerning the interpretation of Rule 89(C), the Chamber notes that the word "power" in the opening sentence of paragraph 24 of the DBQ Decision must be read in relation to the first part of the sentence, and in the context of paragraph 8, where the Chamber says: "The Chamber has a discretion to admit relevant evidence which it deems to have probative value, and conversely, an obligation to refuse evidence which is not relevant, or does not have probative value." To the extent there is any ambiguity, the word "power" in paragraph 24 should be read to conform to the meaning expressed in paragraph 8. The Chamber does not discern that there is any error of law, or even that there is any significant possibility that it has erred in law in a manner that affects the outcome of the decision.

10. The remedy fashioned by the Chamber is said to be impractical, unmanageable, and also inadequate to safeguard the rights of the Accused. The Chamber considers that it has a wide latitude, within the constraints on its discretion imposed by the Rules and the rights of the Accused enshrined in the Statute, to prescribe appropriate trial procedures that are not expressly governed by the Rules, as in this case. Certification may be granted where the issue significantly affects the fair and expeditious conduct of the trial or the outcome of the trial; and resolution of which may materially advance the proceedings. The latter condition is not satisfied in this case. The Chamber does not believe that there is serious doubt on a question of law, resolution of which by the Appeals Chamber would materially advance the proceedings, as required by Rule 73(B). The suggestion by the Defence that the remedy does not meet the minimum threshold of rights enshrined in the Statute is not only unsupported by the jurisprudence of this Tribunal and that of the ICTY, but is also contradicted by general principles of law articulated in divergent national legal systems. Nor does the Chamber believe that there is a serious possibility that the Rules could be interpreted to mean, as argued by the Defence, that any new evidence disclosed or discovered after the start of a trial is categorically inadmissible. In the Chamber's view, this decision involves an exercise of discretion based on an assessment of the factual significance of the evidence, within the framework of clear

legal guidelines. Resolution of such a question by the Appeals Chamber would not materially advance the proceedings.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 5 December 2003

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

5. Prosecutor v. Barayagwiza, Appeal Chamber Decision 3rd November 1999.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before:
Judge Gabrielle Kirk McDonald, Presiding
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: Mr. Agwu U. Okali

Decision of: 3 November 1999

JEAN-BOSCO BARAYAGWIZA
v.
THE PROSECUTOR

DECISION

Counsel for the Appellant:
Mr. Justry P. L. Nyaberi

The Office of the Prosecutor:
Mr. Mohamed C. Othman
Mr. N. Sankara Menon
Mr. Mathias Marcussen

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2. Whether the Appellant was held in Cameroon for any period between 23 February 1998 and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction

3. The reason for any delay between the request for transfer and the actual transfer

4. The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance.

5. The reason for any delay between the initial appearance of the Appellant and the hearing on the Appellant's urgent motion

6. The disposition of the *writ of habeas corpus* that the Appellant asserts that he filed on 2 October 1997

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1. Status of the Appellant

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2. The right to be promptly informed of the charges during the first period of detention

3. The failure to resolve the *writ of habeas corpus* in a timely manner

4. The duty of prosecutorial due diligence

C. Conclusions

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V. DISPOSITION

Appendix A: Chronology of Events

1. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seized of an appeal lodged by Jean-Bosco Barayagwiza ("the Appellant") against the "Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect" of Trial Chamber II of 17 November 1998 ("the Decision"). By Order dated 5 February 1999, the appeal was held admissible. On 19 October 1999, the Appellant filed a Notice of Appeal seeking to disqualify certain Judges of the Trial Chamber from sitting on his case ("19 October 1999 Notice of Appeal"). On 26 October 1999, the Appellant filed an additional Notice of Appeal concerning a request of the Prosecutor to amend the indictment against the Appellant ("26 October 1999 Notice of Appeal").

2. There are several areas of contention between the parties. The primary dispute concerns the arrest and detention of the Appellant during a nineteen-month period between 15 April 1996, when he was initially detained, and 19 November 1997, when he was transferred to the Tribunal's detention unit pursuant to Rule 40*bis* of the Tribunal's Rules of Procedure and Evidence ("the Rules"). The secondary areas of dispute concern: 1) the Appellant's right to be informed promptly of the charges against him; 2) the Appellant's right to challenge the legality of his arrest and detention; 3) the delay between the Tribunal's request for the transfer of the Appellant from Cameroon and his actual transfer; 4) the length of the Appellant's provisional detention; and 5) the delay between the Appellant's arrival at the Tribunal's detention unit and his initial appearance.

3. The accused made his initial appearance before Trial Chamber II on 23 February 1998. On 24 February 1998, the Appellant filed a motion seeking to nullify his arrest and detention. Trial Chamber II heard the oral arguments of the parties on 11 September 1998 and rendered its Decision on 17 November 1998.

4. The dispute between the parties initially concerns the issue of under what authority the accused was detained. Therefore, the sequence of events since the arrest of the accused on 15 April 1996, including the lengthy procedural history of the case, merits detailed recitation. Consequently, we begin with the following chronology.

5. On 15 April 1996, the authorities of Cameroon arrested and detained the Appellant and several other suspects on suspicion of having committed genocide and crimes against humanity in Rwanda in 1994. On 17 April 1996, the Prosecutor requested that provisional measures pursuant to Rule 40 be taken in relation to the Appellant. On 6 May 1996, the Prosecutor asked Cameroon for a three-week extension of the detention of all the suspects, including the Appellant. However, on 16 May 1996, the Prosecutor informed Cameroon that she only intended to pursue prosecutions against four of the detainees, *excluding* the Appellant.

6. The Appellant asserts that on 31 May 1996, the Court of Appeal of Cameroon adjourned *sine die* consideration of Rwanda's extradition request, pursuant to a request to adjourn by the Deputy Director of Public Prosecution of the Court of Appeal of the Centre Province, Cameroon. The Appellant claims that in making this request, the Deputy Director of Public Prosecution relied on Article 8(2) of the Statute.

7. On 15 October 1996, responding to a letter from the Appellant complaining about his detention in Cameroon, the Prosecutor informed the Appellant that Cameroon was not holding him at her behest. Shortly thereafter, the Court of Appeal of Cameroon re-commenced the hearing on Rwanda's extradition request for the remaining suspects, including the Appellant. On 21 February 1997, the Court of Appeal of Cameroon rejected the Rwandan extradition request and ordered the release of the suspects, including the Appellant. The same day, the Prosecutor made a request pursuant to Rule 40 for the provisional detention of the Appellant and the Appellant was immediately re-arrested pursuant to this Order. The Prosecutor then requested an Order for arrest and transfer pursuant to Rule 40*bis* on 24 February 1997 and on 3 March 1997, Judge Aspegren signed an Order to that effect. The Appellant was not transferred pursuant to this Order, however, until 19 November 1997.

8. While awaiting transfer, the Appellant filed a *writ of habeas corpus* on 29 September 1997. The Trial Chamber never considered this application.

9. The President of Cameroon issued a Presidential Decree on 21 October 1997, authorising the transfer of the Appellant to the Tribunal's detention unit. On 22 October 1997, the Prosecutor submitted the indictment for confirmation, and on 23 October 1997, Judge Aspegren confirmed the indictment, and issued a Warrant of Arrest and Order for Surrender addressed to the Government of Cameroon. The Appellant was not transferred to the Tribunal's detention unit, however, until 19 November 1997 and his initial appearance did not take place until 23 February 1998.

10. On 24 February 1998, the Appellant filed the Extremely Urgent Motion seeking to have his arrest and detention nullified. The arguments of the parties were heard on 11 September 1998. Trial Chamber II, in its Decision of 17 November 1998, dismissed the Extremely Urgent Motion *in toto*. In rejecting the arguments put forward by the Appellant in the Extremely Urgent Motion, the Trial Chamber made several findings. First, the Trial Chamber held that the Appellant was initially arrested at the behest of Rwanda and Belgium and not at the behest of the Prosecutor. Second, the Trial Chamber found that the period of detention under Rule 40 from 21 February until 3 March 1997 did not violate the Appellant's rights under Rule 40. Third, the Trial Chamber found that the Appellant had failed to show that the Prosecutor had violated the rights of the Appellant with respect to the length of his provisional detention or the delay in transferring the Appellant to the Tribunal's detention unit. Fourth, the Trial Chamber held that Rule 40*bis* does not apply until the actual transfer of the suspect to the Tribunal's detention unit. Fifth, the Trial Chamber concluded that the provisional detention of the Appellant was legally justified. Sixth, the Trial Chamber found that when the Prosecutor opted to proceed against some of the individuals detained with the Appellant, but excluding the Appellant, the Prosecutor was exercising prosecutorial discretion and was not discriminating against the Appellant. Finally, the Trial Chamber held that Rule 40*bis* is valid and does not contradict any provisions of the Statute. On 4 December 1998, the Appellant filed a Notice of Appeal against the Decision and ten days later the Prosecution filed its Response.

11. The Appeals Chamber considered the Appellant's appeal and found that the Decision dismissed an objection based on the lack of personal jurisdiction over the accused and, therefore, an appeal lies as of right under Sub-rule 72(D). Consequently, a Decision and Scheduling Order was issued on 5 February 1999, and the parties submitted additional briefs. Notwithstanding these additional submissions by the parties, however, the Appeals Chamber determined that additional information was required to decide the appeal. Consequently, a Scheduling Order was filed on 3 June 1999, directing the Prosecutor to specifically address the following six questions and provide documentation in support thereof:

1. Whether the Appellant was held in Cameroon for any period between 21 February 1997 and 19 November 1997 at the request of the Tribunal, and if so, what effect did this detention have in relation to personal jurisdiction.

2. Whether the Appellant was held in Cameroon for any period between 23 February 1998

and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction.

3. The reason for any delay between the request for transfer and the actual transfer.

4. The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance.

5. The reason for any delay between the initial appearance of the Appellant and the hearing on the Appellant's urgent motion.

6. The disposition of the *writ of habeas corpus* that the Appellant asserts that he filed on 2 October 1997.

12. The Prosecutor filed her Response to the 3 June 1999 Scheduling Order on 22 June 1999, and the Appellant filed his Reply on 2 July 1999. The submissions of the parties in response to these questions are set forth in section II.C., *infra*.

II. THE APPEAL

A. The Appellant

13. As noted *supra*, the Appellant has submitted numerous documents for consideration with respect to his arrest and detention. The main arguments as advanced by the Appellant are consolidated and briefly summarised below.

14. First, the Appellant asserts that the Trial Chamber erred in constructing a "Chronology of Events" without a proper basis or finding. According to the Appellant, the Trial Chamber further erred in dividing the events into arbitrary categories with the consequence that the Trial Chamber considered the events in a fragmented form. This resulted in a failure to perceive the events in their totality.

15. Second, the Appellant claims that the Trial Chamber erred in holding that the Appellant failed to provide evidence supporting his version of the arrest and detention. Thus, the Appellant contends, it was error for the Trial Chamber to conclude that the Appellant was arrested at the behest of the Rwandan and Belgian governments. Further, because the Trial Chamber found that the Appellant was detained at the behest of the Rwandan and Belgian authorities, the Trial Chamber erroneously held that the Defence had failed to show that the Prosecutor was responsible for the Appellant's being held in custody by the Cameroon authorities from 15 April 1996 until 21 February 1997.

16. Third, the Appellant contends that the Trial Chamber erred in holding that the detention under Rule 40 between 21 February 1997 and 3 March 1997, when the Rule 40*bis* request was approved, does not constitute a violation of the Appellant's rights under Rule 40. Further, the Trial Chamber erred in holding that there is no remedy for a provisionally detained person before the detaining State has transferred him prior to the indictment and warrant for arrest.

17. Fourth, the Appellant argues that the Trial Chamber erred in failing to declare that there was a breach of the Appellant's rights as a result of the Prosecutor's delay in presenting the indictment for confirmation by the Judge. Furthermore, the Appellant contends that the Trial Chamber erred in holding that the Appellant failed to show that the Prosecutor violated his rights due to the length of the detention or delay in transferring the Appellant. Similarly, the Appellant contends that the Trial Chamber erred in holding that the provisional charges and detention of the Appellant were justified under the circumstances.

18. Fifth, with respect to the effect of the detention on the Tribunal's jurisdiction, the Appellant sets forth three arguments. The Appellant's first argument is that the overall length of his detention, which was 22 months, was unreasonable, and therefore, unlawful. Consequently, the Tribunal no longer has personal jurisdiction over the accused. The Appellant next asserts that the pre-transfer detention of the accused was 'very oppressive, torturous and discriminative'. As a result, the Appellant asserts that he is entitled to unconditional release. Finally, the Appellant contends that his detention cannot be justified on the grounds of urgency. In this regard, the length of time the Appellant was provisionally detained without benefit of formal charges amounts to a 'monstrous degree of prosecutorial indiscretion and apathy'.

19. In conclusion, the Appellant requests the Appeals Chamber to quash the Trial Chamber Decision and unconditionally release the Appellant.

B. The Prosecutor

20. In responding to the Appellant's arguments, the Prosecutor relies on three primary counter-arguments, which will be summarised. First, the Prosecutor submits that the Appellant was not in the custody of the Tribunal before his transfer on 19 November 1997, and consequently, no event taking place prior to that date violates the Statute or the Rules. The Prosecutor contends that her request under Rule 40 or Rule 40*bis* for the detention and transfer of the accused has no impact on this conclusion.

21. In support of this argument, the Prosecutor contends that the Appellant was detained on 15 April 1996 at the instance of the Rwandan and Belgian governments. Although the Prosecutor made a request on 17 April 1996 to Cameroon for provisional measures, the Prosecutor asserts that this request was 'only superimposed on the pre-existing request of Rwanda and Belgium' for the detention of the Appellant.

22. The Prosecutor further argues that the Tribunal does not have custody of a person pursuant to Rule 40*bis* until such person has actually been physically transferred to the Tribunal's detention unit. Although an Order pursuant to Rule 40*bis* was filed directing Cameroon to transfer the Appellant on 4 March 1997, the Appellant was not actually transferred until 19 November 1997. Consequently, the responsibility of the Prosecutor for any delay in bringing the Appellant to trial commences only after the Tribunal established custody of the Appellant on 19 November 1997.

23. The Prosecutor argues that custody involves 'care and control' and since the Appellant was not under the 'care and control' of the Tribunal prior to his transfer, the Prosecutor is not responsible for any delay resulting from Cameroon's failure to promptly transfer the Appellant. Furthermore, the Prosecutor asserts that Article 28 of the Statute strikes a delicate balance of distributing obligations between the Tribunal and States. Under this arrangement, 'neither entity is an agent or, *alter ego*, of the other: and the actions of the one may not be imputed on the other just because they were carrying out duties apportioned to them under the Statute'.

24. The Prosecutor acknowledges that although the 'delay in this transfer is indeed long, there is no factual basis to impute the fault of it to the ICTR Prosecutor'. She summarises this line of argument by concluding that since the Appellant was not in the custody of the Tribunal before his transfer to the Tribunal's detention unit on 19 November 1997, it follows that the legality of the detention of the Appellant while in the custody of Cameroon is a matter for the laws of Cameroon, and beyond the competence of the Appeals Chamber.

25. The second principal argument of the Prosecution is that the Prosecutor's failure to request Cameroon to transfer the Appellant on 16 May 1996 does not give the Appellant 'prescriptive claims against the Prosecutor's eventual prosecution'. The thrust of this contention seeks to counter the argument that the Prosecutor is somehow estopped from prosecuting the Appellant as the result of

correspondence between the Prosecutor and both Cameroon and the Appellant himself.

26. The Prosecutor asserts that simply because at a certain stage of the investigation she communicated to the Appellant that she was not proceeding against him, this cannot have the effect of creating statutory or other limitations against prosecution for genocide and other serious violations of international humanitarian law. Moreover, the Prosecutor argues that she cannot be barred from proceeding against an accused simply because she did not proceed with the prosecution at the first available opportunity. Finally, the Prosecutor claims that her 'abstention from proceeding against the Appellant-Defendant before 3 March 1997 was due to on-going investigation'.

27. The third central argument of the Prosecutor is that any violations suffered by the Appellant prior to his transfer to the Tribunal's detention unit have been cured by subsequent proceedings before the Tribunal, presumably the confirmation of the Appellant's indictment and his initial appearance.

28. In conclusion, the Prosecution argues that there is no provision within the Statute that provides for the issuance of the order sought by the Appellant, and, in any event, the remedy sought by the Appellant is not warranted in the circumstances. In the event the Appeals Chamber finds a violation of the Appellant's rights, the Prosecutor suggests that the following remedies would be proper: 1) an Order for the expeditious trial of the Appellant; and/or 2) credit for the period of undue delay as part of the sentence, if the Appellant is found guilty, pursuant to Rule 101(D).

C. **Arguments of the Parties Pursuant to the 3 June 1999 Scheduling Order**

29. With respect to the specific questions addressed to the Prosecutor in the 3 June 1999 Scheduling Order, the parties submitted the following answers.

1. **Whether the Appellant was held in Cameroon for any period between 21 February 1997 and 19 November 1997 at the request of the Tribunal, and if so, what effect did this detention have in relation to personal jurisdiction.**

30. On 21 February 1997, following the Decision of the Cameroon Court of Appeal to release the Appellant, the Prosecutor submitted a Rule 40 Request to detain the Appellant for the benefit of the Tribunal. Further, the Prosecutor submits that following the issuance of the Rule 40*bis* Order on 4 March 1997, Cameroon was obligated, pursuant to Article 28, to implement the Prosecutor's request. However, because the Tribunal did not have custody of the Appellant until his transfer on 19 November 1997, the Prosecutor contends that the Tribunal 'could not regulate the conditions of detention or other matters regarding the confinement of the accused'. Nevertheless, the Prosecutor argues that between 21 February 1997 and 19 November 1997, 'there existed what could be described as joined or concurrent personal jurisdiction over the Appellant, the personal jurisdiction being shared between the Tribunal and Cameroon'.

31. The Appellant contends that Cameroon was holding him at the behest of the Prosecutor during this entire period. Furthermore, the Appellant argues that '[t]he only Cameroonian law applicable to him was the law concerning the extradition'. Consequently, he argues that the issue of concurrent or joint personal jurisdiction by both the Tribunal and Cameroon is 'fallacious, misleading and unacceptable'. In addition, he asserts that, read in conjunction, Articles 19 and 28 of the Statute confer obligations upon the Detaining State only when the appropriate documents are supplied. Since the Warrant of Arrest and Order for Surrender was not signed by Judge Aspegren until 23 October 1997, the Appellant contends that his detention prior to that date was illegal, given that he was being held after 21 February 1997 on the basis of the Prosecutor's Rule 40 request.

2. **Whether the Appellant was held in Cameroon for any period between 23 February 1998 and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction.**

32. The parties are in agreement that the Appellant was transferred to the Tribunal's detention unit on 19 November 1997, and consequently was not held by Cameroon at any period after that date.

3. **The reason for any delay between the request for transfer and the actual transfer.**

33. The Prosecutor fails to give any reason for this delay. Rather, without further comment, the Prosecutor attributes to Cameroon the period of delay between the request for transfer and the actual transfer.

34. The Appellant contends that the Prosecutor 'forgot about the matter and didn't really bother about the actual transfer of the suspect'. He argues that since Cameroon had been holding him pursuant to the Tribunal's Rule 40*bis* Order, Cameroon had no further interest in him, other than to transfer him to the custody of the Tribunal. In support of his contentions in this regard, the Appellant advances several arguments. First, the Prosecutor did not submit the indictment for confirmation before the expiration of the 30-day limit of the provisional detention as requested by Judge Aspegren in the Rule 40*bis* Order. Second, the Appellant asserts that the Prosecutor didn't make any contact with the authorities of Cameroon to provide for the transfer of the Appellant pursuant to the Rule 40*bis* Order. Third, the Prosecutor did not ensure that the Appellant's right to appear promptly before a Judge of the Tribunal was respected. Fourth, following the Rule 40*bis* Order, the Appellant claims, '[t]he Prosecutor didn't make any follow-up and didn't even show any interest'. Fifth, the Appellant contends that the triggering mechanism in prompting his transfer was his filing of a *writ of habeas corpus*. In conclusion, the Appellant rhetorically questions the Prosecutor, 'How can she expect the Cameroonian authorities to be more interested [in his case] than her?' [sic].

4. **The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance.**

35. The Prosecutor contends that the Trial Chamber and the Registry have responsibility for scheduling the initial appearance of accused persons.

36. While the Appellant acknowledges that the Registrar bears some responsibility for the delay, he argues that the Prosecutor 'plays a big role in initiating of hearings' and plays a 'key part in the process'. The Appellant contends that the Prosecutor took no action to bring him before the Trial Chamber as quickly as possible. On the contrary, the Appellant asserts that the Prosecutor delayed seeking confirmation of the indictment and 'caused the removal of the Defence's motion for Habeas Corpus from the hearing list on 31 October 1997 thus delaying further the appearance of the suspect before the Judges'.

5. **The reason for any delay between the initial appearance of the Appellant and the hearing on the Appellant's urgent motion.**

37. With respect to the delay between the initial appearance and the hearing on the Urgent Motion, the Prosecutor again disclaims any responsibility for scheduling matters, arguing that the Registry, in consultation with the Trial Chambers, maintains the docket. The hearing on the Urgent Motion was originally docketed for 14 May 1998. However, on 12 May 1998, Counsel for the Appellant informed the Registry that he was not able to appear and defend his client at that time, because he had not been assigned co-counsel as he had requested and because the Tribunal had not paid his fees. Consequently, the hearing was re-scheduled for 11 September 1998.

6. **The disposition of the *writ of habeas corpus* that the Appellant asserts that he filed on 2 October 1997.**

38. With respect to the disposition of the *writ of habeas corpus* filed by the Appellant on 2 October 1997, the Prosecutor replied as follows:

24. The Prosecutor respectfully submits that following the filing of the *habeas corpus* on 2 October 1997 the President wrote the Appellant by letter of 8 October 1997, informing him that the Office of the Prosecutor had informed him that an indictment would be ready shortly.

25. The Prosecutor is not aware of any other disposition of the *writ of habeas corpus*.

39. In fact, the letter referred to was written on 8 *September* 1997—prior to the filing of the *writ of habeas corpus*—and the Appellant contends that it was precisely this letter which prompted him to file the *writ of habeas corpus*. Moreover, the Appellant asserts that he was informed that the hearing on the *writ of habeas corpus* was to be held on 31 October 1997. However, directly contradicting the claim of the Prosecutor, the Appellant asserts that 'the Registry without the consent of the Defence removed the hearing of the motion from the calendar only because the Prosecution promised to issue the indictment soon'. Moreover, the Appellant claims that the indictment was filed and confirmed on 22 October 1997 and 23 October 1997, respectively, in order to pre-empt the hearing on the *writ of habeas corpus*. The Appellant is of the view that the *writ of habeas corpus* is still pending, since the Trial Chamber has not heard it, notwithstanding the fact that it was filed on 29 September 1997.

III. APPLICABLE AND AUTHORITATIVE PROVISIONS

40. The relevant parts of the applicable Articles of the Statute, Rules of the Tribunal and international human rights treaties are set forth below for ease of reference. The Report of the U.N. Secretary-General establishes the sources of law for the Tribunal. The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.

A. The Statute

Article 8

Concurrent Jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 17

Investigation and Preparation of Indictment

1. [...]

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may,

as appropriate, seek the assistance of the State authorities concerned.

3. [...]

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an Indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the present Statute. The Indictment shall be transmitted to a Judge of the Trial Chamber.

Article 20

Rights of the accused

1. [...]
2. [...]
3. [...]
4. In the determination of any charge against the accused pursuant to the present statute, the accused shall be entitled to the following minimum guarantees, in full equality:
   a. To be informed promptly and in detail in a language in which he or she understands of the nature and cause of the charge against him or her;
   b. [...]
   c. To be tried without undue delay;
   d. [...]
   e. [...]
   f. [...]
   g. [...]

Article 24

Appellate Proceedings

1. [...]

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 28

Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

   a. The identification and location of persons;
   b. [...]
   c. [...]
   d. The arrest or detention of persons;
   e. The surrender or transfer of the accused to the International Tribunal for Rwanda.

B. The Rules

Rule 2
Definitions

[...]

Accused: A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47.

[...]

Suspect: A person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction.

[...]

Rule 40

Provisional Measures

(A) In case of urgency, the Prosecutor may request any State:

i. to arrest a suspect and place him in custody;
ii. to seize all physical evidence;
iii. to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

The state concerned shall comply forthwith, in accordance with Article 28 of the Statute.

(B) Upon showing that a major impediment does not allow the State to keep the suspect in custody or to take all necessary measures to prevent his escape, the Prosecutor may apply to a Judge designated by the President for an order to transfer the suspect to the seat of the Tribunal or to such other place as the Bureau may decide, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the State authorities concerned, the authorities of the host Country of the Tribunal and the Registrar.

(C) In the cases referred to in paragraph B, the suspect shall, from the moment of his transfer, enjoy all the rights provided for in Rule 42, and may apply for review to a Trial Chamber of the Tribunal. The Chamber, after hearing the Prosecutor, shall rule upon the application.

(D) The suspect shall be released if (i) the Chamber so rules, or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer.

Rule 40*bis*

Transfer and Provisional Detention of Suspects

(A) In the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal. This request shall indicate the grounds upon which the request is made and, unless the Prosecutor wishes only to question the suspect, shall include a provisional charge and a summary of the material upon which the Prosecutor relies.

(B) The Judge shall order the transfer and provisional detention of the suspect if the following

conditions are met:

(i) the Prosecutor has requested a State to arrest the suspect and to place him in custody, in accordance with Rule 40, or the suspect is otherwise detained by a State;

(ii) after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and

(iii) the Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.

(C) The provisional detention of the suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal.

(D) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the request made by the Prosecutor under Sub-Rule (A), including the provisional charge, and shall state the Judge's grounds for making the order, having regard to Sub-Rule (B). The order shall also specify the initial time limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43.

(E) As soon as possible, copies of the order and of the request by the Prosecutor are served upon the suspect and his counsel by the Registrar.

(F) At the end of the period of detention, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by the needs of the investigation, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the provisional detention for a period not exceeding 30 days.

(G) At the end of that extension, at the Prosecutor's request indicating the grounds upon which it is made and if warranted by special circumstances, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing, to extend the detention for a further period not exceeding 30 days.

(H) The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made.

(I) The provisions in Rules 55(B) to 59 shall apply *mutatis mutandis* to the execution of the order for the transfer and provisional detention of the suspect.

(J) After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the initial order, or another Judge of the same Trial Chamber, who shall ensure that his rights are respected.

(K) During detention, the Prosecutor, the suspect or his counsel may submit to the Trial Chamber of which the Judge who made the initial order is a member, all applications relative to the propriety of provisional detention or to the suspect's release.

(L) Without prejudice to Sub-Rules (C) to (H), the Rules relating to the detention on remand of

accused persons shall apply *mutatis mutandis* to the provisional detention of persons under this Rule.

Rule 58

National Extradition Provisions

The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

Rule 62

Initial Appearance of Accused

Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber without delay, and shall be formally charged. The Trial Chamber shall:

(i) satisfy itself that the right of the accused to counsel is respected

(ii) read or have the indictment read to the accused in a language he speaks and understands, and satisfy itself that the accused understands the indictment;

(iii) call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;

(iv) in case of a plea of not guilty, instruct the Registrar to set a date for trial.

Rule 72

Preliminary Motions

A. Preliminary motions by either party shall be brought within sixty days following disclosure by the Prosecutor to the Defence of all material envisaged by Rule 66(A)(I), and in any case before the hearing on the merits.

B. Preliminary motions by the accused are:

i. objections based on lack of jurisdiction;
ii. [...]
iii. [...]
iv. [...]

C. The Trial Chamber shall dispose of preliminary motions *in limine litis*.

D. Decisions on preliminary motions are without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as of right.

E. Notice of Appeal envisaged in Sub-Rule (D) shall be filed within seven days from the impugned decision.

F. Failure to comply with the time-limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.

C. International Covenant on Civil and Political Rights

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 14

1. [...]

2. [...]
3. In the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality:
    a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
    b. [...]
    c. [...]
    d. [...]
    e. [...]
    f. [...]
    g. [...]
4. [...]
5. [...]
6. [...]
7. [...]

D. European Convention on Human Rights

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

    a. [...]

    b. [...]

    c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence

or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d. [...]

e. [...]

f. the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 6

1. [...]

2. [...]

3. Everyone charged with a criminal offence has the following minimum rights:

   a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b. [...]
   c. [...]
   d. [...]
   e. [...]

E. **American Convention on Human Rights**

Article 7

1. [...]
2. [...]
3. No one shall be subject to arbitrary arrest or detention.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before judge or other law officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In states Parties whose law provides that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. [...]

Article 8

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

   a. [...]
   b. prior notification in detail to the accused of the charges against him;
   c. [...]
   d. [...]
   e. [...]
   f. [...]
   g. [...]
   h. [...]

3. [...]

4. [...]

5. [...]

IV. DISCUSSION

A. Were the rights of the Appellant violated?

1. Status of the Appellant

41. Before discussing the alleged violations of the Appellant's rights, it is important to establish his status following his arrest and during his provisional detention. Rule 2 sets forth definitions of certain terms used in the Rules. The indictment against the Appellant was not confirmed until 23 October 1997. Pursuant to the definitions of 'accused' and 'suspect' set forth in Rule 2, the Appeals Chamber finds that the Appellant was a 'suspect' from his arrest on 15 April 1996 until the indictment was confirmed on 23 October 1997. After 23 October 1997, the Appellant's status changed and he became an 'accused'.

2. The right to be promptly charged under Rule 40*bis*

42. Unlike national systems, which have police forces to effectuate the arrest of suspects, the Tribunal lacks any such enforcement agency. Consequently, in the absence of the suspect's

voluntary surrender, the Tribunal must rely on the international community for the arrest and provisional detention of suspects. The Statute and Rules of the Tribunal establish a system whereby States may provisionally detain suspects at the behest of the Tribunal pending transfer to the Tribunal's detention unit.

43. In the present case, there are two relevant periods of time under which Cameroon was clearly holding the Appellant at the behest of the Tribunal. Cameroon arrested the Appellant pursuant to the Rwandan and Belgian extradition requests on 15 April 1996. Two days later, the Prosecutor made her first Rule 40 request for provisional detention of the Appellant. On 6 May 1996, the nineteenth day of the Appellant's provisional detention pursuant to Rule 40, the Prosecutor requested the Cameroon authorities to extend the Appellant's detention for an additional three weeks. On 16 May 1996, however, the Prosecutor informed Cameroon that she was no longer interested in pursuing a case against the Appellant at 'that stage'. Thus, the first period runs from 17 April 1996 until 16 May 1996—a period of 29 days, or nine days longer than allowed under Rule 40. This first period will be discussed, *infra*, at sub-section IV.B.2.

44. The second period during which Cameroon detained the Appellant for the Tribunal commenced on 4 March 1997 and continued until the Appellant's transfer to the Tribunal's detention unit on 19 November 1997. On 21 February 1997, the Cameroon Court rejected Rwanda's extradition request and ordered the release of the Appellant. However, on the same day, while the Appellant was still in custody, the Prosecutor again made a request pursuant to Rule 40 for the provisional detention of the Appellant. This request was followed by the Rule 40*bis* request, which resulted in the Rule 40*bis* Order of Judge Aspegren dated 3 March 1997, and filed on 4 March 1997. This Order comprised, *inter alia*, four components. First, it ordered the transfer of the Appellant to the Tribunal's detention unit. Second, it ordered the provisional detention in the Tribunal's detention unit of the Appellant for a maximum period of thirty days. Third, it requested the Cameroon authorities to comply with the transfer order and to maintain the Appellant in custody until the actual transfer. Fourth, it requested the Prosecutor to submit the indictment against the Appellant prior to the expiration of the 30-day provisional detention.

45. However, notwithstanding the 4 March 1997 Rule 40*bis* Order, the record reflects that the Tribunal took no further action until 22 October 1997. On that day, the Deputy Prosecutor, Mr. Bernard Muna (who had spent much of his professional career working in the Cameroon legal community prior to joining the Office of the Prosecutor) submitted the indictment against the Appellant for confirmation. Judge Aspegren confirmed the indictment against the Appellant the next day and simultaneously issued a Warrant of Arrest and Order for Surrender addressed to the Government of Cameroon on 23 October 1997. However, the Appellant was not transferred to the Tribunal's detention unit until 19 November 1997. Thus, Cameroon held the Appellant at the behest of the Tribunal from 4 March 1997 until his transfer on 19 November 1997. At the time the indictment was confirmed, the Appellant had been in custody for 233 days, more than 7 months, from the date the Rule 40*bis* Order was filed.

46. It is important that Rule 40 and Rule 40*bis* be read together. It is equally important in interpreting these provisions that the Appeals Chamber follow the principle of 'effective interpretation', a well-established principle under international law. Interpreting Rule 40 and Rule 40*bis* together, we conclude that both Rules must be read restrictively. Rule 40 permits the Prosecutor to request any State, in the event of urgency, to arrest a suspect and place him in custody. The purpose of Rule 40*bis* is to restrict the length of time a suspect may be detained without being indicted. We cannot accept that the Prosecutor, acting alone under Rule 40, has an unlimited power to keep a suspect under provisional detention in a State, when Rule 40*bis* places time limits on such detention if the suspect is detained at the Tribunal's detention unit. Rather, the principle of effective interpretation mandates that these Rules be read together and that they be restrictively interpreted.

47. Although both Rule 40 and Rule 40*bis* apply to the provisional detention of suspects, there are

important differences between the two Rules. For example, the time limits under which the Prosecutor must issue an indictment vary depending upon which Rule forms the basis of the provisional detention. Pursuant to Rule 40(D)(ii), the suspect must be released if the Prosecutor fails to issue an indictment within 20 days of the transfer of the suspect to the Tribunal's detention unit, while Rule 40*bis*(H) allows the Prosecutor 90 days to issue an indictment. However, the remedy for failure to issue the indictment in the proscribed period of time is the same under both Rules: *release of the suspect.*

48. The Prosecutor may apply for Rule 40*bis* measures 'in the conduct of an investigation'. Rule 40*bis* applies only if the Prosecutor has previously requested provisional measures pursuant to Rule 40 or if the suspect is otherwise already being detained by the State to whom the Rule 40*bis* request is made. The Rule 40*bis* request, which is made to a Judge assigned pursuant to Rule 28, must include a provisional charge and a summary of the material upon which the Prosecutor relies.

49. The Judge must make two findings before a Rule 40*bis* order is issued. First, there must be a reliable and consistent body of material that tends to show that the suspect may have committed an offence within the Tribunal's jurisdiction. Second, the Judge must find that provisional detention is a necessary measure to 'prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation'.

50. Pursuant to Rule 40*bis*(C), the provisional detention of the suspect may be ordered for an initial period of thirty days. This initial thirty-day period begins to run from the 'day after the transfer of the suspect to the detention unit of the Tribunal'. Two additional thirty-day period extensions are permissible. At the end of the first thirty-day period, the Prosecutor must show that an extension is warranted by the needs of the investigation in order to have the provisional detention extended. At the end of the second thirty-day period, the Prosecutor must demonstrate that special circumstances warrant the continued provisional detention of the suspect for the final thirty-day period to be granted. In no event shall the total period of provisional detention of a suspect exceed ninety days. At the end of this cumulative ninety-day period, the suspect must be released if the indictment has not been confirmed and an arrest warrant signed.

51. The Statute and Rules of the Tribunal envision a system whereby the suspect is provided a copy of the Prosecutor's request, including provisional charges, in conjunction with the Rule 40*bis* Order. He is also served a copy of the confirmed indictment with the Warrant of Arrest, and pursuant to Rule 62(ii) he is to be orally informed of the charges against him at the initial appearance. In the present case, 6 days elapsed between the filing of the Rule *40bis* Order on 4 March 1997 and the date on which the Appellant apparently was shown a copy of the Rule 40*bis* Order. Additionally, 27 days elapsed between the confirmation of the indictment against the Appellant on 23 October 1998 and the service of a copy of the indictment upon the Appellant on 19 November 1998.

52. The Trial Chamber found that the Appellant was initially arrested at the behest of Rwanda and Belgium, a point the Prosecutor reiterates in this appeal, contending that the Prosecutor's request was merely 'superimposed' on the existing requests of those States. However, the Prosecutor fails to acknowledge that on 16 May 1996, she requested a three-week extension of the provisional detention of the Appellant. The Appeals Chamber finds the Appellant was detained at the request of the Prosecutor from 17 April 1996 through 16 May 1996. This detention—for 29 days—violated the 20-day limitation in Rule 40.

53. The Prosecutor also successfully argued before the Trial Chamber that Rule 40*bis* is inapplicable, since its operative provisions do not apply until after the transfer of the suspect to the Tribunal's detention unit. It is clear, however, that the purpose of Rule 40 and Rule 40*bis* is to limit the time that a suspect may be provisionally detained without the issuance of an indictment. This comports with international human rights standards. Moreover, if the time limits set forth in Rule 40(D) and

Rule 40*bis*(H) are not complied with, those rules mandate that the suspect must be released.

54. Although the Appellant was not physically transferred to the Tribunal's detention unit until 19 November 1997, he had been detained since 21 February 1997 solely at the behest of the Prosecutor. The Appeals Chamber considers that if the Appellant were in the constructive custody of the Tribunal after the Rule *40bis* Order was filed on 4 March 1997, the provisions of that Rule would apply. In order to determine if the period of time that the Appellant spent in Cameroon at the behest of the Tribunal is attributable to the Tribunal for purposes of Rule 40*bis*, it is necessary to analyse the relationship between Cameroon and the Tribunal with respect to the detention of the Appellant. In fact, the Prosecutor has acknowledged that between 21 February 1997 and 19 November 1997, 'there existed what could be described as joined or concurrent personal jurisdiction over the Appellant, the personal jurisdiction being shared between the Tribunal and Cameroon'.

55. The Tribunal issued a valid request pursuant to Rule 40 for provisional detention, and shortly thereafter, pursuant to Rule 40*bis*, for the transfer of the Appellant. These requests were honoured by Cameroon, and *but for* those requests, the Appellant would have been released on 21 February 1997, when the Cameroon Court of Appeal denied the Rwandan extradition request and ordered the immediate release of the Appellant.

56. Thus, the Appellant's situation is analogous to the 'detainer' process, whereby a special type of warrant (known as a 'detainer' or 'hold order') is filed against a person *already in custody* to ensure that he will be available to the demanding authority upon completion of the present term of confinement. A 'detainer' is a device whereby the requesting State can obtain the custody of the detainee upon his release from the detaining State. The U.S. Supreme Court has stated that, '[I]n such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State...'. Moreover, that court has held that since the detaining state acts as an agent for the demanding state pursuant to the detainer, the petitioner is in custody for purposes of filing a *writ of habeas corpus* pursuant to U.S. law. Thus, the court reached the conclusion that the accused is in the constructive custody of the requesting State and that the detaining State acts as agent for the requesting state for purposes of *habeas corpus* challenges. In the present case, the relationship between the Tribunal and Cameroon is even stronger, on the basis of the international obligations imposed on States by the Security Council under Article 28 of the Statute.

57. Other cases have held that a defendant sentenced to concurrent terms in separate jurisdictions is in the constructive custody of the second jurisdiction after the first jurisdiction has imposed sentence on him. For example, In the Matter of Eric Grier, Peritioner v. Walter J. Flood, as Warden of the Nassau County Jail, Respondent, the court concluded that '*constructive custody attached before any sentence was imposed*. In Ex p. Hampton M. Newell, the court ruled that although the petitioner was in the physical custody of the federal authorities, he was in the constructive custody of the State of Texas on the basis of a detainer that Texas had filed against him.

58. The Prosecutor relies, in part, on a definition of custody ('care and control') from an oft-cited law dictionary. However, this same law dictionary also defines custody as 'the detainer of a man's person by virtue of lawful process or authority'. Thus, even using the Prosecutor's authority, custody can be taken to mean the detention of an individual pursuant to lawful authority even in the absence of physical control. It would follow, therefore, that notwithstanding a lack of physical control, the Appellant *was* in the Tribunal's custody *if* he were being detained pursuant to 'lawful process or authority' of the Tribunal. Or, as a Singapore court noted in Re Onkar Shrian, '[T]hat the person bailed is in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if he were in the actual custody of the proper gaoler'.

59. The Prosecutor has also relied on In the Matter of Surrender of Elizaphan Ntakirutimana in support of the proposition that under international law, an order by the Tribunal for the transfer of an individual does not give the Tribunal custody over such a person until the physical transfer has taken

place. Reliance on this case is misguided in two respects. First, the U.S. Fifth Circuit Court of Appeals recently upheld a District Court ruling that reversed the Decision of the Magistrate that Ntakirutimana could not be extradited. Second, notwithstanding the reversal, Ntakirutimana had challenged the transfer process and is thus clearly distinguishable from the facts in the present case. There is no evidence here that either the Appellant sought to challenge his transfer to the Tribunal, or that Cameroon was unwilling to transfer him. On the contrary, the Deputy Prosecutor of the Cameroon Centre Province Court of Appeal, appearing at the Rwandan extradition hearing on 31 May 1996, argued that the Tribunal had primacy and, thus, convinced that Court to defer to the Tribunal. Moreover, as noted above, the President of Cameroon signed a decree order to transfer the Appellant prior to the signing of the Warrant of Arrest and Order for Surrender by Judge Aspegren on 23 October 1997. These facts indicate that Cameroon was willing to transfer the Appellant.

60. The co-operation of Cameroon is consistent with its obligation to the Tribunal. The Statute and Rules mandate that States must comply with a request of the Tribunal for the surrender or transfer of the accused to the Tribunal. This obligation on Member States of the United Nations is mandatory, since the Tribunal was established pursuant to Chapter VII of the Charter of the United Nations.

61. Thus, the Appeals Chamber finds that, under the facts of this case, Cameroon was holding the Appellant in constructive custody for the Tribunal by virtue of the Tribunal's lawful process or authority. In the present case, the Prosecutor specifically requested Cameroon to detain and transfer the Appellant. The Statute of the Tribunal obligated Cameroon to detain the Appellant for the benefit of the Prosecutor. The Prosecutor has admitted that it had personal jurisdiction over the Appellant after the Rule 40*bis* Order was issued. That Order also asserts personal and subject matter jurisdiction. This finding does not mean, however, that the Tribunal was responsible for each and every aspect of the Appellant's detention, but only for the decision to place and maintain the Appellant in custody. However, as will be discussed below, this limitation imposed on the Tribunal is consistent with international law. Even if the appellant was not in the constructive custody of the Tribunal, the principles governing the provisional detention of suspects should apply.

62. The Appeals Chamber recognises that international standards view provisional (or pre-trial) detention as an exception, rather than the rule. However, in light of the gravity of the charges faced by accused persons before the Tribunal, provisional detention is often warranted, so long as the provisions of Rule 40 and Rule 40*bis* are adhered to. The issue, therefore, is whether the length of time the Appellant spent in provisional detention, prior to the confirmation of his indictment, violates established international legal norms for provisional detention of suspects.

63. It is well-established under international human rights law that pre-trial detention of suspects is lawful, as long as such pre-trial detention does not extend beyond a reasonable period of time. The U.N. Human Rights Committee, in interpreting Article 9(2) of the ICCPR, has developed considerable jurisprudence with respect to the permissible length of time that a suspect may be detained without being charged. For example, in Glenford Campbell v. Jamaica, the suspect was detained for 45 days without being formally charged. In holding this delay to be a violation of ICCPR Article 9(2), the Committee stated the following:

> [T]he Committee finds that the author was not "promptly" informed of the charges against him: one of the most important reasons for the requirement of "prompt" information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority. A delay from 12 December 1984 to 26 January 1985 does not meet the requirement of article 9, paragraph 2.

64. Similar findings have been made in other cases involving alleged violations of ICCPR Article 9 (2). For example, in Moriana Hernández Valentini de Bazzano, a period of eight months between the commencement of detention and filing of formal charges was held to violate ICCPR Article 9(2). In Monja Jaona, a period of eight months under which the suspect was placed under house arrest

without being formally charged was found to be a violation of ICCPR Article 9(2). In Alba Pietraroia, the petitioner was detained for seven months without being formally charged and the Committee held that this detention violated ICCPR Article 9(2). Finally, in Leopoldo Buffo Carballal, a delay of one year between arrest and formal filing of charges was held to be a violation of ICCPR Article 9(2).

65. The Appeals Chamber also notes that the delay in indicting the Appellant apparently caused concern for President Kama. In a letter sent to the Appellant's Counsel on 8 September 1997, President Kama:

> I have already reminded the Prosecutor of the need to establish as soon as possible an indictment against Mr. Jean Bosco Barayagwiza, if she still intends to prosecute him. Only recently, Mr. Bernard Muna, the Deputy Prosecutor, reassured me that an indictment against Mr. Jean Bosco Barayagwiza should soon be submitted to a Judge for review.

However, even at that point the 90-day period had expired.

66. Additionally, the Trial Chamber, in its Decision dismissing the Extremely Urgent Motion, stated, 'It is regrettable that the Prosecution did not submit an indictment until 22 October 1997'. Moreover, even the Prosecutor acknowledged that the delay in indicting the Appellant was not justified. During the oral argument on the Appellant's Extremely Urgent Motion on 11 September 1998, Mr. James Stewart, appearing for the Prosecutor, acknowledged that the Appellant could or should have been indicted earlier:

> Now, I will say this, and I have to be frank with you, the president of this tribunal – and this is reflected in one of the letters that was sent to the accused –was anxious for the prosecutor to produce an indictment, if we were going to indict this man, and it may have been that *the indictment was, was not produced as early as it could have been or should have been*...

67. In conclusion, we hold that the length of time that the Appellant was detained in Cameroon at the behest of the Tribunal without being indicted violates Rule 40*bis* and established human rights jurisprudence governing detention of suspects. The delay in indicting the Appellant violated the 90-day rule as set forth in Rule 40*bis*. In the present appeal, Judge Aspregren issued the Rule 40*bis* Order with the proviso that the indictment be presented for confirmation within 30 days (the Rule permits for two 30-day extensions). In doing so, he invoked Sub-rule 40*bis*, thereby making an assertion of jurisdiction over the Appellant. The Prosecutor agrees that there was 'joined or concurrent jurisdiction' over the Appellant. Sub-rule 40*bis*(H) provides explicitly that the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made if the indictment is not issued within 90 days. This limitation on the detention of suspects is consistent with established human rights jurisprudence.

3. The delay between the transfer of the Appellant and his initial appearance

68. In the present case, the Appellant was transferred to the Tribunal on 19 November 1997. However, his initial appearance was not held until 23 February 1998—some 96 days *after* his transfer. At the outset of this analysis the Appeals Chamber rejects the Prosecutor's contention that a 31-day holiday recess, between 15 December 1997 and 15 January 1998, could somehow justify this delay. The Appellant should have had his initial appearance well before the holiday recess even commenced and did not have it until over one month after the end of the recess.

69. The issue, therefore, is whether the 96-day period between the Appellant's transfer and initial appearance violates the statutory requirement that the initial appearance is held without delay. There is no evidence that the Appellant was afforded an opportunity to appear before an independent Judge

during the period of the provisional detention and the Appellant contends that he was denied this opportunity. Consequently, it is even more important for the protection of his rights that his initial appearance was held without delay.

70. Rule 62, which is predicated on Articles 19 and 20 of the statute, provides that an accused shall be brought before the assigned Trial Chamber and formally charged *without delay* upon his transfer to the seat of the Tribunal. In determining if the length of time between the Appellant's transfer and his initial appearance was unduly lengthy, we note that the right of the accused to be promptly brought before a judicial authority and formally charged ensures that the accused will have the opportunity to mount an effective defence. The international instruments have not established specific time limits for the initial appearance of detainees, relying rather on a requirement that a person should 'be brought promptly before a Judge' following arrest. The U.N. Human Rights Committee has interpreted 'promptly' within the context of 'more precise' standards found in the criminal procedure codes of most States. Such delays must not, however, exceed a few days. Thus, in Kelly v. Jamaica, the U.N. Human Rights Committee held that a detention of five weeks before being brought before a Judge violated Article 9(3).

71. Based on the plain meaning of the phrase, 'without delay', the Appeals Chamber finds that a 96-day delay between the transfer of the Appellant to the Tribunal's detention unit and his initial appearance to be a violation of his fundamental rights as expressed by Articles 19 and 20, internationally-recognised human rights standards and Rule 62. Moreover, we find that the Appellant's right to be promptly indicted under Rule 40*bis* to have been violated. Although we find that these violations do not result in the Tribunal losing jurisdiction over the Appellant, we nevertheless reaffirm that the issues raised by the Appellant certainly fall within the ambit of Rule 72.

72. In the Tadić Interlocutory Appeal Decision, the Appeals Chamber set forth several policy arguments for why a liberal approach to admitting interlocutory appeals is warranted. The Appeals Chamber there stated:

> Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal? Indeed—this is by no means conclusive, but interesting nevertheless: *were not those questions to be dealt with in limine litis, they could obviously be raised on an appeal on the merits. Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial.* After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of the Appellant's interlocutory appeal is indisputable.

We find that the challenge to jurisdiction raised by the Appellant is consistent with the logic underlying the decision reached in the Tadić case. Given that the Appeals Chamber is of the opinion that to proceed with the trial of the Appellant would amount to an act of injustice, we see no purpose in denying the Appellant's appeal, forcing him to undergo a lengthy and costly trial, only to have him raise, once again the very issues currently pending before this Chamber. Moreover, in the event the Appellant was to be acquitted after trial we can foresee no effective remedy for the violation of his rights. Therefore, on the basis of these findings, the Appeals Chamber will decline to exercise jurisdiction over the Appellant, on the basis of the abuse of process doctrine, as discussed in the following Sub-section.

B. The Abuse of Process Doctrine

1. In general

73. The Appeals Chamber now considers, in light of the abuse of process doctrine, the Appellant's allegations concerning three additional issues: 1) the right to be promptly informed of the charges during the first period of detention; 2) the alleged failure of the Trial Chamber to resolve the *writ of habeas corpus* filed by the Appellant; and 3) the Appellant's assertions that the Prosecutor did not diligently prosecute her case against him. These assertions will be considered. Before addressing these issues, however, several points need to be emphasised in the context of the following analysis. First and foremost, this analysis focuses on the alleged violations of the Appellant's rights and is not primarily concerned with the entity responsible for the alleged violation(s). As will be discussed, it is clear that there are overlapping areas of responsibility between the three organs of the Tribunal and as a result, it is conceivable that more than one organ could be responsible for the violations of the Appellant's rights. However, even if fault is shared between the three organs of the Tribunal—or is the result of the actions of a third party, such as Cameroon—it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights. Second, we stress that the circumstances set forth in this analysis must be read as a whole. Third, none of the findings made in this sub-section of the Decision, in isolation, are necessarily dispositive of this issue. That is, it is the combination of these factors—and not any single finding herein—that lead us to the conclusion we reach in this sub-section. In other words, the application of the abuse of process doctrine is case-specific and limited to the egregious circumstances presented by this case. Fourth, because the Prosecutor initiates the proceedings of the Tribunal, her special responsibility in prosecuting cases will be examined in sub-section 4, *infra*.

74. Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process. The House of Lords summarised the abuse of process doctrine as follows:

> [P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.

It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.

75. The application of this doctrine has resulted in dismissal of charges with prejudice in a number of cases, particularly where the court finds that to proceed on the charges in light of egregious violations of the accused's rights would cause serious harm to the integrity of the judicial process. One of the leading cases in which the doctrine of abuse of process was applied is R. v. Horseferry Road Magistrates' Court *ex parte* Bennett. In that case, the House of Lords stayed the prosecution and ordered the release of the accused, stating that:

> [A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) *because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.*

The abuse of doctrine has been applied in several cases. For example, in Bell v. DPP of Jamaica, the Privy Council held that under the abuse of process doctrine courts have an inherent power to decline to adjudicate a case which would be oppressive as the result of unreasonable delay. In making this determination, the court set forth four guidelines for determining whether a delay would deprive the accused of a fair trial:

1. the length of the delay;

2. the prosecution's reasons to justify the delay;

3. the accused's efforts to assert his rights; and

4. the prejudice caused to the accused.

Regarding the issue of prejudice, in R. v. Oxford City Justices, *ex parte* Smith (D.K.B.), the court applied the abuse of process doctrine in dismissing a case on the grounds that a two-year delay between the commission of the offence and the issuing of a summons was unconscionable, stating:

> In the present case it seems to me that the delay which I have described was not only quite unjustified and quite unnecessary due to inefficiency, but it was a delay of such length that it could rightly be said to be unconscionable. That is by no means the end of the matter. It seems to me also that the delay here was of such a length that it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case.

In R. v. Hartley, the Wellington Court of Appeal relied on the abuse of process doctrine in quashing a conviction that rested on an unlawful arrest and the illegally obtained confession that followed.

76. Closely related to the abuse of process doctrine is the notion of supervisory powers. It is generally recognised that courts have supervisory powers that may be utilised in the interests of justice, regardless of a specific violation. The U.S. Supreme Court has stated that courts have a 'duty of establishing and maintaining civilized standards of procedure and evidence' as an inherent function of the court's role in supervising the judicial system and process. As Judge Noonan of the U.S. Ninth Circuit Court of Appeals has stated:

> This court has inherent supervisory powers to dismiss prosecutions in order to deter illegal conduct. The "illegality" deterred by exercise of our supervisory power need not be related to a constitutional or statutory violation.

The use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process.

77. As noted above, the abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct. Considering the lengthy delay in the Appellant's case, 'it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case'. The following discussion, therefore, focuses on whether it would offend the Tribunal's sense of justice to proceed to the trial of the accused.

2. The right to be promptly informed of the charges during the first period of detention

78. In the present case, the Appellant makes several assertions regarding the precise date he was informed of the charges. However, using the earliest date, we conclude that the Appellant was

informed of the charges on 10 March 1997 when the Cameroon Deputy Prosecutor showed him a copy of the Rule 40*bis* Order. This was approximately 11 months after he was initially detained pursuant to the *first* Rule 40 request.

79. Rule 40*bis* requires the detaining State to promptly inform the *suspect* of the charges under which he is arrested and detained. Thus, the issue is when does the right to be promptly informed of the charges attach to suspects before the Tribunal. Existing international norms guarantee such a right, and suspects held at the behest of the Tribunal pursuant to Rule 40*bis* are entitled, at a bare minimum, to the protections afforded under these international instruments, as well as under the rule itself. Consequently, we turn our analysis to these international standards.

80. International standards require that a suspect who is arrested be informed promptly of the reasons for his arrest and the charges against him. The right to be promptly informed of the charges serves two functions. First, it counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect. In this respect, the suspect needs to be promptly informed of the charges against him in order to challenge his detention, particularly in situations where the prosecuting authority is relying on the serious nature of the charges in arguing for the continued detention of the suspect. Second, the right to be promptly informed gives the suspect the information he requires in order to prepare his defence. The focus of the analysis in this Sub-section is on the first of these two functions. At the outset of this analysis, it is important to stress that there are two distinct periods when the right to be informed of the charges are applicable. The first period is when the suspect is initially arrested and detained. The second period is at the initial appearance of the accused after the indictment has been confirmed and the accused is in the Tribunal's custody. For purposes of the discussion in this Sub-section, only the first period is relevant.

81. The requirement that a suspect be promptly informed of the charges against him following arrest provides the 'elementary safeguard that any person arrested should know why he is deprived of his liberty'. The right to be promptly informed at this preliminary stage is also important because it affords the arrested suspect the opportunity to deny the offence and obtain his release prior to the initiation of trial proceedings.

82. International human rights jurisprudence has developed norms to ensure that this right is respected. For example, the suspect must be notified 'in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, as he sees fit, to apply to a court to challenge its lawfulness...'. However, there is no requirement that the suspect be informed in any particular way. Thus, at this initial stage, there is no requirement that the suspect be given a copy of the arrest warrant or any other document setting forth the charges against him; in fact, there is no requirement at this stage that the suspect be notified in writing at all, so long as the suspect is informed promptly.

83. The European Court of Human Rights has held that the required information need not be given in its entirety by the arresting officer at the 'moment of the arrest', provided that the suspect is informed of the legal grounds of his arrest within a sufficient time after the arrest. Moreover, the information may be divulged to the suspect in stages, as long as the required information is provided promptly. Whether this requirement is complied with requires a factual determination and is, therefore, case-specific. Consequently, we will briefly survey the jurisprudence of the Human Rights Committee and the European Court of Human Rights in interpreting the promptness requirement of Article 9(2) of the ICCPR, Article 5(2) of the ECHR and Article 7 of the ACHR.

84. As pointed out above, the Human Rights Committee held in Glenford Campbell v. Jamaica, that detention without the benefit of being informed of the charges for 45 days constituted a violation of Article 9(2) of the ICCPR. Under the jurisprudence of the European Court of Human Rights, intervals of up to 24 hours between the arrest and providing the information as required pursuant to ECHR Article 5(2) have been held to be lawful. However, a delay of ten days between the arrest and

informing the suspect of the charges has been held to run afoul of Article 5(2).

85. In the present case, the Appellant was detained for a total period of 11 months before he was informed of the general nature of the charges that the Prosecutor was pursuing against him. While we acknowledge that only 35 days out of the 11-month total are clearly attributable to the Tribunal (the periods from 17 April—16 May 1996 and 4—10 March 1997), the fact remains that the Appellant spent an inordinate amount of time in provisional detention without knowledge of the general nature of the charges against him. At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal—and not any other entity—that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated.

86. As noted above, in Bell v. DPP of Jamaica, the abuse of process doctrine was applied where unreasonable delay would have resulted in an oppressive result had the case gone to trial. Applying the guidelines set forth in that case convinces us that the abuse of process doctrine is applicable under the facts of this case. The Appellant was detained for 11 months without being notified of the charges against him. The Prosecutor has offered no satisfactory justifications for this delay. The numerous letters attached to one of the Appellant's submissions point to the fact that the Appellant was in continuous communication with all three organs of the Tribunal in an attempt to assert his rights. Moreover, we find that the effect of the Appellant's pre-trial detention was prejudicial.

3. The failure to resolve the *writ of habeas corpus* in a timely manner

87. The next issue concerns the failure of the Trial Chamber to resolve the Appellant's *writ of habeas corpus* filed on 29 September 1997. The Prosecutor asserts that *after* the Appellant filed the *writ of habeas corpus*, the President of the Tribunal wrote a letter to the Appellant informing the Appellant that the Prosecutor would be submitting an indictment shortly. In fact, the President's letter is dated *8 September 1997*, and the Appellant claims that the *writ* was filed on the basis of this letter from the President. Moreover, the Appellant asserts that he was informed that the hearing on the *writ of habeas corpus* was to be held on 31 October 1997. The Appellant asserts that 'the Registry without the consent of the Defence removed the hearing of the motion from the calendar only because the Prosecution promised to issue the indictment soon'. The Appellant also claims that the indictment was filed and confirmed on 22 October 1997 and 23 October 1997, respectively, in order to pre-empt the hearing on the *writ of habeas corpus*. These assertions by the Appellant are, of course, impossible for him to prove, absent an admission by the Prosecutor. We note, however, that the Prosecutor has not directed the Appeals Chamber to any evidence to the contrary, and that the Appellant was never afforded an opportunity to be heard on the *writ of habeas corpus*.

88. Although neither the Statute nor the Rules specifically address *writs of habeas corpus* as such, the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules. Moreover, this is a fundamental right and is enshrined in international human rights norms, including Article 8 of the Universal Declaration of Human Rights, Article 9(4) of the ICCPR, Article 5(4) of the ECHR and Article 7(6) of the ACHR. The Inter-American Court of Human Rights has defined the *writ of habeas corpus* as:

> [A] judicial remedy designed to protect personal freedom or physical integrity against arbitrary decisions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered.

Thus, this right allows the detainee to have the legality of the detention reviewed by the judiciary.

89. The European Court of Human Rights has held that the detaining State must provide recourse to an independent judiciary in all cases, whether the detention was justified or not. Under the jurisprudence of that Court, therefore, a *writ of habeas corpus* must be heard, even though the detention is eventually found to be lawful under the ECHR. Thus, the right to be heard on the *writ* is an entirely separate issue from the underlying legality of the initial detention. In the present case, the Appellant's right was violated by the Trial Chamber because the *writ* was filed but was not heard.

90. The Appeals Chamber is troubled that the Appellant has not been given a hearing on his *writ of habeas corpus*. The fact that the indictment of the Appellant has been confirmed and that he has had his initial appearance does not excuse the failure to resolve the *writ*. The Appellant submits that as far as he is concerned the *writ of habeas corpus* is still pending. The Appeals Chamber finds that the *writ of habeas corpus* is rendered moot by this Decision. Nevertheless, the failure to provide the Appellant a hearing on this *writ* violated his right to challenge the legality of his continued detention in Cameroon during the two periods when he was held at the behest of the Tribunal and the belated issuance of the indictment did not nullify that violation.

4. The duty of prosecutorial due diligence

91. Article 19(1) of the Statute of the Tribunal provides that the Trial Chambers shall ensure that accused persons appearing before the Tribunal are guaranteed a fair and expeditious trial. However, the Prosecutor, has certain responsibilities in this regard as well. For example, the Prosecutor is responsible for, *inter alia*: conducting investigations, including questioning suspects; seeking provisional measures and the arrest and transfer of suspects; protecting the rights of suspect, by ensuring that the suspect understands those rights; submitting indictments for confirmation; amending indictments prior to confirmation; withdrawing indictments prior to confirmation; and, of course, for actually prosecuting the case against the accused.

92. Because the Prosecutor has the authority to commence the entire legal process, through investigation and submission of an indictment for confirmation, the Prosecutor has been likened to the 'engine' driving the work of the Tribunal. Or, as one court has stated, '[T]he ultimate responsibility for bringing a defendant to trial rests on the Government and not on the defendant'. Consequently, once the Prosecutor has set this process in motion, she is under a duty to ensure that, within the scope of her authority, the case proceeds to trial in a way that respects the rights of the accused. In this regard, we note that some courts have stated that 'mere delay' which gives rise to prejudice and unfairness might by itself amount to an abuse of process. For example, in R. Grays Justices ex p. Graham, the Queen's Bench stated in *obiter dicta* that:

> [P]rolonged delay in starting or conducting criminal proceedings may be an abuse of process when the substantial delay was caused by the improper use of procedure or inefficiency on the part of the prosecution and the accused has neither caused nor contributed to the delay.

93. The Prosecutor has asserted that her 'abstention from proceeding against the Appellant-Defendant before 3 March 1997 was due to on-going investigation,. The Prosecutor further argues that she should not be barred from proceeding against the Appellant simply because she did not proceed against the Appellant at the first available opportunity. In putting forth this argument, the Prosecutor relies on Judge Shahabuddeen's Separate Opinion from the Kovačević Decision. In that Separate Opinion, Judge Shahabuddeen referred to United States v. Lovasco, a leading United States case on pre-indictment delay, wherein the Court stated:

> [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgement as to when to seek an indictment. Judges are not free, in defining 'due process', to impose on law enforcement officers our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function'. ... Our task is more circumscribed. We are to determine only whether the action

> complained of—here, compelling respondent to stand trial after the Government delayed indictment to investigate further—violates ... "fundamental conceptions of justice..." which "define the community's sense of fair play and decency"...

The Court continued:

> It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.

94. The facts in Lovasco are clearly distinguishable from those of the Appellant's case, and, therefore, we do not find the Supreme Court's reasoning persuasive. In Lovasco, the respondent was subjected to an 18-month delay between the alleged commission of the offences and the filing of the indictment. However, Mr. Lovasco had not been arrested during the 18-month delay and was not in custody during that period when the police were conducting their investigation. We also note that in United States v. Scott, in a dissent filed by four of the Court's nine Justices, (including Justice Marshall, the author of the Lovasco decision), the Lovasco holding regarding pre-indictment delay was characterised as a 'disfavored doctrine'.

95. Moreover, in the Kovačević Decision relied upon by the Prosecutor, the Appeals Chamber held that that the Rules provide a mechanism whereby the Prosecutor may seek to amend the indictment. Pursuant to Rule 50(A), the following scheme for amending indictments is available to the Prosecutor. The Prosecutor may amend an indictment, without prior leave, at any time before the indictment is confirmed. After the indictment is confirmed, but prior to the initial appearance of the accused, the indictment may be amended only with the leave of the Judge who confirmed it. At or after the initial appearance of the accused, the indictment may be amended only with leave of the Trial Chamber seized of the case. The Prosecutor thus has the ability to amend indictments based on the results of her investigations. Therefore, the Prosecutor's argument that investigatory delay at the pre-indictment stage does not violate the rights of a suspect who is in provisional detention is without merit. Rule 40*bis* clearly requires issuance of the indictment within 90 days and the amendment process is available in situations where additional information becomes available to the Prosecutor.

96. Although a suspect or accused before the Tribunal is transferred, and not extradited, extradition procedures offer analogies that are useful to this analysis. In the context of extradition, several cases from the United States confirm that the prosecuting authority has a due diligence obligation with respect to accused awaiting extradition. For example, in Smith v. Hooey, the Supreme Court found that the Government had a 'constitutional duty to make a diligent, good-faith effort to bring [the defendant] before the court for trial'. In United States v. McConahy, the court held that the Government's obligation to provide a speedy resolution of pending charges is not relieved unless the accused fails to demand that an effort be made to return him and the prosecuting authorities have made a diligent, good faith effort to have him returned and are unsuccessful, or can show that such an effort would prove futile. We note that the Appellant made several inquiries of Tribunal officials regarding his status. It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal's detention unit until after he filed the *writ of habeas corpus*. Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant. Rather, it appears that the Appellant was simply forgotten about.

97. Moreover, conventional law and the legislation of many national systems incorporate provisions for the protection of individuals detained pending transfer to the requesting State. We also note in this regard that the European Convention on Extradition provides that provisional detention may be terminated after as few as 18 days if the requesting State has not provided the proper documents to the requested State. In no case may the provisional detention extend beyond 40 days from the date of

arrest.

98. Setting aside for the moment the Prosecutor's contention that Cameroon was solely responsible for the delay in transferring the Appellant, the only plausible conclusion is that the Prosecutor failed in her duty to take the steps necessary to have the Appellant transferred in a timely fashion. The Appellant has claimed that the Prosecutor simply forgot about his case, a claim that is, of course, impossible for the Appellant to prove. However, we note that after the Appellant raised this claim, the Prosecutor failed to rebut it in any form, relying solely on the argument that it was Cameroon's failure to transfer the Appellant that resulted in this delay. The Prosecutor provided no evidence that she contacted the authorities in Cameroon in an attempt to get them to comply with the Rule 40*bis* Order. Further, in the 3 June 1999 Scheduling Order, the Appeals Chamber directed the Prosecutor to answer certain questions and provide supporting documentation, including an explanation for the delay between the request for transfer and the actual transfer. Notwithstanding this Order, the Prosecutor provided no evidence that she contacted the Registry or Chambers in an effort to determine what was causing the delay.

99. While it is undoubtedly true, as the Prosecutor submits, that the Registry and Chambers have the primary responsibility for scheduling the initial appearance of the accused, this does not relieve the Prosecutor of some responsibility for ensuring that the accused is brought before a Trial Chamber 'without delay' upon his transfer to the Tribunal. In the present case, the Appellant was transferred to the Tribunal on 19 November 1997. However, his initial appearance was not held until 23 February 1998—some 96 days *after* his transfer, in violation of his right to an initial appearance 'without delay'. There is no evidence that the Prosecutor took any steps to encourage the Registry or Chambers to place the Appellant's initial appearance on the docket. Prudent steps in this regard can be demonstrated through written requests to the Registry and Chambers to docket the initial appearance. The Prosecutor has made no such showing and the only logical conclusion to be drawn from this failure to provide such evidence is that the Prosecutor failed in her duty to diligently prosecute this case.

C. Conclusions

100. Based on the foregoing analysis, we conclude that the Appellant was in the constructive custody of the Tribunal from 4 March 1997 until his transfer to the Tribunal's detention unit on 19 November 1997. However, international human rights standards comport with the requirements of Rule 40*bis*. Thus, even if he was not in the constructive custody of the Tribunal, the period of provisional detention was impermissibly lengthy. Pursuant to that Rule, the indictment against the Appellant had to be confirmed within 90 days from 4 March 1997. However, the indictment was not confirmed in this case until 23 October 1997. We find, therefore, that the Appellant's right to be promptly charged pursuant to international standards as reflected in Rule 40*bis* was violated. Moreover, we find that the Appellant's right to an initial appearance, without delay upon his transfer to the Tribunal's detention unit under Rule 62, was violated.

101. Moreover, we find that the facts of this case justify the invocation of the abuse of process doctrine. Thus, we find that the violations referred to in paragraph 101 above, the delay in informing the Appellant of the general nature of the charges between the initial Rule 40 request on 17 April 1996 and when he was actually shown a copy of the Rule 40*bis* Order on 10 March 1997 violated his right to be promptly informed. Also, we find that the failure to resolve the Appellant's *writ of habeas corpus* in a timely manner violated his right to challenge the legality of his continued detention. Finally, we find that the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence.

D. The Remedy

102. In light of the above findings, the only remaining issue is to determine the appropriate remedy

for the violation of the rights of the Appellant. The Prosecutor has argued that the Appellant is entitled to either an order requiring an expeditious trial or credit for any time provisionally served pursuant to Rule 101(D). The Appellant seeks unconditional immediate release.

103. With respect to the first of the Prosecutor's suggestions, the Appeals Chamber notes that an order for the Appellant to be expeditiously tried would be superfluous as a remedy. The Appellant is already entitled to an expedited trial pursuant to Article 19(1) of the Statute. With respect to the second suggestion, the Appeals Chamber is unconvinced that Rule 101(D) can adequately protect the Appellant and provide an adequate remedy for the violations of his rights. How does Rule 101(D) offer any remedy to the Appellant in the event he is acquitted?

104. We turn, therefore, to the remedy proposed by the Appellant. Article 20(3) states one of the most basic rights of all individuals: the right to be presumed innocent until proven guilty. In the present case, the Appellant has been in provisional detention since 15 April 1996—more than three years. During that time, he spent 11 months in illegal provisional detention at the behest of the Tribunal without the benefits, rights and protections afforded by being formally charged. He submitted a *writ of habeas corpus* seeking to be released from this confinement—and was never afforded an opportunity to be heard on this *writ*. Even after he was formally charged, he spent an additional 3 months awaiting his initial appearance, and several more months before he could be heard on his motion to have his arrest and detention nullified.

105. The Statute of the Tribunal does not include specific provisions akin to speedy trial statutes existing in some national jurisdictions. However, the underlying premise of the Statute and Rules are that the accused is entitled to a fair and expeditious trial. The importance of a speedy disposition of the case benefits both the accused and society, as has been recognised by national courts:

> The criminal defendant's interest in prompt disposition of his case is apparent and requires little comment. Unnecessary delay may make a fair trial impossible. If the accused is imprisoned awaiting trial, lengthy detention eats at the heart of a system founded on the presumption of innocence. ... Moreover, we cannot emphasize sufficiently that the public has a strong interest in prompt trials. As the vivid experience of a witness fades into the shadow of a distant memory, the reliability of a criminal proceeding may become seriously impaired. This is a substantial price to pay for a society that prides itself on fair trials.

106. The crimes for which the Appellant is charged are very serious. However, in this case the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him. This finding is consistent with Rule 40*bis*(H), which requires release if the suspect is not charged within 90 days of the commencement of the provisional detention and Rule 40 (D) which requires release if the Prosecutor fails to issue an indictment within 20 days after the transfer of the suspect. Furthermore, this limitation on the period of provisional detention is consistent with international human rights jurisprudence. Finally, this decision is also consistent with national legislation dealing with due process violations that violate the right of the accused to a prompt resolution of his case.

107. Considering the express provisions of Rule 40*bis*(H), and in light of the Rwandan extradition request for the Appellant and the denial of that request by the court in Cameroon, the Appeals Chamber concludes that it is appropriate for the Appellant to be delivered to the authorities of Cameroon, the State to which the Rule 40*bis* request was initially made.

108. The Appeals Chamber further finds that this dismissal and release must be with prejudice to the Prosecutor. Such a finding is consistent with the jurisprudence of many national systems.

Furthermore, violations of the right to a speedy disposition of criminal charges have resulted in dismissals with prejudice in Canada, the Philippines, the United States and Zimbabwe. As troubling as this disposition may be to some, the Appeals Chamber believes that to proceed with the Appellant's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process. Moreover, we find that it is the only effective remedy for the cumulative breaches of the accused's rights. Finally, this disposition may very well deter the commission of such serious violations in the future.

109. We reiterate that what makes this case so egregious is the combination of delays that seemed to occur at virtually every stage of the Appellant's case. The failure to hear the *writ of habeas corpus*, the delay in hearing the Extremely Urgent Motion, the prolonged detention of the Appellant without an indictment and the cumulative effect of these violations leave us with no acceptable option but to order the dismissal of the charges with prejudice and the Appellant's immediate release from custody. We fear that if we were to dismiss the charges without prejudice, the Appellant would be subject to immediate re-arrest and his ordeal would begin anew. Were we to dismiss the indictment without prejudice, the strict 90-day limit set forth in Rule 90*bis*(H) could be thwarted by repeated release and re-arrest, thereby giving the Prosecutor a potentially unlimited period of time to prepare and submit an indictment for confirmation. Surely, such a 'revolving door' policy cannot be what was envisioned by Rule 40*bis*. Rather, as pointed out above, the Rules and jurisprudence of the Tribunal permit the Prosecutor to seek to amend the indictment if additional information becomes available. In light of this possibility, the 90-day rule set forth in Rule 40*bis* must be complied with.

110. Rule 40*bis*(H) states that in the event that the indictment has not been confirmed and an arrest warrant signed within 90 of the provisional detention of the suspect, the 'suspect shall be released'. The word used in this Sub-rule, 'shall', is imperative and it is certainly not intended to permit the Prosecutor to file a new indictment and re-arrest the suspect. Applying the principle of effective interpretation, we conclude that the charges against the Appellant must be dismissed with prejudice to the Prosecutor. Moreover, to order the release of the Appellant without prejudice—particularly in light of what we are certain would be his immediate re-arrest—could be seen as having cured the prior illegal detention. That would open the door for the Prosecutor to argue (assuming *arguendo* the eventual conviction of the Appellant) that the Appellant would not then be entitled to credit for that period of detention pursuant to Rule 101(D), on the grounds that the release was the remedy for the violation of his rights. The net result of this could be to place the Appellant in a worse position than he would have been in had he not raised this appeal. This would effectively result in the Appellant being punished for exercising his right to bring this appeal.

111. The words of the Zimbabwean Court in the Mlambo case are illustrative. In ordering the dismissal of the charges and release of the accused, the Zimbabwean Court held:

> The charges against the applicant are far from trivial and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are charged with the commission of serious crimes. Yet, that trial can only be undertaken if the guarantee under... the Constitution has not been infringed. In this case it has been grievously infringed and the unfortunate result is that a hearing cannot be allowed to take place. To find otherwise would render meaningless a right enshrined in the Constitution as the supreme law of the land'.

We find the forceful words of U.S. Supreme Court Justice Brandeis compelling in this case:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself: it invites anarchy. To declare that

> in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

112. The Tribunal—an institution whose primary purpose is to ensure that justice is done—must not place its imprimatur on such violations. To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals—including those charged with unthinkable crimes—would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results.

V. DISPOSITION

113. For the foregoing reasons, THE APPEALS CHAMBER hereby:

Unanimously,

1. ALLOWS the Appeal, and in light of this disposition considers it unnecessary to decide the 19 October 1999 Notice of Appeal or the 26 October 1999 Notice of Appeal;

Unanimously,

2. DISMISSES THE INDICTMENT with prejudice to the Prosecutor;

Unanimously,

3. DIRECTS THE IMMEDIATE RELEASE of the Appellant; and

By a vote of four to one, with Judge Shahabuddeen dissenting,

4. DIRECTS the Registrar to make the necessary arrangements for the delivery of the Appellant to the Authorities of Cameroon.

Judge Shahabuddeen appends a Separate Opinion to this Decision.

Judge Nieto-Navia appends a Declaration to this Decision.

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

Gabrielle Kirk McDonald Mohamed Shahabuddeen Lal Chand Vohrah

Presiding

Wang Tieya Rafael Nieto-Navia

Dated this third day of November 1999
At The Hague,
The Netherlands.

[Seal of the Tribunal]

Appendix A

Chronology of Events

15 April 1996:	Cameroon arrests twelve to fourteen Rwandans on the basis of international arrest warrants. The accused was among those arrested. The parties disagree with respect to the question of under whose authority the accused was detained. The Appellant asserts he was arrested by Cameroon on the basis of a request from the Prosecutor, while the Prosecutor contends that the Appellant was arrested on the basis of international arrest warrants emanating from the Rwandan and Belgian authorities.
17 April 1996:	The Prosecutor requests that provisional measures under Rule 40 be taken in relation to the Appellant.
6 May 1996:	The Prosecutor seeks a three-week extension for the detention of the Appellant in Cameroon.
16 May 1996:	The Prosecutor informs Cameroon that she seeks to transfer and hold in provisional detention under Rule 40*bis* four of the individuals detained by Cameroon, *excluding* the Appellant.
31 May 1996:	The Court of Appeal in Cameroon issues a Decision to adjourn *sine die* consideration of the Rwandan extradition proceedings concerning the Appellant as the result of a request by the Cameroonian Deputy Director of Public Prosecution. In support of his request, the Deputy Director cites Article 8(2) of the ICTR Statute.
15 October 1996:	The Prosecutor sends the Appellant a letter indicating that Cameroon is not holding the Appellant at her behest.
21 February 1997:	The Cameroon court rejects Rwanda's extradition request for the Appellant. The court orders the Appellant's release, but he is immediately re-arrested at the behest of the Prosecutor pursuant to Rule 40. This is the second request under Rule 40 for the provisional detention of the Appellant.
24 February 1997:	Pursuant to Rule 40*bis*, the Prosecutor requests the transfer of the accused to Arusha.
4 March 1997:	An Order pursuant to Rule 40*bis* (signed by Judge Aspegren on 3 March 1997), is filed. This Order requires Cameroon to arrest and transfer the

	Appellant to the Tribunal's detention unit.
10 March 1997:	The Appellant is shown a copy of the Rule 40*bis* Order, including the general nature of the charges against him.
29 September 1997:	The Appellant files a *writ of habeas corpus*.
21 October 1997:	The President of Cameroon signs a decree ordering the Appellant's transfer to the Tribunal's detention unit.
22 October 1997:	The Prosecutor submits the indictment for confirmation.
23 October 1997:	Judge Aspegren confirms the indictment against the Appellant and issues a Warrant of Arrest and Order for Surrender to Cameroon.
19 November 1997:	The Appellant is transferred to Arusha.
23 February 1998:	The Appellant makes his initial appearance.
24 February 1998:	The Appellant files the Extremely Urgent Motion seeking to nullify the arrest.
11 September 1998:	The Trial Chamber hears the arguments of the parties on the Motion.
17 November 1998:	The Trial Chamber dismisses the Extremely Urgent Motion *in toto*.
27 November 1998:	The Appellant notified the Appeals Chamber of his intention to appeal, claiming that he did not receive the Decision until 27 November 1998. On that same day, he signs his Notice of Appeal.

6. Prosecutor v. Naletilic; Trial Chamber 1. Decision on Defence's Motion concerning Translation of all documents, 18th October 2001.

10297

BEFORE TRIAL CHAMBER I SECTION A

Before:
Judge Liu Daqun, Presiding
Judge Maureen Harding Clark
Judge Fatoumata Diarra

Registrar:
Mr. Hans Holthuis

Order of:
18 October 2001

PROSECUTOR

v.

MLADEN NALETILIC aka "TUTA"
and
VINKO MARTINOVIC aka "STELA"

DECISION ON DEFENCE'S MOTION CONCERNING TRANSLATION OF ALL DOCUMENTS

The Office of the Prosecutor:

Mr. Kenneth Scott

Counsel for the Accused:

Mr. Kresimir Krsnik, for Mladen Naletilic
Mr. Branko Seric, for Vinko Martinovic

TRIAL CHAMBER I, SECTION A ("the Chamber") 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"):

BEING SEISED OF the oral motion on 11 September 2001 by Counsel for Mladen Naletilic for translation into BCS of all items of evidence submitted by the Prosecutor;

NOTING the Chamber's oral request on 11 September 2001 to the parties to make written submissions;

NOTING the "Defence Opinion Concerning Translation of All Documents" filed by Counsel for Mladen Naletilic on 17 September 2001 ("the Opinion");

NOTING the "Prosecutor's Submission Concerning Translation of Non-BCS Documentary Exhibits

into BCS" filed on 17 September 2001 ("the Submission");

CONSIDERING that, in the Opinion, Counsel for Mladen Naletilic requests translation of all documents, intended to be tendered and subsequently admitted by the Prosecutor, into the language the accused understands, in order for him to properly prepare and present his defence;

CONSIDERING that, in the Opinion, Counsel for Mladen Naletilic submits that the accused has a right to a fair trial pursuant to Article 21 (4) of the Statute of the Tribunal ("the Statute"), and that a fair trial is not guaranteed by the fact that Counsel understands and speaks English;

CONSIDERING FURTHER that Counsel for Mladen Naletilic submits that the accused has the right to understand the content of documents, "which are used to prosecute him for serious crimes"; that Counsel refers to the "Decision on Defence Application for Forwarding Documents in the Language of the Accused" (*Prosecutor v. Zejnil Delalic*, IT- 96-21-T, 25 September 1996), ("the Delalic Decision");

CONSIDERING that, in the Submission, the Prosecutor argues that the translation of documents, according to Rule 66 (A) of the Rules of Procedure and Evidence ("the Rules"), is limited to the supporting material accompanying the indictment, all prior statements obtained by the Prosecutor from the accused, witness statements and Rule 92 *bis* statements;

NOTING that the Prosecutor submits that the Delalic Decision has not been followed as Tribunal practice;

NOTING FURTHER that the Prosecutor submits that Counsel for Mladen Naletilic never requested the disclosure of documents pursuant Rule 66 (B) of the Rules and that the Prosecutor, on her own initiative, made available to the Counsel for Mladen Naletilic seventeen binders of potential Prosecution exhibits;

CONSIDERING that although Rule 3 (A) of the Rules provides that the working languages of the Tribunal are English and French, the Chamber is aware that the application of this Rule must be consistent with the right of the accused to a fair trial; that Article 21 (4) of the Statute, in relevant parts provides:

Article 21
Rights of the accused

1. All persons shall be equal before the International Tribunal.

...

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

...

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

CONSIDERING that the Prosecutor has provided Counsel for Mladen Naletilic with a copy in BCS of all material required pursuant to Rule 66 (A) of the Rules and that the Prosecutor was not requested to disclose the seventeen binders referred to above but did so with a view to facilitate the proceedings;

CONSIDERING that neither Article 21 of the Statute nor Rule 3 of the Rules explicitly entitle the accused to receive all documents from the Prosecutor in a language he understands;

CONSIDERING that the guarantees provided in Article 21 (4) of the Statute do not extend to all documents, but only to evidence, which forms the basis of the determination by the Chamber of the charges against the accused; and that this right is ensured, *inter alia,* by the fact that all evidence admitted at trial is provided in a language the accused understands;

FOR THE FOREGOING REASONS

DECIDES that, all exhibits which the parties intend to submit for admission shall be available in a language the accused understands, as well as in at least one of the official languages of the Tribunal at the time of it being submitted to the Chamber for admission and that it is the responsibility of the party, intending to submit the document, to ensure that such translations are available;

STATES that this decision shall enter into effect on 12 November 2001 and that, in the meantime, both parties shall strive to provide appropriate translations as soon as practicable;

DECIDES that from 12 November 2001 onwards, a document, which is not in a language the accused understands as well as at least one of the official languages of the Tribunal, as ordered above, may not be submitted to the Chamber for admission.

DECIDES that the documents already submitted to the Chamber for admission which does not exists in a language the accused understands shall be translated as soon as practicable;

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

Dated this eighteenth day of October 2001,
At The Hague,
The Netherlands

_____

Judge Liu Daqun
Presiding Judge

[Seal of the Tribunal]

7. Prosecutor v. Krajisnik, Decision on Prosecution Motion for Clarification in respect of Application of Rules 65*ter,* 66(B) and 67(C), 1st August, 2001

/030/

IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Patrick Robinson
Judge Mohamed Fassi Fihri

Registrar:
Mr. Hans Holthuis

Decision of:
1 August 2001

PROSECUTOR

v.

MOMCILO KRAJISNIK
&
BILJANA PLAVSIC

DECISION ON PROSECUTION MOTION FOR CLARIFICATION IN RESPECT OF APPLICATION OF RULES 65 *TER*, 66 (B) AND 67 (C)

Office of the Prosecutor:

Mr. Mark Harmon
Mr. Alan Tieger

Counsel for the Accused:

Mr. Deyan Brashich, for Momcilo Krajisnik
Mr. Robert. J. Pavich and Mr. Eugene O'Sullivan, for Biljana Plavsic

I. INTRODUCTION

1. The Trial Chamber hereby gives its decision in relation to a motion filed by the Office of the Prosecutor ("Prosecution") seeking clarification in respect of the application of Rules 65 *ter*, 66 (B) and 67 (C) of the Rules of Procedure and Evidence ("Rules").[1]

2. The Prosecution has identified 800 "core" documents[2] which, it is understood, are documents on which they intend to rely at trial. To date, nearly 400 of those documents have been disclosed to the Defence. The Prosecution now seeks to clarify their obligations with regard to the remainder.

3. The disclosure regime in so far as relevant to this Decision proceeds by the following steps:

(a) All supporting material accompanying the indictment must be disclosed within 30 days of the initial appearance (Rule 66 (A)(i));

(b) Copies of the statements of witnesses who the Prosecution intends to call at trial must be disclosed within a time limit set by the Pre-Trial Judge or Trial Chamber (Rule 66 (A)(ii));

(c) The Prosecution, on request, must permit the Defence to inspect material for preparation of the Defence or "intended for use by the Prosecutor as evidence at trial" (Rule 66 (B));

(d) However, such a request triggers an entitlement for reciprocal discovery by the Prosecution of material which the Defence intends to use as evidence at trial (Rule 66 (C)); and

(e) Not less than six weeks before the Pre-Trial Conference the Prosecution must file, *inter alia*, "the list of exhibits the Prosecutor intends to offer stating where possible whether the defence has any objection as to authenticity" (Rule 65 *ter* (E)(iii)).

II. ARGUMENTS OF THE PARTIES

4. The Prosecution is only prepared to disclose the remainder of the documents under the reciprocal disclosure provisions of Rules 66 (B) and 67 (C) and argues that these Rules are substantive Rules and have primacy over Rule 65 *ter* (E)(iii), which is purely procedural: therefore, the Defence are not entitled to disclosure of the exhibits under the latter Rule if they have not triggered the reciprocal disclosure provisions.[3] The Prosecution argues that the reciprocal disclosure provisions increase the efficiency of proceedings, protect equality of arms and protect the integrity of documentary evidence.[4] In support of its argument, the Prosecution relies on a ruling of Trial Chamber I that to force it to disclose the exhibits in its list in circumstances where the reciprocal disclosure provisions had not been triggered would be to create an imbalance in the equality of arms and, therefore, there was no obligation on the Prosecution to do so.[5]

5. Defence counsel for the accused Momcilo Krajisnik submits that a true equality of arms requires the disclosure of the exhibits since the Prosecution has access to material, such as government archives, to which the Defence does not have access.[6] Defence counsel for Biljana Plavsic, having triggered the reciprocal disclosure provisions, has no direct interest in this matter.[7]

III. DISCUSSION

6. The Trial Chamber notes that the ruling of Trial Chamber I, referred to above, has not been followed in other cases. Indeed, the usual Prosecution practice has been to engage in open pre-trial disclosure without relying on the reciprocal disclosure provisions. This practice was followed in the cases in Trial Chamber II, in *Dokmanovic*, *Kovacevic*, *Kupreskic*, *Kunurac* and *Krnojelac*, and in Trial Chamber III, in *Kordic*, *Sikirica* and *Simic*. Indeed, in the instant case this practice was followed until a recent change in counsel who have conduct of this prosecution: this practice was to make open and early disclosure to the Defence of all relevant material as it was identified by the Prosecution and this led to the disclosure of the 400 documents, referred to above, among other material.[8]

7. The Trial Chamber considers that this practice should be followed rather than that favoured by Trial Chamber I. The only way in which the Defence can properly prepare for trial is by having notice in advance of the material on which the Prosecution intends to rely, including exhibits. The Prosecution, by not disclosing the documents prior to trial, places the Defence in a position in which it will not be able to prepare properly; and it is this fact that is likely to lead to a violation of the principle of equality of arms. In addition, the practice may lead to applications for adjournment during the trial to allow the Defence to deal with exhibits of which they had no prior notice, and

given the number of documents concerned in this case, such applications might be frequent.

8. Accordingly, the Trial Chamber interprets the requirement in Rule 65 *ter* (E)(iii) for the Prosecution to file a list of exhibits to mean that the exhibits themselves should be filed and disclosed. (It may also be noted that were this not so, there would be little point in the Rule referring to Defence objections to authenticity since it is difficult to see how the Defence can be in a position to indicate any objections if it has not had the opportunity of viewing the exhibits.)[9]

9. The Trial Chamber does not accept the Prosecution's characterisation of Rules 65 *ter*, 66 and 68, referred to above and does not accept that the latter has precedence. To do so would mean that the only way that an accused could obtain disclosure of the Prosecution case would be by incurring a disclosure obligation. This would be to allow a narrow interpretation of the Rules to override elementary notions of a fair trial, i.e. that the accused, without incurring the obligation of disclosure, should know the case he or she has to meet and should be given adequate opportunity to prepare a Defence. Furthermore, the Chamber, whilst considering how conflicts in the Rules are to be resolved, must take into consideration the requirement under the Statute of the International Tribunal that the proceedings be fair and expeditious and that there be equality between the parties in the preparation for and conduct of trial. There is also a danger in literal interpretation of the Rules that read narrowly the rights and obligations of the parties, particularly where such interpretations compromise these requirements of fairness and expedition. The reciprocal disclosure provisions remain of utility with respect to a broader range of material than the exhibits upon which the Prosecution intends to rely, and to conduct a general trawl through the Prosecution files.

10. Therefore, the Prosecution must disclose all the exhibits on which it intends to rely, at least, by the time that it files its pre-trial brief.

IV. DECISION

11. For these reasons, and pursuant to Rule 65 *ter* of the Rules, the Trial Chamber orders the Prosecution to serve on the Defence the balance of the core documents together with all documents listed pursuant to Rule 65 *ter* (E)(iii) at the time of filing its pre-trial brief.

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

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Richard May
Presiding

Dated this first day of August 2001
At The Hague
The Netherlands

[Seal of the Tribunal]

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1. "Prosecution's Motion for Clarification in Respect of Application of Rules 65 *ter*, 66 (B) and 67 (C)", filed by the Prosecution on 25 June 2001 (hereafter "the Motion"). Note that oral submissions were made by the parties with respect to the Motion on 10 July 2001.
2. Status Conference, 23 May 2001, Transcript page 25.
3. The Motion, paras. 4, 21-23; Motions Hearing, 10 July 2001, Transcript page 48.
4. *Prosecutor v. Krstic*, Case No. IT-98-33-PT, Status Conference, 6 March 2000, Transcript pages 398-400.
5. *Ibid.*

6. "Accused Krajisnik's Opposition to Motion for Clarification" filed by the Defence for Krajisnik on 6 July 2001 (hereafter "the Response"), paras. 5-8. Defence counsel for Krajisnik also submitted that the Motion was an attempt to review an order already made by the Pre-Trial Judge that the documents should be disclosed (Response, paras. 3-5). In fact, no such order was made, the Pre-Trial Judge having merely indicated to the Prosecution that the sooner the remaining documents were disclosed the better (Status Conference, 23 May 2001, Transcript page 46).
7. Motions Hearing, 10 July 2001, Transcript page 56.
8. Status Conference, 25 January 2001, Transcript page 74.
9. The Prosecution has also expressed concern that pre-trial disclosure, in circumstances where reciprocal disclosure has not been triggered, might risk destruction, alteration or creation of evidence in order to assist the Defence. It is noted, however, that this has never been raised before by the Prosecution under its previous disclosure regime and, at any rate, without specific information supporting such an allegation in this case, the argument carries no weight.

8. State v. Scholtz (1997) 1 LRC 67; Namibia, Supreme Court 6th February 1996.

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secretly and anonymously authorising telephonic intercepts, is clearly much closer to the functions of the other branches than are those of a statutory reporter, publicly identified, evaluating evidence and submissions, judicially reviewable and presenting a report which reality suggests would inevitably find its way into the public domain, save for any specially confidential parts. Yet by the authority of this court, *Hilton* and *Grollo* permit the former and that authority was not challenged. This case will prohibit the latter. It is said that 'historically' judges have been vested with functions such as authorising the issue of warrants. So they have. But they have also, in our history, been called upon to report to the executive upon difficult and sensitive questions. History does not stand still.

In my respectful opinion, the decision in this case involves a departure from long-standing practice in Australia in the use of judges, including federal judges; a rejection of the principles found to be appropriate in the more rigid constitutional context considered by the Supreme Court of the United States; an undue constriction of Parliament's decision to authorise utilisation of 'any person' as a reporter; and a serious limitation on the privilege of the executive government to choose a person, who happens to be a judge, where the sensitivity and importance of the particular case is considered by it to warrant that course.

Conclusion and orders

Having rejected both the construction and constitutional arguments advanced for the plaintiffs to attack the nomination of Justice Mathews as reporter under the Act, I favour giving the following answers to the questions reserved by the Chief Justice: (a) Question 1.1 Yes, (b) Question 1.2 No.

The matter should be remitted to the Federal Court of Australia to hear and determine the proceedings upon the plaintiffs' statement of claim in accordance with the answers given to the questions reserved.

The plaintiffs should pay the costs of the minister of the special case and of the hearing and determination of the questions reserved.

Solicitors:
Piper Alderman for the plaintiffs.
Australian Government Solicitor for the defendants.

Namibia

State v Scholtz

Supreme Court
Mahomed CJ, Dumbutshena and Leon Ag JJA
6 February 1996

(1) *Constitutional law – Fundamental rights – Fair trial – Equality before the law – Access to information – Criminal trial – Disclosure by prosecution – Police dockets – Witness statements – Whether full disclosure of evidential material requirement for fair trial – Constitution of the Republic of Namibia 1990, arts 7, 10, 12.*

(2) *Criminal procedure – Disclosure by prosecution – Police dockets – Witness statements – Appropriate principles.*

The respondent was arraigned in the High Court on various charges and during the trial he applied for an order for the disclosure by the Prosecutor General of statements of prosecution witnesses. The appellant opposed that application. The court granted an order restricted to disclosure of statements of state witnesses who had not yet testified. Following completion of the trial the appellant was granted leave to appeal on the sole ground that the trial judge had erred in law by ordering that certain witness statements were not privileged and should be made available to the defence.

HELD: Declaratory order granted in terms of (2) below.

(1) The principles of procedure that protected witness statements against disclosure where such statements were procured for the purpose of evidence to be given in a contemplated lawsuit were incompatible with art 12(1)(a) of the Constitution of the Republic of Namibia 1990, since the purpose for which that article was enacted was to enable courts to determine the civil rights of citizens and criminal cases fairly and under conditions of equality for all, an objective also recognised in art 10 of the Constitution which demanded that '[a]ll persons shall be equal before the law'. The rules and standards of a fair trial therefore had to be known to both sides in order for the contest to be fair. Although regard had to be paid to the legal history, traditions and usages of the country concerned if the purposes of its Constitution were to be fully understood, constitutional rights should not have implicit restrictions read into them in order to bring them into line with the common law. A trial could not be just and balanced when the prosecution hid from the defence relevant material of evidential importance which might be used to spring a surprise on the defence during the cross-examination. It followed that refusal to disclose witness statements to the defence could not be justified on the ground that the material would be used to enable the defence to tailor its evidence to conform with information in the Crown's possession. Full disclosure was in accord with arts 7 and 12 of the Constitution (see pp 72, 75–76, 77, 79, 81–83, 86–88, post).

Dicta of Dickson J in *R v Big M Drug Mart Ltd* [1986] LRC (Const) 332 at 364, of Sopinka J in *R v Stinchcombe* [1992] LRC (Crim) 68 at 73–74 and of Kentridge Ag J in *State v Zuma* [1995] 1 LRC 145 at 154–155 applied. *R v Heikel (Ruling No 8)* (1990) 5 CRR (2d) 362, *R v Maguire* [1991] LRC (Crim) 227, *R v Ward* [1993] 2 All ER 577 and *Shabalala v A-G of the Transvaal* [1996] 1 LRC 207 approved. *State v Nassar* [1994] 3 LRC 295 considered. *R v Steyn* 1954 (1) SA 324 (A) disapproved.

Per curiam. (i) To be effective disclosure has to be done at the earliest possible time to allow the accused to prepare thoroughly his reply to the charge in his defence (see pp 88–89, post).

(ii) If before any trial the prosecution has in its possession documents or other evidential material helpful to the defence case but wants to claim public interest immunity the defence should be informed of that fact and the court should be asked to give directions or a ruling on the prosecution's claim to public interest immunity. The decision has to be made by a judge. It would not be proper to allow the prosecution to decide which of the relevant materials should be denied to the accused on the grounds of public interest immunity. The prosecution should not be judge in their own cause on the claim to immunity (see pp 84, 88, post).

(2) To provide guidance in future prosecutions in which an accused might seek to obtain contents of police dockets relevant to the prosecution on a particular matter, the court declared as follows. In prosecutions before the High Court, an accused person (or his legal representative) should ordinarily be entitled to the information contained in the police docket relating to the case prepared by the prosecution against him, including copies of the statements of witnesses, whom the police have interviewed in the matter, whether or not the prosecution intended to call any such witness at the trial. The state should be entitled to withhold from the accused (or his legal representative) any information contained in any such docket, if it satisfied the court on a balance of probabilities that it had reasonable grounds for believing that the disclosure of any such information might reasonably impede the ends of justice or otherwise be against the public interest. The duty of the state to afford to an accused person (or his legal representative) the right of access to the prosecution information held against him should ordinarily be discharged upon service of the indictment and before the accused was required to plead in the High Court; provided, however, that the court should be entitled to allow the state to defer the discharge of that duty to a later stage in the trial, if the prosecution established on a balance of probabilities that the interests of justice required such deferment in any particular case. Nothing should preclude an accused person appearing before a court other than the High Court from relying on those provisions (see pp 70–71, post).

[*Editors' note*: Articles 7, 10 and 12 of the Constitution of the Republic of Namibia 1990, so far as material, are set out at pp 78, 79, 72, post.]

Cases referred to in judgment

A-G of Namibia, Ex p, Re Corporal Punishment by Organs of State [1992] LRC (Const) 515, 1991 (3) SA 76 (NmS), Nam SC

A-G v Moagi 1982 (2) BLR 124, Bot CA

Anderson v Bank of British Columbia (1876) LR 2 Ch D 644, [1874–80] All ER Rep 396, UK CA

Boucher v R [1955] SCR 16, (1955) 110 CCC 263, Can SC

Dallison v Caffery [1964] 2 All ER 610, [1965] 1 QB 348, [1964] 3 WLR 385, UK CA

Dersch v Canada (A-G) [1990] 2 SCR 1505, (1990) 77 DLR (4th) 473, (1990) 60 CCC (3d) 132, Can SC

Duke v R [1972] SCR 917, (1972) 7 CCC (2d) 474, (1972) 28 DLR (3d) 129, Can SC

Kristman, Re (1984) 32 Alta LR (2d) 325, (1984) 12 DLR (4th) 283, (1984) 13 CCC (3d) 522, Alta QB

Minister of Defence, Namibia v Mwandinghi 1992 (2) SA 355 (NmS), Nam SC

Minister of Home Affairs v Fisher [1979] 3 All ER 21, [1980] AC 319, [1979] 2 WLR 889, Berm PC

Minister van Justisie, ex p, Re, State v Wagner 1965 (4) SA 504 (A), SA AD

R v Big M Drug Mart Ltd [1986] LRC (Const) 332, [1985] 1 SCR 295, (1985) 18 DLR (4th) 321, Can SC

R v Bourget (1987) 54 Sask R 178, (1987) 41 DLR (4th) 756, (1987) 35 CCC (3d) 371, Sask CA

R v Bryant (1946) 31 Cr App R 146, UK CCA

R v Davis [1993] 2 All ER 643, [1993] 1 WLR 613, UK CA

R v Heikel (Ruling No 8) (1990) 5 CRR (2d) 362

R v Lawson (1989) 90 Cr App R 107, UK CA

R v Maguire [1991] LRC (Crim) 227, [1992] 2 All ER 433, [1992] QB 936, UK CA

R v McIlkenny [1991] LRC (Crim) 196, [1992] 2 All ER 417, (1992) 93 Cr App R 287, UK CA

R v Steyn 1954 (1) SA 324 (A), SA AD

R v Stinchcombe [1992] LRC (Crim) 68, [1991] 3 SCR 326, Can SC

R v Ward [1993] 2 All ER 577, [1993] 1 WLR 619, (1993) 96 Cr App R 1, UK CA

Shabalala v A-G of the Transvaal [1996] 1 LRC 207, 1995 (12) BCLR 1593 (CC), SA CC

State v Acheson 1991 (2) SA 805 (NmH), Nam HC

State v Alexander (1) 1965 (2) SA 796 (A), SA AD

State v B 1980 (2) SA 946 (A), SA AD

State v Fani 1994 (1) SACR 635 (E), 1994 (1) BCLR 43

State v James 1994 (2) SACR 141 (E), 1994 (3) SA 881, 1994 (1) BCLR 57

State v Mavela 1990 (1) SACR 582 (A), SA AD

State v Nassar [1994] 3 LRC 295, (1995) 2 SA 82 (Nm), Nam HC

State v Yengeni (1) 1990 (1) SA 639 (C)

State v Zuma [1995] 1 LRC 145, 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), SA CC

Legislation referred to in judgment

Canada

Canadian Charter of Rights and Freedoms 1982, ss 7, 11

Criminal Code am RSC 1985, c 27 (1st Supp) ss 101(2)(d), 603

Namibia

Constitution of the Republic of Namibia 1990, arts 5, 7, 10(1), 12(1)(a), 25(2)

Criminal Procedure Act 1977, ss 39(2), 80, 84(1), 106, 144, 206

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South Africa
Constitution of the Republic of South Africa 1993, ss 23, 25(2), (3)

United Kingdom
Criminal Appeal Act 1968, s 2(1)(c)

Other sources referred to in judgment
Attorney General's Practice Note [1982] 1 All ER 734
Rights and Constitutionalism: The New South African Legal Order p 413

Appeal
The state appealed on the ground that Hannah J in the High Court erred in law to order that certain witness statements in a criminal trial against the respondent Scholtz were not privileged and should be made available to the defence. The facts are set out in the judgment of the court.

K Van Niekerk and *F Winson* for the appellant.
M S Navsa SC and *L Mpathi* for the respondent.

6 February 1996. The following judgment of the court was delivered.

DUMBUTSHENA Ag JA. This appeal comes to this court by leave of the court a quo. That leave was granted on the understanding that only one ground of appeal was to be argued. That ground is—

> '[t]hat the Honourable Judge erred in law to order that certain witness statements are not privileged and should be made available to the defence.'

In this appeal the state is the appellant and the respondent was the accused at the criminal trial. During the trial an application was made on his behalf for the disclosure, by the Prosecutor General to the accused, of the witness statements of those witnesses who had not yet testified. Hannah J granted the order, directing the Prosecutor General to produce the specified witness statements.

In passing it is proper to mention that the respondent has no interest in the appeal. He was acquitted on one count of murder and one count of attempted murder and convicted for assault with intent to do grievous bodily harm. He was sentenced to 18 months' imprisonment which was wholly suspended on appropriate conditions. The court a quo ordered him to pay to the complainant, Patricia Waters, the sum of R1,000.

This appeal and the judgment thereof have wide implications and effects on the administration of justice and more so on the work of the Prosecutor General's department. It was for this reason that, after hearing argument, this court made and handed in a declaratory order. We did not want to delay the consequences flowing from our judgment. This is the order we made:

> 'A formal order upholding or dismissing the appeal would in the circumstances of this case be inappropriate and will not serve or fulfil the object of this litigation which is to provide helpful guidance in future prosecutions in which the accused seeks to obtain the contents of police dockets relevant to the prosecution on a particular matter. The most useful course would be to make an order in the form of a declarator. It is accordingly declared that:
>
> (1) In prosecutions before the High Court, an accused person (or his legal representative) shall ordinarily be entitled to the information contained in the police docket relating to the case prepared by the prosecution against him, including copies of the statements of witnesses, whom the police have interviewed in the matter, whether or not the prosecution intends to call any such witness at the trial.
>
> (2) The state shall be entitled to withhold from the accused (or his legal representative), any information contained in any such docket, if it satisfies the court on a balance of probabilities, that it has reasonable grounds for believing that the disclosure of any such information might reasonably impede the ends of justice or otherwise be against the public interest. (Examples of such claims are where the information sought to be withheld would disclose the identity of an informer which it is necessary to protect, or where it would disclose police techniques of investigation which it is similarly necessary to protect, or where such disclosure might imperil the safety of a witness or would otherwise not be in the public or state interest.)
>
> (3) The duty of the state to afford to an accused person (or his legal representative) the right referred to in paragraph 1 shall ordinarily be discharged upon service of the indictment and before the accused is required to plead in the High Court. Provided, however, that the court shall be entitled to allow the state to defer the discharge of that duty to a later stage in the trial, if the prosecution establishes on a balance of probabilities that the interests of justice require such deferment in any particular case.
>
> (4) Nothing contained in this declaration shall be interpreted so as to preclude an accused person appearing before a court other than the High Court from contending that the provisions of paragraphs 1, 2 and 3 hereof should *mutatis mutandis* also be of application to the proceedings before such other court.'

We indicated at the end of reading the order that our reasons would follow later. These are our reasons.

The trial in this case commenced in February 1994 and resumed on 30 August 1994. On 23 August the defence counsel in *State v Nassar* [1994] 3 LRC 295 applied for an order seeking disclosure by the Prosecutor General of witness statements in his possession. The relief sought was as follows ([1994] 3 LRC 295 at 299–300):

> '1. That the State be ordered to provide the accused with the following:
>
> 1.1 Copies of all witnesses' statements in the possession of the State relating to the charges against the accused;
>
> 1.2 Copies of all relevant documents in the possession of the State relating to the charges against the accused;

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1.3 Copies of all video recordings or tape recordings which are in the possession of the State and/or the police and relating to the charges against the accused.

2. Granting the applicant further and/or alternative or related relief.'

I make reference to the prayer and the order of the court a quo in *State v Nassar* because the case covered wider ground than the instant case and Hannah J was part of the two-judge bench in that case. In *Nassar* the following order was made ([1994] 3 LRC 295 at 299):

'(1) The State provides the accused or his legal representatives within 14 days of this order with a copy of all witness statements in its possession relating to the charges contained in the indictment;

(2) The State provides the accused and his legal representatives with the opportunity to view the screening of all video tape recordings and to listen to all audio tape recordings in its possession or in the possession of the police relating to the charges contained in the indictment;

(3) The State provides the accused with a copy of the transcript of such video and audio tape recordings within 14 days of compliance with paragraph 2;

(4) The opportunity to view and to listen to such video and audio tape recordings shall be at a time convenient to both the State and the accused's legal representatives and shall be provided within 7 days of this order unless otherwise agreed.'

When the trial in the instant case resumed on 30 August the respondent's counsel similarly applied for an order for the disclosure by the Prosecutor General of statements of prosecution witnesses. The application was vigorously opposed by the state, as was that in *Nassar*. However, the court a quo granted an order restricted to disclosure of statements of state witnesses who had not yet testified. The appeal against the decision in *Nassar* has not yet been heard for reasons which have nothing to do with the present appeal. Judgment in *Nassar* was only handed down on 21 September 1994. By that time the judgment in the instant case had already been delivered. What stands to be decided in this appeal is whether disclosure or non-disclosure of prosecution witness statements to the defence falls within the ambit of art 12(1)(a) of the Constitution of the Republic of Namibia 1990, which provides:

'In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law ...'

If disclosure of statements of prosecution witnesses falls within the ambit of art 12 of the Constitution, then such disclosure constitutes one of the important elements of a fair trial. Non-disclosure of relevant material might therefore be vulnerable to attack on this ground.

It is therefore of no consequence that the Criminal Procedure Act 1977 does not have a provision for a general right of disclosure of materials in a police

docket as submitted by Ms Winson for the appellant. The right resides in arts 7 and 12 of the Constitution.

The provisions in the Criminal Procedure Act were common law principles meant to introduce some measure of fairness in the conduct of criminal cases. A summary of some of those principles or rules will suffice. Section 39(2) of the Act requires that the arresting officer should inform the accused of the reason for arrest. If a warrant was used to effect arrest, a copy of the warrant must be handed to him upon demand. In terms of s 80 the accused may examine the charge at any time of the relevant proceedings. In s 84(1) particulars of the offence must be set forth in the charge including where the offence was committed and against whom it was committed, if any, and the property, if any, in respect of which the offence is alleged to have been committed. But all that is required in this section is that the information is reasonably sufficient to inform the accused of the nature of the charge. If the accused believes that the information does not contain sufficient particulars of any matter alleged in the charge, he can object and, in proper circumstances, move to quash the charge (s 106). There are other sections meant to make it possible for an accused to know what case he is being asked to meet in order to prepare his defence.

Under the then prevailing conditions s 144 of the Act could be considered an improvement on the other methods of informing an accused person of his rights. Subsection (4) requires that an indictment be served on an accused ten days before he stands trial in the High Court unless he agrees to shorter notice.

If the accused is arraigned in the High Court in a summary trial, sub-s (3) provides:

'(a) ... the indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the Prosecutor General, are necessary to inform the accused of the allegations against him and that will not be prejudicial to the administration of justice and the security of the State, as well as a list of the names and addresses of the witnesses the Prosecutor General intends calling at the summary trial on behalf of the State: Provided that—(i) this provision shall not be so construed that the State shall be bound by the contents of the summary; (ii) the Prosecutor General may withhold the name and address of a witness if he is of the opinion that such witness may be tampered with or be intimidated or that it would be in the interest of the security of the State that the name and address of such witness be withheld; (iii) the omission of the name or address of a witness from such list shall in no way effect the validity of the trial.

(b) Where the evidence for the State at the trial of the accused differs in a material respect from the summary referred to in paragraph (a), the trial court may, at the request of the accused and if it appears to the court that the accused might be prejudiced in his defence by reason of such difference, adjourn the trial for such period as to the court may seem adequate.'

On behalf of the appellant, Ms Winson contended both in her written argument and in oral submissions before us that s 144 bears all the elements of

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a fair trial. Ms Winson may be right but all that the accused receives is a summary of substantial facts meant to inform him of the allegations made against him. He is given a list of witnesses the Prosecutor General intends to call at his trial without a summary of their evidence. The contents of the substantial facts do not bind the state during the trial. Names and addresses of witnesses may be withheld for fear that they may be tampered with or intimidated or for reasons of the security of the state. And more importantly what is revealed to him is subject to the subjective judgment of the Prosecutor General. It does not guarantee the accused a fair trial. Fairness depends on the personal whim of the Prosecutor General or his/her representative.

It is generally agreed that a preparatory examination, in as far as a fair trial is concerned, is nearer to what is desirable. Ms Winson argued with conviction that Ch 20, which provides for preparatory examinations to be held at the discretion of the Prosecutor General, guaranteed a fair trial. There is some substance in this submission. The accused is provided with the full case of the prosecution because at the end of the preparatory examination he gets a record of the proceedings. He, if he so wishes, can cross-examine prosecution witnesses during the preparatory examination proceedings. But not all cases require preparatory examinations. And what is more, the system has fallen into disuse. Ms Winson submitted further that the preparatory examination was useful only to the accused as he was informed in detail of the state's case without disclosing his, and this gave him or her an unfair advantage. This may be so, but it is the state that accuses and seeks to prove the guilt of the accused. However, preparatory examinations brought openness to trials and, to a significant extent, did away with trial by ambush.

South Africa

In South Africa the question of non-disclosure of witness statements was dealt with in *R v Steyn* 1954 (1) SA 324 (A), which was based on English law, as it was on 31 May 1961. That case decided that a witness statement was a privileged document and there was no entitlement to its disclosure to an accused. I will refer briefly to the long reign *R v Steyn* had on the courts in South Africa and Namibia and the long list of cases that followed it. But *Steyn* and those other cases have of recent times been overtaken by new developments.

It was contended on behalf of the appellant that there could not be disclosure of state witness statements to the defence because of the common law privilege attaching to witness statements since 1954 and that the courts of our country have recognised:

> 'When statements are procured from witnesses for the purpose that what they say shall be given in evidence in a lawsuit that is contemplated, these statements are protected against disclosure until at least the conclusion of the proceedings which would include any appeal or similar step after the decision in the court of first instance.' (See *R v Steyn* 1954 (1) SA 324 (A) at 335 per Greenberg JA.)

In my view the old rule cannot still survive in the face of art 12(1)(a). Its survival in my view would militate against the purpose for which the article

was enacted, that is, to enable the courts to determine the civil rights of the citizens and criminal cases fairly and under conditions of equality. The right to a fair trial can no longer mean that it is—

> 'an intelligible principle that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief.'

See *Anderson v Bank of British Columbia Anderson v Bank of British Columbia* (1876) LR 2 Ch D 644 at 656, *R v Steyn* 1954 (1) SA 324 (A) at 332, *State v Yengeni* (1) 1990 (1) SA 639 (C) at 664 and *State v Mavela* 1990 (1) SACR 582 (A).

Although *Steyn* was consistently followed in many decisions such as, among others, *Ex p Minister van Justisie, Re State v Wagner* 1965 (4) SA 504 (A) at 514, 515, *State v Alexander* (1) 1965 (2) SA 796 (A) at 811, *State v B* 1980 (2) SA 946 (A) at 952, *State v Yengeni* (1) 1990 (1) SA 639 (C) at 643 and *State v Mavela*, these decisions and many others have been overtaken by the enactment, in both Namibia and South Africa, of Constitutions entrenching justiciable Bills of Rights. The principles of procedure fervently followed before now need to be brought into line with provisions of Bills of Rights laying down tenets of procedure as entrenched rights. These are now the foundations upon which fair trials are built. Under these entrenched rights what Greenberg JA said in *Steyn* 1954 (1) SA 324 (A) at 335—

> 'when statements are procured from witnesses for the purpose that what they say shall be given in evidence in a lawsuit that is contemplated, these statements are protected against disclosure until at least the conclusion of the proceedings which would include any appeal or similar step after the decision in the court of first instance'—

no longer fits in with notions of open justice which require transparency and accountability.

The rules of procedure relating to fair trials in South Africa and Namibia were the same, that is before the new Constitutions were enacted. The same authorities on non-disclosure were followed in the two countries.

South Africa has a new Constitution with a justiciable Bill of Rights. Comparison between the relevant provisions of the Constitution of the Republic of South Africa 1993 and the Constitution of the Republic of Namibia 1990 is instructive. Section 23 of the South African Constitution provides:

> 'Every person shall have the right of access to all information held by the State or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.'

Namibia does not have a similar section.

In *Shabalala v A-G of the Transvaal* [1996] 1 LRC 207 the Constitutional Court considered whether s 23 of the Constitution of South Africa is of application when an accused seeks the disclosure of contents of a police docket for use in

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his defence. Mahomed D-P, who wrote the judgment for the court, remarked as follows ([1996] 1 LRC 207 at 222 (para 34)):

> 'The application for the production of documents in the present case was made during the course of a criminal prosecution of the accused. In that context, not only is s 25(3) of the Constitution of direct application in considering the merits of that application, but it is difficult to see how s 23 can take the matter any further. If the accused are entitled to the documents sought in terms of s 25(3), nothing in s 23 can operate to deny that right and, conversely, if the accused cannot legitimately contend that they are entitled to such documentation in terms of s 25(3) it is difficult to understand how they could, in such circumstances, succeed in an application based on s 23. The real inquiry therefore is whether or not the accused were entitled to succeed in their application on the basis of a right to a fair trial asserted in terms of s 25(3).'

But s 25(3) of the South African Constitution, which reads:

> 'Every accused person shall have the right to a fair trial which shall include ...'

is similar to art 12 of the Namibian Constitution. Before the matter was finally settled in South Africa by the judgment of the Constitutional Court in *Shabalala* a number of judges of Provincial Divisions of the Supreme Court delivered judgments relative to both s 23 and s 25(3). Some of these judgments had varying degrees of conflict but they were the first steps towards the interpretation of ss 23 and 25(3).

In *State v Fani* 1994 (1) SACR 635 (E) at 641 Jones J held that the common law of privilege could exist side by side with rights entrenched in ss 23 and 25 of the South African interim Constitution. In the same breath he went on to state that those sections gave the accused greater rights of information than hitherto enjoyed and expressed the view on the information which should be disclosed to an accused before he or she was called on to plead (see 1994 (1) SACR 635 (E) at 639–640).

Zietsman JP in *State v James* 1994 (2) SACR 141 (E) refused to order the state to hand over either copies or summaries of witness statements. He expressed doubts about the applicability of s 23 to criminal trials.

I agree with Mr Navsa, for the respondent, that the Constitution of Namibia, and in particular Ch 3, reflects Namibia's commitment to preserving and protecting fundamental rights and freedoms. Article 12, on fair trial, entrenches the right to a fair trial and public hearing when civil rights and obligations or any criminal charges against the people are being determined. The words in which art 12 is couched show more than anything else Namibia's commitment to justice. That commitment is not less than that of other constitutional democracies. Mr Navsa urged the court to adopt the principles on fair trials expressed in *R v Stinchcombe* [1992] LRC (Crim) 68. I shall refer to this case below.

Ms Winson argued in support of keeping witness privilege because since 1977 it has been preserved by s 206 of the Criminal Procedure Act 1977, which provides:

> *'The law in cases not provided for*
>
> The law as to the competency, compellability or privilege of witnesses which was in force in respect of criminal proceedings on the thirteenth day of May 1961, shall apply in any case not expressly provided for by this Act or any other law.'

That may be so. What we are considering is the effect of art 12 of the Constitution on those principles:

> 'This means that it would not be necessary for the courts to concern themselves with the issue of whether an accused has been prejudiced in the sense that he would probably not have been convicted but for the irregularity.' (See the English case cited above.)
>
> 'This is especially so in the light of the fact that the Bill of Rights expressly enables individuals to apply to the courts for appropriate relief in the case of any infringement of any of the entrenched rights contained in the Bill.' (See *Rights and Constitutionalism: The New South African Legal Order* p 413, see also art 25(2) of the Namibian Constitution.)

The burden of the appellant's submissions is that the notion of a fair trial is not a new one created by art 12 of the Constitution. It is an extension of the law as it existed before independence. That may be so. What, however, has happened is that that law has undergone some metamorphosis or transformation and some of the principles of criminal procedure in the Criminal Procedure Act are now rights entrenched in a justifiable Bill of Rights. That is, in my view, the essence of their inclusion in art 12 of the Constitution. Any person whose rights have been infringed or threatened can now approach a competent court and ask for the enforcement of his rights to a fair trail. See art 25(2) which reads:

> 'Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.'

These entrenched tenets of a fair trail strengthen in a significant way the due process proceedings. The fundamental rights or freedoms guaranteed by the Constitution ensure that rights and freedoms are not ignored. The courts are there to enforce them.

Generally art 7 of the Constitution lays down broadly the due process requirement. It provides:

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'No person shall be deprived of personal liberty except according to procedures established by law.'

That requirement is followed by provisions of art 12 which lay down specifics, albeit not all of them, which in the main guarantee a fair trial and the protection of personal liberty. Article 12 reads as follows:

'1.(a) In the determination of their civil rights and obligations or any criminal charge against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court or tribunal established by law: provided that such court or tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

(b) A trial referred to in sub-article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.

(c) Judgments in criminal cases shall be given in public, except where the interests of juvenile persons or morals otherwise require.

(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

(e) All persons shall be afforded adequate time and facilities for the preparation of and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.

(f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof.

2. No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this sub-article shall be construed as changing the provisions of the common law defences for "previous acquittal" and "previous conviction".

3. No persons shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed.'

The rights and freedoms enshrined in the Constitution are fundamental to the well-being and existence of Namibia. Article 5 calls for their protection. They are to—

'be respected by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the courts in the manner hereinafter prescribed.'

Article 10(1) is fundamental and central to the new perceptions. Courts of law have to interpret and enforce the protection of fundamental rights and freedoms. Article 10(1) provides: 'All persons shall be equal before law.' Apart from this, equality pervades the political, social and economic life of the republic of Namibia. A reading of the Constitution leaves one in no doubt as to what is intended to be achieved in order for the people of Namibia to live a full life based on equality and liberty.

It is in this light that art 12 should be looked at and interpreted in a broad and purposeful way. And the courts must ask whether the retention of privileges of witness statements accords with the exercise of the rights in the Constitution. If the constitutional purpose or intention is equality for all, one must ask whether non-disclosure accords with that purpose or intention? I think not. To achieve equality between the prosecution and the defence is what the Constitution demands when it says '[a]ll persons shall be equal before the law'. That is why, in my view, art 12 and the tenets of a fair trial therein cannot be given an interpretation that supports *R v Steyn* and the authorities that followed it. But those authorities cannot be ignored because they form the historical foundation upon which the procedural rights now enshrined in art 12 were built. It is, however, the Constitution which is the supreme law of Namibia.

It would be a sad waste of time were I to venture into the interpretation of the fundamental rights and freedoms in the Namibian Constitution, sufficient has been said in reported cases both in this jurisdiction and other jurisdictions. I refer to *State v Acheson* 1991 (2) SA 805 (NmH), *Ex p A-G of Namibia, Re Corporal Punishment by Organs of State* [1992] LRC (Const) 515, *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355 (NmS), *Minister of Home Affairs v Fisher* [1979] 3 All ER 21 and *State v Zuma* [1995] 1 LRC 145. I would like to extract from that judgment what was said by Kentridge Ag J because it refers to s 25(3) of the South African Constitution, which deals with a fair trial, and because that section is in many ways similar to art 12 of the Namibian Constitution. The learned acting judge remarked:

'In *R v Big M Drug Mart Ltd* [1986] LRC (Const) 332 at 364, [1985] 1 SCR 295 at 359–360, Dickson J (later Chief Justice of Canada) said, with reference to the Canadian Charter of Rights: "The meaning of right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection." (Dickson J's emphasis.) Both Lord Wilberforce and Dickson J emphasised that regard must be paid to the legal history, traditions and usages of the country concerned, if the

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purposes of its Constitution are to be fully understood. This must be right. I may none the less be permitted to refer to what I said in another court of another Constitution albeit in a dissenting judgment: "Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law." (See *A-G v Moagi* 1982 (2) BLR 124 at 184.) The caveat is of particular importance in interpreting s 25(3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.' (See [1995] 1 LRC 145 at 154–155.)

I agree with what the learned acting judge said because it is relevant to the interpretation of art 12 and other provisions of the Namibian Bill of Rights.

England

It is important to consider the changes in procedural rules in England, a country without the benefit of a written Constitution and a justiciable Bill of Rights.

In England the law of disclosure of witness statements and other relevant materials has in recent years appreciably developed. To cut a long story short, in *R v Bryant* (1946) 31 Cr App R 146 a statement taken from a person known to the prosecution to contain material evidence favourable to the accused and which the prosecution was not going to use because it had no intention to call him as a witness could be handed to the defence. But as Lord Goddard LCJ said, there was no duty to supply a copy of the statements to the defence. He asked ((1946) 31 Cr App R 146 at 155):

> 'Is there a duty in such circumstances on the prosecution to supply a copy of the statement which they have taken to the defence? In the opinion of the Court there is no such duty, nor has there ever been.'

However, that attitude was not maintained for long. The courts changed their stance. It was decided in later cases that where the prosecution intended to call a witness who had given them material evidence and they have in their possession a statement made by him which was materially inconsistent with his evidence the prosecution should inform the defence of that fact and hand a copy of the statement to the defence. In *Dallison v Caffery* [1964] 2 All ER 610 at 618, [1965] 1 QB 348 at 369 Lord Denning MR went a little further and stated:

> 'The duty of a prosecution counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence.'

It should be remembered the courts were at no time considering the existence of a general duty to disclose. They were concerned with what they perceived

to be fair to the defence and to justice. It must also be noted that it was not until 1989 that the Court of Appeal in *R v Lawson* (1989) 90 Cr App R 107 at 114 expressed a clear preference for the above approach. Subject to the requirements of any public interest immunity, it was held that the prosecution should have provided the appellant with all statements or other documents recording relevant interviews with the appellant. The court was of the view that it made no difference whether the document took the form of a witness statement, or notes of an interview, or a police officer's report.

In this regard recent trends in England and Wales on non-disclosure have been influenced to a great extent by a number of what I would call indiscretions on the part of some police investigating crimes and some experts who elected to leave out relevant materials or statements they believed favoured the defence in cases they regarded as highly sensitive. As a result courts were forced to make judgments ignorant of evidence, witness statements or relevant materials favourable to the accused. The accused were convicted. After convictions and in some cases long afterwards, upon information received the Home Secretary referred these cases to the Court of Appeal. I refer below to some of those cases because they helped in the development of a new and vigorous judicial policy on the duty to disclose statements, results of interviews and other relevant materials to the defence.

The first case I would like to refer to is *R v Maguire* [1991] LRC (Crim) 227, [1992] QB 936. In that case all male appellants were found to have positive traces of nitro-glycerine under their nails. Mrs Maguire did not have them but a number of pairs of thin plastic gloves found to have been used by her were examined and the tests were positive for nitro-glycerine. They all were convicted. The case was referred to the Court of Appeal (Criminal Division): among other things it was found that there was failure to reveal facts which were relevant and ought to have been revealed. The prosecution witnesses had been selective about experimental data which supported their case and discarded that which did not. They therefore misled the court. They failed to reveal to the defence matters favourable to the defence. Experts from RARDE were not brought to the attention of the defence during trial. Incorrect evidence was given to the trial court on the significance of nitro-glycerine found under finger nails of male defendants. There was the possibility of innocent contamination of fingernails and gloves. Besides it was impossible to distinguish nitro-glycerine and pentaerythritol tetranitrate. It was said that the duty to disclose was a continuing one. The effect of all this is summarised in the headnote as follows ([1992] 2 All ER 433):

> 'A failure on the part of the prosecution to disclose to the defence material documents or information which ought to have been disclosed may be a material "procedural" irregularity in the course of the trial providing grounds for an appeal against conviction to be allowed under s 2(1)(c) of the [Criminal Appeal Act 1968]. Furthermore, the duty of disclosure is not confined to prosecution counsel but includes forensic scientists retained by the prosecution and accordingly failure by a forensic scientist to disclose material which he knew might have some bearing on the offence charged and the surrounding circumstances of the case may be

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a material irregularity in the course of the trial providing grounds for an appeal against conviction to be allowed ...'

In *R v Ward* [1993] 2 All ER 577 nearly the same happened. Ward was convicted of the murder of 12 people who died after a bomb exploded on board a coach in which soldiers and members of their families were travelling. She was also convicted of causing explosions elsewhere in England. The evidence against her consisted of confession statements made to the police and scientific evidence to the effect that after the coach explosion traces of nitro-glycerine were found in a caravan in which she had stayed. After other explosions traces of nitro-glycerine were found on her person. One of the forensic scientists in the case was Dr Frank Skuse, whose evidence on the use of the Griess test to establish the presence of nitro-glycerine had been discredited in investigations which led to the appeal in *R v McIlkenny* [1991] LRC (Crim) 196, (1992) 93 Cr App R 287 (the case popularly known as 'the Birmingham six'). The Home Secretary referred *Ward* to the Court of Appeal because Dr Skuse's evidence in *Ward* was based on similar use of the Griess test. There was also concern that the scientific evidence carried out in connection with an inquiry by Sir John May into the case of the Maguire family, whose convictions were quashed on appeal, had shown that other substances could give a result in some of the tests similar to that given by nitro-glycerine with the result that Ward might not have been handling explosives at all. But the point of substance argued on appeal was that there had been material irregularity in the original trial because the prosecution had failed to disclose material relevant to both the confessions and scientific evidence. To cut a long story short it was found that the police and the Director of Public Prosecutions had failed to disclose to the defence information about witnesses from whom statements had been taken, including the statements of certain RUC officers who had interviewed Ward indicating a belief in her innocence. There was failure to disclose a number of statements made by the appellant to the police which contained inaccuracies, inconsistencies and retractions. Psychologists who had made a report before her trial had failed to record in their report a second suicide attempt made by her whilst in prison awaiting trial. Three senior government forensic scientists had deliberately withheld scientific tests from the defence which threw doubt on the scientific evidence. One of these tests showed that dyestuffs present in boot polish could be confused with nitro-glycerine in the tests that were used to identify nitro-glycerine. As a result the court found that prosecution's failures to disclose were of such order that individually and collectively they constituted material irregularities in the course of the trial. The court held:

> '(1) The prosecutions' duty at common law to disclose to the defence all relevant material, ie evidence which tended either to weaken the prosecution case or to strengthen the defence case, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial, to disclose

> to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses. Furthermore, an expert witness who had carried out or knew of experiments or tests which tended to cast doubt on the opinion he was expressing was under a clear obligation to bring the records of such experiments and tests to the attention of the solicitor who was instructing him so that they might be disclosed to the other party. On the facts, the non-disclosure of notes of some interviews by the police to the Director of Public Prosecutions, the non-disclosure of certain material by the Director of Public Prosecutions, the non-disclosure of certain material by the Director of Public Prosecutions and prosecuting counsel to the defence and the non-disclosure by forensic scientists employed by the Crown of the results of certain tests carried out by them which threw doubt on the scientific evidence put forward by the Crown at the trial cumulatively amounted to a material irregularity which, on its own, undoubtedly required the appellant's conviction to be quashed.' (See the headnote [1993] 2 All ER 577–578.)

In the instant appeal it was argued on behalf of the appellant that disclosure of the contents of a police docket would, among other things, retard police investigations. Although this point does not arise in the present appeal it is dealt with in general in the body of this judgment. But one has to bear in mind what was said by Glidewell LJ in *R v Ward* [1993] 2 All ER 577 at 601, [1993] 1 WLR 619 at 645:

> '... "all relevant evidence of help to an accused" is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led.'

There may be in the police docket a piece of paper referring to some event, incident, time or other thing that will assist the accused in selecting material for his defence or in reminding him of the time and place where he was.

It used to be the practice that all instruments or documents recording relevant interviews, witness statements or notes of interviews or a police officer's report should be disclosed. See *R v Ward* [1993] 2 All ER 577 at 602, [1993] 1 WLR 619 at 646.

I agree with Ms Winson's conclusion that the English approach with regard to disclosure of evidence in the possession of the state has undergone dramatic changes which are primarily attributable to the *Attorney General's Practice Note* [1982] 1 All ER 734. In my view the courts have gone beyond the Attorney General's guidelines. These developments were expedited by the nature of the cases the courts were hearing and the ominous consequences brought about by acts of violence and terrorism and the subsequent reaction of the police to those acts and the serious nature of the crimes arising from them.

There were attempts by the police and others to hide away pieces of evidence of help to the defence in the preparation of the accused's case. This resulted in a failure of justice.

But what is significant for our purposes is that these developments have taken place in England and Wales without a Bill of Rights and without the benefit of a written Constitution. England has in a very significant way moved away from the law in force on 31 May 1961, which in terms of our Criminal Procedure Act we still follow and enforce.

Before I consider the position in Canada I would like to deal with public interest immunity. I share the view of the appellant's counsel that public interest immunity is protected by privilege, but is that still the position? It is necessary under certain circumstances to protect public interest immunity in order to safeguard the interests of public administration and the protection of the state. I do not, however, share the view that public interest immunity should be preferred in order to deny an accused a fair trial and justice. Open justice requires fairness to be evenly applied between the prosecution and the defence.

Rather than make public interest immunity an exception to the general duty to disclose, it should be weighed in the scales of justice. That weighing should be done by the courts. If before any trial the prosecution has in its possession documents or other evidential materials helpful to the defence case but wants to claim public interest immunity the defence should be informed of that fact and the court should be asked to give directions or some ruling on the prosecution's claim to public interest immunity. The decision must be made by a judge. It would not be proper to allow the prosecution to decide which of the relevant materials should be denied to the accused on the grounds of public interest immunity. The prosecution should not be judged in their own cause on the claim to immunity. As to how to proceed before a judge in chambers it would, in my view, be proper for the Chief Justice to draw up a practice direction. The compelling reason for allowing the court to decide on documents or other material claimed by the prosecution to be covered by public interest immunity is not unduly to compromise the accused's right to a fair trial. See *R v Davis* [1993] 2 All ER 643 at 646–647, [1993] 1 WLR 613 at 616–617 and *R v Ward* [1993] 2 All ER 577 at 601–602, [1993] 1 WLR 619 at 645–646.

> 'The effect of *R v Ward* is to give the court the role of monitoring the views of the prosecution as to what material should or should not be disclosed and it is for the court to decide. Thus, the procedure described as unsatisfactory in *R v Ward*, of the prosecution being judge in their own cause, has been superseded by requiring the application in the court. This clearly gives greater protection to the defence than existed hitherto—indeed as much protection as can be given without pre-empting the issue. Although ideally one would wish the defence to have notice of all such applications, and to have sufficient information to make at least some representations, we recognise that, in a small minority of cases, the public interest prevents that being possible.' (See *R v Davis* [1993] 2 All ER 643 at 648, [1993] 1 WLR 613 at 618 per Lord Taylor LCJ.)

Canada

Now let me turn to Canada.

The Canadian Charter of Rights and Freedoms 1982 in s 7 provides:

> 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

Article 7 of Ch 3 of the Constitution of the Republic of Namibia merely confirms the rule of law by requiring that no one shall be deprived of personal liberty except according to procedures established by law. Section 11 of the Canadian Charter reads:

> 'Any person charged with an offence has a right ... (b) to be tried within a reasonable time; (c) not to be compelled to be a witness in proceedings against that person in respect of the offence; (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.'

Before the proper interpretation of ss 7 and 11 of the Canadian Charter of Rights and Freedoms by the Supreme Court there were conflicting signals from the provincial courts and the Court of Appeal. The law on fair trial was not settled. However, s 603 of the Canadian Criminal Code provided:

> 'An accused is entitled, after he has been ordered to stand trial or at his trial, (a) to inspect without charge the indictment, his own statement, the evidence and the exhibits, if any; and (b) to receive, on payment of a reasonable fee determined in accordance with a tariff of fees fixed or approved by the Attorney-General of the province, a copy (i) of the evidence; (ii) of his own statement, if any, and (iii) of the indictment; but the trial shall not be postponed to enable the accused to secure copies unless the court is satisfied that the failure of the accused to secure them before the trial is not attributable to lack of diligence on the part of the accused [am RSC 1985, c 27 (1st Supp) s 101(2)(d)].'

R v Heikel (Ruling No 8) (1990) 5 CRR (2d) 362 enumerates classes of documents required to be produced for discovery by those who may be adversely affected by its possible use as evidence at a trial. These included, among others, business records, certificates of analyses of bodily substances for alcohol content and transcripts of intercepted private communications respectively.

No law required full disclosure to be made. It was left to the courts to develop the law. This, as I pointed out above, resulted in conflicting decisions. In a very helpful written submission Ms Winson contended that those courts that ruled in favour of disclosure of information not provided for by legislation argued the failure to disclose other information held by the prosecution effectively denied the accused the opportunity to make full answer and defence as he was entitled to do in terms of s 7 of the Charter and that it impinged on his right to a fair trial in terms of s 11(d) of the Charter. It was those judges that argued in favour of full disclosure that won the day as can be seen from cases cited below.

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The court said in *R v Heikel* (1990) 5 CRR (2d) 362 at 363:

> 'I am in complete agreement with Tallis JA, in *R v Bourget* (1987) 54 Sask R 178, that with the advent of the *Charter*, full and timely discovery of "documents" that are material or relevant to the offences with which the accused are charged, ought properly to be considered a guaranteed right of an accused person within sections 7 and 11(d) of the *Charter*. To deny the accused such timely discovery, to my mind, is contrary to the principles of fundamental justice and will deprive an accused of his or her right to make full answer and defence and thereby infringe or deny the accused's sections 7 and 11(d) *Charter* rights to liberty and security of the person. Such right, of course, must be subjected to certain exceptions such as "documents" which fall within a category of privilege, those which may require protective orders, the possible timing of the disclosure of Crown witness statements and editing of same by the court and other exceptions which may arise.'

Contrast this with what McBain J said in *Re Kristman* (1984) 12 DLR (4th) 283 (Alberta Court of Queens Bench). The learned judge said there was no right either at common law or under the Charter to require disclosure in favour of an accused or require the state to disclose all evidence relating to the police investigation. The learned judge said ((1984) 12 DLR (4th) 283 at 298–299):

> 'Parliament in the provisions of the *Criminal Code*, and in the Charter, have not provided for the sort of pre-trial discovery and examination of witnesses demanded by the applicant's counsel, and thus it is not a "right" enshrined in legislation, fundamental or otherwise. The Charter does not, in the submission of the Crown, require the courts to question the validity of legislation or the reasons for its being formulated as it is. In *Duke v R* (1972) 7 CCC (2d) 474 at 479, (1972) 28 DLR (3d) 129 at 134, Fauteux C.J.C. said (Laskin J. dissenting on this, however): "In my opinion the failure of the Crown to provide evidence to the accused person does not deprive the accused of a fair trial unless, by law, it is required to do so."'

The proper approach to full discovery was dealt with by Sopinka J in *R v Stinchcombe*. The appellant in that case was charged with a criminal breach of trust, theft and fraud. He was a lawyer who was alleged to have appropriated money from his client. A witness who had given evidence favourable to the accused at the preliminary hearing was subsequently interviewed by agents of the Crown. Crown counsel decided not to call the witness at the trial and would not produce the statements recorded at the interview. Defence counsel applied for the disclosure of those statements. The trial judge refused to permit their disclosure to the defence on the ground that there was no obligation on the Crown to disclose the statements and in any event the witness was not worthy of credit. He appealed. The Court of Appeal dismissed the appeal. With leave of the Court of Appeal the appellant appealed to the Supreme Court. The Supreme Court sent back the case for retrial holding, among many other reasons, that in indictable offences the Crown had a legal duty to disclose all relevant information to the defence. The learned judge proceeded to reply to the fears of the Crown, fears that were amply expressed by Ms Winson in

her submissions in the instant case and which I have mentioned above. Sopinka J dealt first with the argument that the duty to disclose must be reciprocal, that is the defence must also disclose. The learned judge remarked ([1992] LRC (Crim) 68 at 73):

> 'It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. In *Boucher v R* [1955] SCR 16 at 23–24 Rand J stated: "It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings." I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.'

He dismissed the argument that the duty to disclose all relevant material could impose an onerous new obligation on the prosecution which would result in increased delays in bringing accused persons to trial. The learned judge believed, and I agree with his reasoning, that—

> '[t]he adoption of uniform, comprehensive rules for disclosure by the Crown would add to the work-load of some Crown counsel but this would be offset by the time saved which is now spent resolving disputes such as this one surrounding the extent of the Crown's obligation and dealing with matters that take the defence by surprise' (See [1992] LRC (Crim) 68 at 73.)

In fact more time was spent on adjournments in jurisdictions that do not have a general duty to disclose than those that have it, I interpose.

Experience elsewhere has shown that the prosecution abandons cases more readily where it knows that it has no leg to stand on. On the other hand, the defence readily enters pleas of guilty once the strength of the prosecution case cannot be met against a defence that is likely to succeed. I agree that much time would be saved and delays reduced by reason of the increased guilty pleas,

withdrawal of charges and shortening of proceedings because of the reduction of issues to be contested.

It was submitted on behalf of the appellant that disclosure of witness statements would enable the accused to tailor his evidence in order to conform with information in prosecution witness statements. Sopinka J's answer to this problem removes the fear that the accused will be able to tailor his defence in accordance with the information provided in prosecution witness statements. The learned judge said ([1992] LRC (Crim) 68 at 74):

> 'Refusal to disclose is also justified on the ground that the material will be used to enable the defence to tailor its evidence to conform with information in the Crown's possession. For example, a witness may change his or her testimony to conform with a previous statement given to the police or counsel for the Crown. I am not impressed with this submission. All forms of discovery are subject to this criticism. There is surely nothing wrong in a witness refreshing his or her memory from a previous statement or document. The witness may even change his or her evidence as a result. This may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradictory writings which the prosecutor holds close to the vest. The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material.'

I agree. But a trial cannot be just and balanced when the prosecution hides from the defence relevant materials of evidential importance in order to spring a surprise on the defence during the cross-examination. The rules and the standards of a fair trial must be known to both sides in order for the contest to be fair. The English cases cited in some detail above prove the folly of refusing to disclose witness statements, information and other documents to the defence.

The other fear which the appellant feels militates against full disclosure is that it will put to risk the security and safety of persons who provide the prosecution with information. I find the answer given by Sopinka J in *Stinchcombe* [1992] LRC (Crim) 68 at 74 an adequate reply to that fear. It is true that disclosure might put to risk the lives of informers and witnesses. These are matters that the Prosecutor General should put before a judge in order to seek his directions. This, however, should be done after informing the defence of the intention of the prosecution. I repeat the Prosecutor General must not be the judge in his own cause. All relevant concerns and fears for the safety of witnesses and informers must be put before a judge in the manner described above. The proof required is a balance of probabilities: see *Shabalala v A-G of the Transvaal* [1996] 1 LRC 207. Sopinka J says ([1992] LRC (Crim) 68 at 74):

> '... there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s 7 of the Canadian Charter of Rights and Freedoms as one of the principles of fundamental justice (see *Dersch v Canada (A-G)* [1990] 2 SCR 1505 at 1514). The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person.'

Any system of justice that tolerates procedures and rules that put accused persons appearing before the courts at a disadvantage by allowing the prosecution to keep relevant materials close to its chest in order to spring a trap in the process of cross-examining the accused and thereby secure a conviction cannot be said to be fair and just. Full disclosure is in accord with arts 7 and 12 of the Constitution. It would be wrong to maintain a system of justice known to be, in some respects, unfair to the accused. The right to disclose has acquired a new vigour and protection under the provisions of arts 7 and 12 of the Constitution. English cases cited above are proof beyond doubt that non-disclosure leads to the denial of justice.

For disclosure to be effective it must be done at the earliest possible time. In some instances soon after arrest and in others long before the accused is asked to plead and in some cases only after the witness has given his evidence-in-chief. This depends on the circumstances of each case. However, the overriding factor should be the sufficiency of time in which the accused should prepare his or her case. In my view it won't be sufficient time to hand witness statements and other materials to the accused a few minutes before plea. There should be reasonable time to allow the accused to prepare thoroughly his reply to the charge and his defence. It is for these reasons that we made the order mentioned above.

Costs will follow the event, including costs of two counsel.

Solicitors:
Prosecutor General for the appellant.
Legal Assistance Centre for the respondent.

ANNEXES

A Trial Transcript of 18th January 2005 (RUF)

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL-2004-15-T
TRIAL CHAMBER I

THE PROSECUTOR
OF THE SPECIAL COURT
v.
ISSA SESAY
MORRIS KALLON
AUGUSTINE GBAO

TUESDAY, 18 JANUARY 2005
9.54 A.M.
TRIAL

Before the Judges:

Benjamin Mutanga Itoe, Presiding
Bankole Thompson
Pierre Boutet

For Chambers:

Ms Candice Welsch
Mr Matteo Crippa

For the Registry:

Ms Maureen Edmonds
Mr Geoff Walker

For the Prosecution:

Mr Peter Harrison
Mr Alain Werner
Ms Sharan Parmar
Mr Mark Wallbridge (Case Manager)

For the Principal Defender:

Mr Ibrahim Mansaray

For the accused Issa Sesay:

Mr Wayne Jordash
Ms Sareta Ashraph

For the accused Morris Kallon:

Mr Shekou Touray
Mr Melron Nicol-Wilson

For the accused Augustine Gbao:

Mr Andreas O'Shea
Mr John Cammegh

[HS180105A]

Tuesday, 18 January 2005

[Open session]

[The accused Sesay and Kallon not present]

[The accused Gbao entered court]

[On commencing at 9.54 a.m.]

PRESIDING JUDGE: Good morning, learned counsel. We are resuming our session, and we would be asking the Prosecution to call the next witness.

MR HARRISON: The next witness, which will be the 20th witness in the trial, is TF1-141. The Prosecution has discussed certain matters with all Defence counsel, and we have a suggestion on how we might proceed this morning. We suspect it may be a more efficient means of proceeding, and I'd like to indicate to the Court what we have discussed.

There are, in fact, three applications to be made with respect to this particular witness.

PRESIDING JUDGE: By who?

MR HARRISON: The first application would be by the Prosecution, which is an application that the next witness testify by closed-circuit television and that there be a support person in the room of the witness when they testify by closed-circuit television.

The second and third applications would be made by Mr Jordash and Mr O'Shea, and they are in respect to objections to certain evidence which was disclosed in the most recent statement of 10 January 2005.

PRESIDING JUDGE: In the most recent statement for this

witness?
MR HARRISON: Correct.
PRESIDING JUDGE: Dated?
MR HARRISON: 10 January 2005.
MR JORDASH: Just to clarify, and this is probably my lack of -- I beg your pardon to jump up.
PRESIDING JUDGE: That's okay.
MR JORDASH: It's an objection to evidence which has been disclosed in three statements. One on the 9th of October 2004, one on the 19th to the 20th of October 2004, and one in a statement dated the 10th of January 2005.
PRESIDING JUDGE: So there are three statements, not one.
MR JORDASH: It's three statements.
PRESIDING JUDGE: Facts contained -- you're objecting to certain facts contained in three statements.
MR JORDASH: Indeed. It's the statements which have been served after the date which Your Honours prescribed as the date for which the Prosecution should adhere to as to serving evidence pursuant to Rule 66, which was, I think, the 16th of April 2004. So it's all the evidence since then.
PRESIDING JUDGE: Yes. Now, for the neatness of the record, why don't we allow Mr Harrison to conclude.
MR JORDASH: Indeed.
PRESIDING JUDGE: And then you can supplement his application with whatever further observations you have to make.
MR JORDASH: Certainly.
PRESIDING JUDGE: All right.
MR HARRISON: Yes. And I have no difficulty with Mr Jordash

pointing out that information, or any other information where I may be misleading.

That was the introduction that I wish to give to the Court as to how we might proceed this morning if in the Court's view that is an efficient manner. What we also contemplated was that all applications would be resolved before the witness would be brought into the room so that they would take place without him knowing the words uttered. The Prosecution is at the Court's pleasure, but we are prepared to deal with the first application. We estimate submissions of perhaps 10 to 15 minutes. But I should indicate that it's -- what's most significant probably for the Court is the information that has been provided in the statutory declaration by Ms An Michels, the psychologist from the witness and victim management.

[Trial Chamber confers]

JUDGE THOMPSON: Mr Jordash.

MR JORDASH: I agree with everything my learned friend has just said. To a large extent, it's in Your Honours hands as to the order of events or order of arguments. But it makes sense perhaps to deal with the argument as to the special measures since it involves the psychologist, Ms Michels, who is here in Court. So perhaps it might make sense to deal with that argument first, and then move on to the arguments as to exclusion of evidence.

PRESIDING JUDGE: What about -- we would like to have on record, you know, besides the statement dated the 10th of January 2005, you say you would also be objecting to two other statements. May we have the dates please.

MR JORDASH: 9th of October 2004, and the 19th-20th of October 2004.
PRESIDING JUDGE: 19th and 20th of October?
MR JORDASH: Yes.
PRESIDING JUDGE: 19th?
MR JORDASH: 19th and 20th. It's -- basically, it's the proofing exercise carried out on the 19th and the 20th of October, and it's information contained as a result of those proofing exercises.
JUDGE BOUTET: So those statements, to follow your -- are statements that the Prosecution would have obtained subsequent to a series of other statements in this case.
MR JORDASH: Yes. The statements obtained on the 19th and 20th of October and the 10th of January are perhaps not properly described as statements because they arise through a proofing exercise. But they --
JUDGE BOUTET: It's clarification of a previous statement, in other words, like we've seen with other witnesses.
MR JORDASH: That's the process by which the evidence arises. I would seek to argue that it's not evidence which arises through clarification, but that's the process.
JUDGE THOMPSON: In other words, there's an earlier statement in time, which is the original statement or controlling statement.
MR JORDASH: Yes.
JUDGE THOMPSON: And these may well be described as supplemental, the ones that you're likely to object to may well be characterised "supplemental" statements.
MR JORDASH: In the Prosecution's view and in our view,

they're additional statements.

JUDGE THOMPSON: Well, whatever. But there is a controlling statement which they relate to.

MR JORDASH: They purport to relate to. We would say not.

JUDGE THOMPSON: That's the kind of language. I just wanted to make sure --

MR JORDASH: Your Honour, yes.

JUDGE THOMPSON: -- that we're not talking about independent statements in terms of your 19 October, 19 and 20, and 10/1/05. They are statements which are additional to the controlling statement.

MR JORDASH: Your Honour, yes.

JUDGE THOMPSON: All right.

Mr O'Shea.

MR O'SHEA: Your Honours, with regard to the order of the three applications, we have no difficulty with the Prosecution proposal that the Prosecution application go first. We also have no difficulty with the application of Mr Sesay coming second. With regard to our application, our application is distinct from that of Mr Jordash. It is similar to this extent, that we are objecting to particular evidence in the statement which has been referred to as being dated the 10th of January 2005.

The evidence that we are objecting to is distinct from the evidence which Mr Jordash is objecting to.

PRESIDING JUDGE: But it's contained in the same statement.

MR O'SHEA: But it's contained in the same statement, yes. The legal basis of the submissions, while overlapping,

are also distinct. However, that having been said, it may be a time-saving exercise to deal with the arguments in relation to Mr Sesay and the arguments in relation to Gbao collectively, but I'm in Your Honours' hands in relation to that. They are distinct points, but they do overlap on questions of law. And so it may -- it may be convenient to hear the arguments from Mr Jordash, then hear the arguments of myself, and then Your Honours can deal with the two issues distinctly in one decision or two.

JUDGE BOUTET: Can I ask if the application that the Prosecution's intending to make about the witness testifying in closed circuit and the assistance of the witness, if this application is opposed in any way, shape, or form by the Defence of either accused?

JUDGE THOMPSON: Perhaps I should join you in seeking clarification on that because it seems as if there are two applications in one. So whether the Prosecution can guide us as to whether there's an agreement. If there isn't, then why not, in other words, separate them.

MR HARRISON: No, there's no agreement. That's why there's an application. And there's no agreement on either the closed circuit or on the support person being present. Our suggestion is that there be one application seeking two forms of relief, and the Court can deal with them in one decision, granting one, both, or none.

JUDGE THOMPSON: All right, thanks.

Mr Touray.

MR NICOL-WILSON: Your Honour, we are not objecting to the

Prosecution's application, but there is a likelihood that we will raise certain issues after the application which will take the form of an objection to that application. But we want to wait first and listen to the application.

JUDGE THOMPSON: So in other words, you want to reserve your position on that --

MR NICOL-WILSON: Yes, until after --

JUDGE THOMPSON: You've heard the application.

MR NICOL-WILSON: But we just want to inform the Court that there's a likelihood that we will raise an objection to the application, but we want to listen to the application first.

JUDGE THOMPSON: Well, that's fine.

MR JORDASH: Could I make clear the extent of our opposition to the application. The Prosecution want this young man to give evidence by --

JUDGE THOMPSON: Well, are we -- we're not yet hearing the application. We were, in fact, advised by the Prosecution that they want to apprise the Chamber of some kind of agreement between the Prosecution and the Defence as to the modus operandi this morning in terms of an efficient discharge of judicial business, particularly before this witness testifies. That's the stage at which we are now, whether there is. But we're not yet at the stage of hearing the application substantively because when I accept I got Mr Harrison wrong, he said that the whole purpose of the exercise he has gone through is to inform the Court as to the efficient manner in which we should proceed before this witness testifies. Am I clear

on that?

MR JORDASH: Your Honour, yes. And in that case, I shall sit down.

JUDGE THOMPSON: Yes.

Do you want to throw some light on this?

MR HARRISON: There's nothing I can shed, unless we can proceed in the manner I suggested.

JUDGE THOMPSON: Quite right. That's something which we will have to determine first.

PRESIDING JUDGE: I have listened to both the Prosecution and the Defence teams. And I'm a bit wary about the complexity that these oral applications are likely to take, likely to assume for purposes of our determination. I was wondering, you know, if we could enter in order to give the applications very serious and thorough consideration proceed by some motions in writing which we could subject to some expedited hearing. Because there is -- we are caught up in a complexity somewhere, you know. There are three applications. The Defence is -- Mr Jordash is objecting to not only to the statement of the 10th, but also to the other statements of the 19th and the 20th of October, I mean the 10th of January. Also, the statements of the 19th and 20th of October, and Mr O'Shea has his own concerns which are legitimate. You know his objection is close to those of Mr Jordash, it is being raised for different reasons and purposes.

And the Defence team of the second accused Mr Kallon indicates that they are comfortable going with the

application, but that at that certain stage after listening to the application by the Prosecution, they might raise certain objections. I mean, this throws some complexity that are beyond the ordinary that one would expect to take in an oral application. I was wondering what the reaction of counsel would be on this because we consider the issues fundamental and important at this stage.

Yes, Mr Harrison.

MR HARRISON: The Prosecution is content to proceed in the manner that has been suggested. I have no difficulty with the position taken by Mr Touray and Mr Nicol-Wilson. That's a fair position which they're always entitled to proceed.

The application made by the Prosecution is a very straightforward one. There is simply one rule that would be referred to -- sorry, two rules to be referred to, and essentially I think turns on the evidence and how much weight the Court determines to give to the statutory declaration of the psychologist. There's authorities which the Prosecution say answer completely the motions of Mr Jordash and Mr O'Shea. There's one authority which we say answers their objections completely, and we're prepared to -- we have submitted the authority to -- one of the court legal officers already, and we say that again that's a relatively straightforward matter that can be dealt with.

There's one other bit of information if my friend could just indulge me for a minute. This witness is a

person that the Prosecution has requested be withdrawn from their educational programme on two occasions. There has been considerable hardship to this person, and the Prosecution does very much wish to try to have this witness dealt with in as speedy a manner as possible. Thank you.

MR JORDASH: Your Honour, could I agree with what my learned friend has said. In relation to the issue of the protective measures, my submission would be that the argument will turn upon the evidence, and I would seek the live evidence of Ms Michels. So that extent, a written motion may not actually provide any resolution. As Your Honours may consider that the application does turn on what she has to say about this young man.

In relation to my argument, I've handed to Your Honours' learned legal officers a table of the evidence which has been given by this young man both before April of 2004 and in the evidence which I will seek to exclude. To the extent that the application is complicated, it revolves only around Your Honours' two judgements. One, which my learned friend has just referred, which they rely upon from the CDF trial, and the judgement which I rely upon which is from this trial. So both of which are Your Honours' own judgements, and my application essentially revolves around Your Honours looking at the table which has been prepared by our team and assessing whether that evidence is new, as in an additional statement or whether it arises as supplemental to the old statement. So I would respectfully submit

that it's much less complicated than perhaps it first appears from, perhaps, the long-winded way in which we've all expressed ourselves so far.

MR O'SHEA: I fully understand Your Honours' concern. There are, however, difficulties with the course that Your Honour is considering. With regard to the protective measures, of course it relates to how we proceed with the evidence of this witness, and that is, I think, the essential difficulty.

With regard to our argument, our application, as to complexity, it refers to one line in the supplemental statement of the 10th of January. However, one line, we say, of great significance.

With regard to the law, aspects of the law are covered by Mr Jordash's application, and therefore what Mr Jordash says about Your Honours' own rulings and the interpretations of them applies. So neither from our side nor from the side of the Bench should there need to be too much discussion about the content of Your Honours' own rulings.

The distinct aspect of the law is, while a difficult one for Your Honours to decide possibly, because it is not thus far covered by authority so far as I can see, in terms of its explanation, I think it's simple, and I wouldn't imagine that the new aspect of the legal argument that I intend to put to Your Honours should take more than 10 to 15 minutes, from my side. That's with regard to the complexity.

There's a more significant problem, however, with

the concept of a written motion, which is that is may be that if Your Honours are with my argument partially but not entirely, which I see as a possibility, it may be that Your Honours decide to postpone the testimony of this witness. So the only way we could really deal with the matter in the way of a written motion would be if the Prosecution were to indicate to this Bench that they would be happy to postpone this witness in any event. If that happened, then we could deal with it by written motions. If that does not happen, then one of the remedies is to postpone the testimony, and that's where the difficulty lies. Does Your Honour follow?

JUDGE BOUTET: I don't. I don't see any difference between what you're saying, whether the Prosecution agrees or not, what does that change? If we feel that we need some time to reflect upon that, then we'll certainly ask the Prosecution to postpone the evidence of this witness. So as far as we're concerned, obviously if we're asking you to produce something in writing, it means that we don't expect that to be handed to the Court this morning. We'll have to give the time to everybody. And it goes without saying that there will necessarily be a postponement of the evidence of this witness. It goes without saying that if we go that route, that's what will happen.

MR O'SHEA: Indeed. But on the other hand, if we make the application quickly and Your Honours are against us, then the evidence can proceed.

MR JORDASH: Could I just -- could I also... Could I also add

this, and perhaps I should have made this clearer: If after hearing Ms Michels's evidence, I take the view that the evidence for my part passes what I see as the relevant standard in terms of what this young man's psychological state is then I would be happy to concede the application and not require, as such, a decision. Whether that assists Your Honours in deciding whether to hear this argument now, I don't know. But certainly, my opposition is only because I don't know what Ms Michels will say about this young man except what is so far detailed in a short statement.

JUDGE BOUTET: On that issue, if I may, Mr Jordash, so we are better equipped to think and take a decision about that, will this be the focus of your cross-examination -- or your examination, whatever it may be? Are you contesting or disputing the expertise level of that particular witness? I'm not talking -- I'm talking of Ms An whatever her second name is. And are you disputing conclusions or recommendation? I know you're going to challenge -- not challenge, but trying to get some clarification as to how much and what it is that he's suffering and whether it has or has not. But this is the focus of your examination of that witness, not the other issues that I'm raising.

MR JORDASH: Indeed.

JUDGE BOUTET: And you're not intending to call a counter expert. We're not going in that direction.

JUDGE THOMPSON: But let me add to that if that is the focus of your position, of course, it would seem that the Court

would have to apply its mind to the criteria. I mean, we're not just going to -- if you cross-examine, you question credentials, you question methodology, you question reasoning, then you question conclusion of the expert, the Court will have to now be able to advise itself on the criteria for assessing the scientific validity of expert testimony. So that in itself puts a little complexity on the issue because we're not just going to say, "oh, well, Mr Jordash has questioned this, and therefore that's the end of the matter." We would be called upon somehow to say what criteria, if any, should be applied in assessing the scientific validity of the psychological evaluation.

MR JORDASH: If I can summarise my position, in Your Honours' ruling of the -- it was the renewed motion for special measures, and Your Honours' ruling there -- dated the 5th of July 2004 ruled that child witnesses could give evidence via the live link in order to prevent certain psychological effects. Now, if Ms Michels's evidence is clear in that regard that this would prevent those psychological effects, Your Honours may take the view that this young man, therefore, falls, despite the dispute about age, into the category of witnesses who should give evidence via live link. In other words, if the Prosecution established through calling their evidence that the same retraumatisation risks apply to this witness as apply to child witnesses, then Your Honours have already ruled on that and it would simply be a matter of adjudicating that it is -- that the

evidence adduced is consistent with your previous order. That's a long way of saying a very simple thing, but I hope Your Honours understand me.

JUDGE THOMPSON: Because my difficulty is we would not be escaping of having to do some preliminary assessment of the scientific validity of expert testimony. Otherwise, why would we need it then?

MR JORDASH: Indeed.

JUDGE THOMPSON: We have to be guided by it. And in doing that, we need to advert our minds to what sort of general criteria to use in assessing the scientific validity of -- and particularly when you say if you question the methodology, the reasoning --

MR JORDASH: I don't. I don't question Ms Michels's expertise.

JUDGE THOMPSON: You can still concede her expertise in the field but at the same time question the reasoning and the conclusion. I mean, that is possible. You can say, well, she is highly qualified. She got her degrees from so and so and so. She is qualified in the clinical aspects of psychology, but you can still say, it's possible, how did you arrive at this conclusion of PSD? Your methodology?

[Trial Chamber confers]

JUDGE THOMPSON: I mean, there could be a distinction here. You can still not challenge her credentials, her expertise, which is a preliminary determination as far as I understand the law, but still challenge the methodology and the conclusion.

MR JORDASH: I --
JUDGE THOMPSON: That's how I understand it.
MR JORDASH: I might. I'm simply saying that if --
PRESIDING JUDGE: [Microphone not activated]
MR JORDASH: Your Honour, your microphone.
PRESIDING JUDGE: Sorry. Thank you.
You said that you're not necessarily challenging the expertise of this witness.
MR JORDASH: Definitely not.
PRESIDING JUDGE: That is what I understand you to have said.
MR JORDASH: And I haven't decided what else I might challenge.
JUDGE THOMPSON: That's the point I'm making. I'm trying to understand whether when you say you're not challenging the expertise, that means that you may be accepting the conclusion of the psychological evaluation or even the reasoning or both. I don't understand it that way.
MR JORDASH: Until I hear the evidence, I don't know what --
JUDGE THOMPSON: You can -- precisely. That's what I have been trying to clear up.
MR JORDASH: I agree with that. But I do suspect that having concluded that her expertise is not to be challenged, my challenge to any evidence will be minimal. It's clarification I seek more than anything else.
[Trial Chamber confers]
PRESIDING JUDGE: Yes, Mr Cammegh.
MR CAMMEGH: Your Honour, can I make it clear that my position on this is exactly the same. First of all, we do not in any way challenge the expertise or the credentials of the

expert witness whose evaluation we are hopefully about to hear. The task is simple, and it is simply this: To explore the ambit upon which she has come to her conclusions. And I very much doubt whether there will be anything that remains in issue after that. But it's our duty to explore the grounds upon which those conclusions are based.

I would venture to suggest that once that has been established, and I will not be in a position to challenge it or take it any further. But I think that's the process that I have to engage in. Just to be sure that the Court is content that the findings on what is, after all, quite an important issue, are satisfactory to the Tribunal and satisfactory to the Defence.

PRESIDING JUDGE: Thank you.

All right, thank you for the arguments which have -- yes.

MR NICOL-WILSON: Your Honour, the Defence for Morris Kallon, as we earlier stated, we have certain concerns with the application by the Prosecution which we know by implication will include a reference to the declaration by the psychologist. We think that the way to proceed would be by motion because we now see that the issues are many, and appears to be very complex. For instance, we shall be looking into the recommendations made by the psychologist, and we definitely need an independent advice in order to be able to deal with the recommendations effectively. So we definitely are in support of the suggestion made by the Presiding Judge

that we think that the right way to proceed would be by motion which would then be dealt with expeditiously.

PRESIDING JUDGE: Well, thank you.

Mr Cammegh, you're up again. Yes, Mr Cammegh.

MR CAMMEGH: Just to make it clear that with all respect to my learned friend, that is not the position that I take, and I anticipate it's not the position of Mr Jordash either. This is an exploration that can only take place orally in our submission, and the quicker the better.

PRESIDING JUDGE: All right.

MR JORDASH: Sorry, and since my learned friend is not making any application, I would suggest what they would need to do to be able to join this argument is to hear first of all from a Ms Michels. That can't be done by written motion.

PRESIDING JUDGE: What do you say?

MR JORDASH: Well --

PRESIDING JUDGE: That can be heard by written motion.

MR JORDASH: Well, as I understand it, my opposition to this application cannot be based unless I hear from Ms Michels. As I understand their position, their application, if there is to be one, cannot take place unless there is oral evidence from Ms Michels. So the written motion route wouldn't, I would submit, resolve this issue. We have a statement from Ms Michels. We've all I think are in agreement that nothing can be decided simply on the basis of that written statement. So we're all in effect waiting to hear from Ms Michels.

JUDGE BOUTET: So would that be a possibility, that we hear

Ms Michels, to see what she has to say, and that may take care of both views. And then see if there is an application following that, because I can see what you're saying is the application by counsel for the second accused can only follow the evidence -- you need to hear the evidence that has to be put forward by that particular expert witness before you make any stated position on that. That's basically what you're saying.

MR JORDASH: Yes.

JUDGE BOUTET: So would that be a possibility? I'm just raising that, that we hear that evidence sort of now, although it would not be in line with what has been suggested by the Prosecution as to how they want to proceed because they would like to proceed first with their application, and then we hear your objection. But just given the way it is moving now, would that be a solution to hear that first, and then we'll see if following this counsel for Mr Kallon still have their motion or not.

MR JORDASH: Your Honour, I would say yes. And also, as I understand the Prosecution's application, it is predicated upon the oral evidence of Ms Michels as well.

JUDGE BOUTET: Okay. Yes.

MR NICOL-WILSON: Your Honour, basically we are saying that there is a declaration already by Ms An Michels, and we are sure that she is going to confine herself in her oral declaration what is stated in this written declaration. So we think the right way to proceed is there will have to be an application from the Prosecution first, and that

is what we think should come in by way of motion so we could respond and that could be dealt with expeditiously. Because we already know what Ms An Michels will be saying to this Court because we have a declaration.

JUDGE BOUTET: The position that Mr Jordash has taken and that of your colleague from the third accused is that maybe this is what the Prosecution is content to establish through the evidence of this witness, but they would like to know more. And the approach, as I hear it from Mr Jordash, to say that we want to explore that, to know and question some of the issues that are raised in that declaration as such, and see from there if we're satisfied with it or not. So obviously even though the Prosecution may use that statement and stick with that statement, your colleagues from the Defence side are saying "we're not content with this. We want to know a little bit more. And it's only once we know more that we're going to be in a position to determine where we go." So yes, maybe that's the position of the Prosecution but it is certainly my understanding not the position of your colleagues from the Defence.

MR NICOL-WILSON: We're in your hands, Your Honour.

PRESIDING JUDGE: The Court will rise for a few minutes. We shall come in when we are ready. The Court will rise, please.

[Break taken at 10.37 a.m.]

[On resuming at 10.50 a.m.]

PRESIDING JUDGE: We would be resuming the session, and we'll take the arguments which have been raised this morning

orally, beginning with the Prosecution. And if at any stage, any necessity arises for arguments to be put in writing, we would take that stand which is solicited by the Defence team of the second accused, Mr Kallon. We would call on Mr Harrison to proceed and present very succinctly, very, very succinctly indeed, and as usual, of course, I'm not saying that Mr Harrison is always long, the arguments he's putting across in support of his application.

Mr Harrison, you may proceed, please.

MR HARRISON: The frank concession the Prosecution makes now is that it cannot establish the age of Witness TF1-141. The best that it can do is advise the Court that in 2000, in approximately December of that year, an estimate was made of the witness's age --

PRESIDING JUDGE: That's in December 2000.

MR HARRISON: An estimate was made by a nurse, who upon reviewing the dental formation and skeletal formation, estimated the age of the witness to be 14 years of age, at that time, in the year 2000.

JUDGE BOUTET: That's December 2000, which would mean that by December 2004, that witness would be 18 and over, based on that estimate.

MR HARRISON: Based on that estimate. That is the frank concession we make. The witness protection order of the Court --

PRESIDING JUDGE: That he was 14.

MR HARRISON: In the year 2000.

PRESIDING JUDGE: 2000, yes.

MR HARRISON: That was the estimate. The witness protection order of the Court, as all members of the Court are aware, does have a provision for category B witnesses which refers to children. There's no definition of children in the order, but I'm wishing to assist the Court by letting the Court know that the convention on rights of the child provides in Article 1 that at any rate for the purpose of that convention "child" is defined as every human being below the age of 18. So the Prosecution advises the Court that we cannot rely solely upon the witness protection order to assert that this is a category B witness.

What we do rely upon are the Rules. And the two Rules that we ask the Court to consider are Rule 75(B)(i)(c). The heading for that Rule is "measures for protection of victims and witnesses", and the particular section I'm relying upon reads as follows. Under (B), "a Judge or a Chamber may hold an in camera proceeding to determine whether to order, (i), measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness or persons related to or associated with him by such means as," and then (c) reads "giving of testimony through image or voice altering devices or closed-circuit television, videolink, or other similar technologies."

And then Rule 85(D) states: "Evidence may be given directly in court or via such communication media, including video, closed-circuit television, as the Trial Chamber may order."

The Prosecution puts that information before the Court and says that's a legal context for any decision.

The factual context is as follows: A statutory declaration which has been distributed to Defence counsel and to the legal officer - and I would ask if the copies have not been given to the members of Court, if they could be given - it's a two-page statutory declaration consisting of six paragraphs. The declarent is Ms An Michels, psychologist of the victims and witnesses unit. She has brought this information to the Prosecution, and the Prosecution, in its conduct of the matter, has chosen to bring this to Court's attention.

We rely upon the assertions made in the statutory declaration. The Prosecution does not choose to expand upon the information in the statutory declaration; however, it's our suggestion that Ms Michels be given the opportunity to address Court in the event that there's some further information that she may wish to convey to the Court that may be of assistance.

I should allow my friends to state their position, but it may be appropriate to have the statutory declaration marked as an exhibit in the proceedings.

[Trial Chamber confers]

JUDGE THOMPSON: Learned counsel for the Prosecution, can we now proceed to have the declarent come to the witness box -- stand.

MR HARRISON: That's my suggestion.

JUDGE THOMPSON: Yes, and it would be preferable, the Bench of the opinion that it would be preferable for her to tender

the document after she has given the evidence. It's her declaration. So we can call the witness.

[The witness entered court]

WITNESS: AN MICHELS - sworn

JUDGE THOMPSON: Proceed, learned counsel.

MR HARRISON: If I can indicate to the Court, the Prosecution does not see Ms Michels as being its witnesses. She is a member of the Registry. We have brought this information to the Court's attention. I'm open to the Court's suggestion. I can put questions to this witness to take her through it. It may be just as appropriate for the Court to do it.

JUDGE THOMPSON: Let me tell you my response quickly that if this witness is here to support your application, it would seem to me logical to conclude that she is a witness for the Prosecution, and I would not want to treat her as a Court witness.

EXAMINED BY MR HARRISON:

Q. Ms Michels, do you have a statutory declaration before you?

A. Yes, I do.

Q. Is that a statutory declaration dated the 16th of December 2004?

A. That's correct.

Q. Is that your statutory --

PRESIDING JUDGE: Please, can you go slowly, please. We want to note down what she is saying.

JUDGE THOMPSON: Excuse me, has she been sworn?

PRESIDING JUDGE: Yes, she has.

JUDGE THOMPSON: Let her proceed, then.
PRESIDING JUDGE: We know that the Court records are being kept by the stenographers, but we keep our own notes so as to guide us at times. That's why we normally ask that examination be conducted at an acceptable speed so as to enable us to get some salient points on our personal records.

Yes, she has a statutory declaration before her. Yes.

MR HARRISON:

Q. It's dated the 16th of December 2004?

A. Yes, it is.

Q. Are all of the contents in that declaration true?

A. Yes, they are.

Q. Is there any other information that you would like Court to know?

A. Basically, this declaration contains the content -- the summary of my findings so I could provide the Court with some other details. But I think that the main information is in this declaration.

MR HARRISON: At this point, could I ask that the statutory declaration become an exhibit.

PRESIDING JUDGE: Yes.

MR HARRISON: That being the case, there's no further questions.

PRESIDING JUDGE: Can the declaration be shown to -- has it been -- let it be shown to the Defence.

MR JORDASH: We already have it.

PRESIDING JUDGE: You already have it, right, okay.

JUDGE THOMPSON: Yes. To be Exhibit 16 is it? 15? 15, yes. 14 we have, it should be 15.

The document is received in evidence and marked Exhibit 15.

[Exhibit No. 15 was admitted]

MR HARRISON: That concludes the questions that the Prosecution wish to put to the witness.

JUDGE THOMPSON: Thank you.

Mr Jordash for the first accused.

MR JORDASH: Thank you.

JUDGE THOMPSON: Your witness.

MR JORDASH: Your Honour, thank you.

CROSS-EXAMINED BY MR JORDASH:

Q. What are the principal symptoms of -- you conclude that this witness has post-traumatic stress disorder?

A. That is correct, yeah.

Q. And the symptoms you list are palpitations and body pains, but what else does this young man suffer?

A. Well, in my declaration --

PRESIDING JUDGE: Just a minute.

THE WITNESS: I'm sorry.

PRESIDING JUDGE: I conclude that the witness is suffering from post-traumatic --

THE WITNESS: Post-traumatic stress.

JUDGE BOUTET: Is there any difference between post-traumatic stress and post-traumatic stress disorder?

THE WITNESS: We could call it post-traumatic stress disorder. Post-traumatic stress is a little bit broader concept than post-traumatic stress disorder. We can call it

post-traumatic stress disorder, yeah.
PRESIDING JUDGE: The question which you were going to ask.
MR JORDASH: If I can just pick up on what Ms Michels has just said.
Q. I don't understand the distinction. Is post-traumatic stress disorder a generic term, and post-traumatic stress falls within that group?
A. Well, basically post-traumatic stress disorder or post-traumatic stress, in this context we can use it's a general term, post-traumatic stress. And there are basically three main groups of symptoms that needs to be there to talk about this type of stress. The first group is that there have to be important -- basically, the person might develop post-traumatic stress after having been confronted or exposed to what we call traumatic events --
PRESIDING JUDGE: Please, you go slowly.
THE WITNESS: I'm sorry.
PRESIDING JUDGE: Because you're going a bit too fast. You say that there are three types of symptoms that would normally be revealed by a situation of post-traumatic stress disorder.
THE WITNESS: Yes, that is correct.
PRESIDING JUDGE: Or post-traumatic stress.
THE WITNESS: Post-traumatic stress.
PRESIDING JUDGE: Which you say are generic terms.
THE WITNESS: Yes.
PRESIDING JUDGE: Which are the symptoms?
THE WITNESS: The three -- what I wanted to say first is that

basically the main condition is that the person has been exposed to a traumatic event or to a series of traumatic events. A traumatic event is an event where a person has been -- I'm sorry.

A traumatic event is an event where a person has been confronted with a life-threatening situation. And in the context of a war, like we are here, it is often a series of life-threatening situations. And so after having been confronted with these situations, in order to be able to speak of post-traumatic stress disorder, there are three groups of symptoms which are important. The first group is the person suffers from intrusive and recurrent recollections of the event.

PRESIDING JUDGE: Please wait. Intrusive and?

THE WITNESS: Recurrent recollections of the event.

JUDGE BOUTET: Which means?

THE WITNESS: Which means this can be flashbacks, images, thoughts about the event that are overwhelming for the person.

JUDGE BOUTET: Yes.

PRESIDING JUDGE: The second symptom?

THE WITNESS: No, this is the first symptom.

PRESIDING JUDGE: Go to the second.

THE WITNESS: The second is that a person has a tendency to avoid everything that is related to these events.

PRESIDING JUDGE: Everything that is related to --

THE WITNESS: Related to these traumatic events. Everything that reminds him of these events. Or when -- if being confronted with a reminder or being asked to talk about

these events, the person might report feelings of physical symptoms, an emotional expressance of stress and fear.

PRESIDING JUDGE: Yes.

THE WITNESS: And thirdly, also often we observe an increased general --

PRESIDING JUDGE: That would be the third symptom.

THE WITNESS: Exactly, the third group of symptoms. That is an increased irritability, presence of physical symptoms, of stress, also having sleeping problems, nervousness, and so on, combined with often feeling of anxiety, anger, and feeling of hopelessness. Also, in this group of symptoms, there might be what we call a lack of emotional responsiveness.

PRESIDING JUDGE: In which group?

THE WITNESS: In the third group. That there is a lack of what we call emotional responsiveness, that the person has the feeling to be -- a feeling of being numb, being far away from his own emotions.

PRESIDING JUDGE: A lack of?

THE WITNESS: Emotional responsiveness.

PRESIDING JUDGE: What does that mean?

THE WITNESS: This means that the person has the feeling to be -- not to feel things in the way he should feel them, to be far removed from his own experiences. Or sometimes, people describe it as being -- feeling numb or feeling dazed.

A last condition to talk about post-traumatic stress disorder is that these symptoms should be present during

a long time; more than three months.
PRESIDING JUDGE: You have covered the grounds for the three symptoms.
THE WITNESS: Mm-hmm.
PRESIDING JUDGE: That go with the phenomena of posttraumatic stress. You are now on what grounds? The fourth one, you said the fourth.
THE WITNESS: Yes, the fourth condition.
PRESIDING JUDGE: Would you say the fourth is also a symptom?
THE WITNESS: No, it's not a symptom. The condition to be able to speak about this type of disorder is that the symptoms should be present during a long time after the event, "a long time" meaning more than three months.
JUDGE BOUTET: On that -- pardon me -- that last observation, when you say have to be present for a long time, more than three months after the event, you mean to say that they have to show up after three months, or they have to be of a duration of three months and more?
THE WITNESS: They have to be -- they might show up after -- later after the event, in a delayed way, but they have to be -- the duration has to be more than three months.
JUDGE BOUTET: And that duration would be of the three groups of symptoms that you have described.
THE WITNESS: Yes, yes.
PRESIDING JUDGE: Yes, Mr Jordash.
MR JORDASH: Thank you.
PRESIDING JUDGE: Unless you had something else.
THE WITNESS: No.

MR JORDASH:

Q. Isn't it right, though, that many of the witnesses giving evidence in this Court including those who come from the rebel groups have been confronted by such traumatic events?

A. That is correct.

Q. Isn't it also true that --

PRESIDING JUDGE: Please, just a minute, Mr Jordash. It is true that most persons including those --

MR JORDASH: Including those from the rebel groups.

PRESIDING JUDGE: Confronted by these symptoms?

MR JORDASH: No. Confronted by --

PRESIDING JUDGE: By the post-traumatic stress.

MR JORDASH: By traumatic events.

PRESIDING JUDGE: By traumatic events.

MR JORDASH:

Q. Similarly, don't many of the witnesses also suffer from recurrent recollections of those events which at times are overwhelming to them?

JUDGE THOMPSON: Don't many of.

MR JORDASH: Similarly, don't many of the witnesses suffer from intrusive recurrent recollections which are for them at times overwhelming.

THE WITNESS: That is true. And I also think that many of -- many of people who went through these events suffer from post-traumatic stress or post-traumatic stress disorder. I think in this case, and this I stated in my declaration, it is not only the fact that there is -- there are these symptoms of post-traumatic stress

disorder which I stated the main symptoms in my declaration, which are for the witness the most disturbing, so to say. The difference here is I think that it is the fact that these symptoms are so clearly present, the fact that the witness suffers from it clearly. But also the fact that there is the issue that the witness -- the level of his mental development. We don't know exactly how old he is, but he's just over 18 maybe, which is an argument. And also the fact that this witness was a child ex-combatant, which is also a factor that makes him more vulnerable for a lot of reasons.

What I want to say is when he was confronted with these traumatic events he was much younger, which makes the witness even now more vulnerable. So it is a combination of these different aspects.

MR JORDASH:

Q. But whatever the causes of this post-traumatic stress disorder or post-traumatic stress, can you say that this young man suffers from it significantly more than other witnesses who have given evidence in this Court -- in the Court rather than through videolink?

A. I think the symptoms are very clear with this witness, yes.

PRESIDING JUDGE: I don't think your question is answered.

MR JORDASH:

Q. Have other witnesses suffered from as clear symptoms?

A. There were other witnesses who suffered from it as clear. I think so.

PRESIDING JUDGE: You mean they're clearer on this witness

than they have been on other witnesses who may have suffered the same -- the same post-traumatic stress?

THE WITNESS: It is difficult for me to compare all the witnesses and how I've seen other witnesses with clear symptoms of post-traumatic stress. It's difficult to say if they were more or less. I think this witness falls in the category of a witness who is severely traumatised. Again, for me, the difference with maybe other witnesses who testified in open court is the fact that he is -- the stage of mental development is not the same. I would not -- I mean, we don't know exactly his age, but I would not consider him as an adult looking at his stage of mental development. And the fact that he was also a child ex-combatant which makes him even more vulnerable. So I think we have to take into consideration these three aspects, and therefore it is true that there is an agreement on child witnesses under 18, this one is most likely a little bit over 18. But therefore, I think he should be considered as a child ex-combatant.

PRESIDING JUDGE: Are you suggesting -- are you suggesting that the impact of post-traumatic stress varies with the age of the victim of the stress?

THE WITNESS: I cannot put it so straightforward. But it is clear that because of the age of the witness, the whole situation of testifying is also more overwhelming. And again, I stress very much the fact that he was an child ex-combatant, which makes him very vulnerable. So we could say, if we take the overall context, it is definitely more impactful. Or put in a different way, I

think the risk for retraumatisation or for a negative impact on the witness from testifying is bigger, I think.

MR JORDASH:

Q. You recommend that a psychologist or a senior support officer be present in the video room together with the child. What role would you see these play?

A. Well, it would be basically the same role that a support person plays in the courtroom when a witness is testifying in a courtroom. It means just being present. I think it is important for this witness that when he's sitting, if he testifies through closed-circuit television, when he sits in the video room, that there is someone present, just being present, someone who he's familiar with. I mean, it is clear, as I also stated, that this person would take care, would be clearly briefed that there is no improper communication that takes place with the witness during testimony. I think the fact that just someone is present with this witness might increase the comfort level and might help the witness to control his feelings of fear and what he also calls depersonalisation, the feeling to be removed from his own experiences or to feel unreal.

PRESIDING JUDGE: I didn't quite get what you said about depersonalisation. You said to control the level of fear and what?

THE WITNESS: Yes. One of the symptoms the witness is complaining of is what we could call depersonalisation, is that at some moments, the witness not only has flashbacks, but also has the feeling that he feels far

removed from his own experiences. Basically, you could say that he feels unreal or strange. And when he is then present with someone who is familiar with, I think it will be easier for him to control these feelings and to stay -- to stay calm and to go through his testimony in a good way.

MR JORDASH:

Q. Would they communicate at all with the witness verbally through the course of their evidence?

A. No.

PRESIDING JUDGE: Supposing he gets emotionally disturbed, would there be no verbal communication?

THE WITNESS: Well, in that case, I think we would proceed in the same way as we proceed in the courtroom, that if it becomes clear that the witness has a difficult moment, Your Honours can decide to adjourn for a few minutes, and the support person can talk or can talk briefly with the witness. This would be the same then what is happening when witnesses are testifying in open court.

PRESIDING JUDGE: But normally, there would be no communication between the psychologist and the witness.

THE WITNESS: No, there would be no communication.

JUDGE BOUTET: So communication if it were to happen would happen as a result of the witness having difficulties and asking the Court to withdraw for a few moments.

THE WITNESS: Exactly.

JUDGE BOUTET: Other than that, it's just a physical presence.

THE WITNESS: Just a physical presence, yes.

MR JORDASH:

Q. If the witness were to say something about either the evidence or the questions being asked of him or the challenges to his evidence, would -- do you know how the person would deal with that?
A. You mean the person sitting in the --
Q. Yes.
A. Well, these again are the same rules as applying in the court, in the open court, meaning that the psychosocial assistant or myself, we are properly briefed on what we can say and not say. I mean, it is not -- the only intervention that takes place is to reduce the stress level and increase the comfort level of the witness and not to interrupt with the testimony.
Q. The conversations which have taken place between the members of your staff and yourself and witnesses have not been public insofar as the Defence don't know what has been said. Are you and your staff briefed, in effect, to say we cannot discuss with you your evidence?
A. Yes, of course. Yes.
Q. Just one final issue: Paragraph 3 of your declaration: "Despite this, Witness TF1-141's reality testing stays intact at all times."
A. Mm-hmm.
MR JORDASH: I beg your pardon.
Q. What does that mean?
A. In this context, reality testing, this means that the witness as far as I could observe in my contacts with him has a correct perception of the reality. This means that I did not --

PRESIDING JUDGE: I'm sorry, what paragraph is that?
MR JORDASH: Paragraph 3.
THE WITNESS: Paragraph 3, the last sentence.
JUDGE THOMPSON: It needs elaboration.
THE WITNESS: What I mean is I did not observe any disruption of his perception of reality which would mean that I did not observe any presence of hallucinations or delusions. I mean, in spite of the symptoms, the witness is able to perceive the reality in a correct way as far as I could assess.
MR JORDASH:
Q. So if I understand that correctly, any frailties in his evidence such as inconsistencies would not be attributable to an illness, but would be attributable to other factors which would ordinarily impact upon a witness's testimony, such as whether it's true?
A. Well, yes. As far as I can judge or as far as I spoke with the witness, I see no reason from his symptoms why he should not perceive the reality in a correct way. So that's...
Q. Okay, thank you.
MR JORDASH: I've got no further questions.
PRESIDING JUDGE: Is it then your opinion, Madam, that this witness can testify normally under guidance, under the normal guidance as you've given, as you've related it?
THE WITNESS: Yes. But I would advise or I think seeing his vulnerability, I would advise that it's through closed-circuit television because he's vulnerable. But I don't see any reason why the normal process of giving

testimony should be changed, apart from that, and apart from having someone in the video room with him.

JUDGE BOUTET: So just to pursue that issue, it's your opinion that regardless of the exact age, whether he is or is not a child, but given his vulnerability as you have described it, you are of the opinion that his evidence, if given, should be in a closed-circuit, not in the normal process per se, with the assistance and so on. In other words, you're not recommending that he be sitting at your place, even though he would be hidden from the public.

THE WITNESS: Exactly, yes. This mainly because to reduce the potential negative impact of his testimony, seeing his vulnerability. That is what I would advise, what I advised in my statement as well.

JUDGE BOUTET: And I have one more question: This opinion that you are giving today to the Court is based upon your own personal observation of that witness?

THE WITNESS: Yes.

JUDGE BOUTET: And on more than one occasion or?

THE WITNESS: As I stated, as I wrote in my declaration, I had regular contacts with the witness. And during these contacts, I made these observations. So it is -- my assessment has been based on these contacts with the witness.

JUDGE BOUTET: Thank you.

PRESIDING JUDGE: Sure, why not.

JUDGE THOMPSON: Mr O'Shea, do you want to cross-examine the accused? Sorry, Mr Touray.

MR TOURAY: Thank you, Your Honour. We'll ask a few questions.

JUDGE THOMPSON: Go ahead.

CROSS-EXAMINED BY MR TOURAY:

Q. Madam, from your declaration, you have had some regular contacts with this witness. Correct?

A. That is correct, yeah.

Q. When was the first time you met this witness?

A. I met the first time this witness in March last year.

Q. This year?

A. No, last year.

Q. Last year. And how many times have you met him since then?

A. I met him again in October, and I had about four longer interviews with him. And then in between, a number of short contacts which I cannot say exactly how many because it was on a regular basis.

PRESIDING JUDGE: You had four long interviews with him. And subsequently?

THE WITNESS: And in between and afterwards, I had shorter contacts with him.

MR TOURAY:

Q. Are you aware that this witness had made -- previous to your meeting him in March 2004 made statements to the OTP?

A. Well, I am -- yes, that is possible, yes.

Q. Do you know whether at that time he had any support from some expert to give him comfort and assurance in making those statements?

A. As far as I'm informed, he had not. He had no other support, no.
Q. No other support. Are you also aware that subsequent to your meeting him in March, he had made some other statements to the OTP?
A. That is possible.
Q. It's possible.
A. Yeah, it's possible.
PRESIDING JUDGE: Not it is possible. Are you aware? Not "it's possible."
MR TOURAY: Subsequent.
PRESIDING JUDGE: Are you aware that subsequent to your meetings - Mr Touray --
MR TOURAY:
Q. Meetings in March, that is after March, he made statements to the OTP?
A. I think he did. I mean, I am informed about this witness after he had been identified as a witness by the OTP.
Q. So it was only after. And during the time he made all his statements, he had no support at all from any expert?
A. Apart from the contact he had with the people of the witness and victims section, as far as I'm informed, he had not, no.
PRESIDING JUDGE: Mr Touray, when you're referring to contacts, you mean contacts with support staff, psychologists?
MR TOURAY: Yes, psychologists, support staff.
Q. Now, you talk of post-traumatic stress. Is there -- does that exhibit any psychic injury leading to some mental

aberration?
A. Well, it is seen -- it can be seen as a mental disorder.
Q. As a mental disorder?
A. Yes.
JUDGE BOUTET: But I thought the question included whether or not it would lead to mental aberration.
THE WITNESS: That is possible. In this case, I have no real indication of long-term effects. I see the symptoms which are present now, and I can see that these are, in a certain way, handicapping the witness because it is disturbing him in his normal behaviour, or more in his social -- in his normal life. But I have no -- at this moment, I have no indication that it would be -- it can be on the long term. I mean, I don't know if the problem would get worse or not.
MR TOURAY:
Q. But there are symptoms of it now?
A. Yes.
JUDGE BOUTET: Symptoms of it. What do you mean, of aberration or of the disease?
MR TOURAY: Mental disorder.
JUDGE BOUTET: Mental disorder, okay.
MR TOURAY: Yes.
Q. Now, this witness is about to be proffered to the Court. Are you aware whether he has undergone any relaxation exercises --
A. Well, as I put in my declaration -- I'm sorry.
Q. Yeah.
A. As I put in my declaration, one of the things we did with

this witness was help him, practice with him relaxation exercises, again, to increase his comfort level and to reduce his fear. This is one of the things we do with witnesses.

[HS180105B 11.50 a.m.]

Q. And you have gone through that today.

A. I didn't do that today, no.

Q. Now, you state in your declaration that despite the recommendations you have made these would only minimise the potential and negative impacts of giving testimony. That is paragraph 5 of your declaration.

A. Yes.

Q. So, no matter what happens, there will still be some negative impact on this witness giving testimony?

A. I cannot say that. I don't know what impact will be of his testimony. I can only say that from my assessment of the witness and the vulnerability of witness testifying in open court might increase or might have a potentially negative impact. There is always a risk for what we call retraumatisation because of his testimony, but I cannot say that this will be the case. That I cannot do.

Q. I think my question is -- I put it -- perhaps you did not understand its properly. I read your paragraph 5 again, "The above measures in combination with relaxation exercises practised before testimony will increase the comfort level of the witness during testimony and help the child control his feelings of fear and depersonalisation minimising the potentially negative impact of giving testimony on witness TF1-141." My

question is there will still be some negative impacts left?

A. There might be some negative impacts left, yes.

Q. Yes.

PRESIDING JUDGE:

Q. Are you confirming that?

A. Well, for me as a psychologist it is difficult to predict what impact will be of a testimony on a witness. I can only, from my expertise and experience and with the contacts I have with witnesses, try to estimate what can be the impact and in this case I think that seeing the factors that I stated, there might, if he testifies in open court, there might be a higher negative impact that is --

Q. No, you see, I am sure what counsel wants to know is -- there are two possibilities: It might, depending on how we assess it, he might give evidence where you are sitting, just as he might also give evidence through closed circuit television. Counsel wants to know whether there will be a negative -- some element of a negative impact whichever way. A negative impact, you know, on the testimony that he is going to give, either where you are sitting or hidden somewhere behind there?

A. I think if we --

PRESIDING JUDGE: Mr Touray, am I right?

MR TOURAY: What I am saying here, Your Honour, the paragraph 5 [inaudible] from the recommendation she makes --

PRESIDING JUDGE: This is it, yes, I have seen your paragraph 5.

MR TOURAY: What she says is, "It still to me..." "It appears to me that still there will be some negative impact left."

PRESIDING JUDGE: Yes, this is what I am trying to expound, you know, to her.

MR TOURAY: Indeed, sir.

PRESIDING JUDGE: You see, because she, the witness, she is now a witness, I mean, she was saying that there could be a negative impact if he testifies openly in open court. That is what appears to be saying. But what you are saying is that -- what you are saying appears to be, you know, that whether here or there --

MR TOURAY: Yes, wherever she [inaudible]

PRESIDING JUDGE: -- there would be a negative impact. That is what you are say?

MR TOURAY: That's what I am saying.

MR HARRISON: But I think the answer has been twice said that there might be.

JUDGE BOUTET: Yes, the paragraph 5 does not say there will be an impact it says --

MR TOURAY: Minimising.

JUDGE BOUTET: It says the potentially negative impact. Potentially there might be, that's what it says. There is no absolute certainty of that, this is what the witness is saying.

MR TOURAY: Yes, we accept that.

JUDGE BOUTET: But whether it's in -- I understand the evidence to be that if the witness testified not in a closed circuit TV scenario as such it could be worse, but

from that there is potentially, there will potentially, be an impact on the witness regardless.

MR TOURAY: Regardless.

JUDGE BOUTET: Potentially.

MR TOURAY: It's not foolproof really.

PRESIDING JUDGE: Potential not real.

MR TOURAY: Yes, I agree.

Q. Now are you really worried about this witness testifying?

MR HARRISON: Well, with respect. Whether this witness is worried is irrelevant. I think it is --

MR TOURAY: No further questions, Your Honour.

JUDGE THOMPSON: Yes, Mr Cammegh, proceed.

MR CAMMEGH: I suppose it is inevitable, is it not, Ms Michels that when you are called upon to make a diagnosis or give an expert opinion on the question of PTSD you are inevitably going to be drawing upon the subjective complaints of a patient. That is to say that you lend an ear to what they have to say about what they are experiencing, periodically, consistently or over any given period of time. And it seems that from your list of symptoms, the intrusive and recurrent recollections firstly; secondly, tendency to avoid everything related to the event.

PRESIDING JUDGE: Mr Cammegh, are you on submission?

MR CAMMEGH: I am asking a question, Your Honour.

PRESIDING JUDGE: You are yet to land.

MR CAMMEGH: Well, I'm going to land a good deal --

PRESIDING JUDGE: With a gesture. Get along, get along, Mr Cammegh.

MR CAMMEGH: Well, I think Your Honour will find I am going to be very quick and to the point.

PRESIDING JUDGE: Yes, please.

MR CAMMEGH:

Q. If I can continue, I will move on to the third symptom which refers to increased irritability et cetera, et cetera. That seems to be the one that may allow some observation by you. Are you content that, over the period of time that you had this person under your care or supervision, you saw evidence of those symptoms pertaining to point 3 yourself?

A. Yes, when you talk about symptoms of increased irritability, nervousness and so on, yes.

Q. Right. You state that as far as the reality tests are concerned that the witness appeared to be most satisfactory.

A. Yes.

Q. That is to say that it would appear, would it, that he is able to distinction between truth and fiction?

A. Yes.

Q. Given that during the course of his testimony he is going to be called upon to recount events that he experienced, traumatic event, what benefit do you think he will derive by giving those traumatic accounts in front of a television camera rather than sat in this room with the curtains closed. What is the benefit of this particular protective measure that you suggest.

A. The benefit, I think, is mainly that you creat a more quiet, a more quiet environment which is less

overwhelming than a courtroom with less people around and where the witness can more easily focus on what is happening. He is only seeing one person at a time and so on. And you prevent a direct confrontation.

MR CAMMEGH: Your Honours, that is all I have to ask and for my part, I must say, I do concede the Prosecution's position.

JUDGE THOMPSON:

Q. Let me ask one question, Ms Michels. To what extent, if at all, would your categorical finding that the reality testing of this witness remains intact, requires some modification or even some limitation in the light of your opinion that presently the witness exhibits symptoms of mental disorder or aberration. And if not, why? And if why not?

A. Well, I have put in my declaration that again, as far as I can -- in my contacts with the witness I never observed a disruption of his reality testing. I have put that in because he has -- I mean, he has symptoms of post traumatic stress, but his reality testing is not -- is intact. So that it is in the context of the symptoms he has that I found it necessary to state that explicitly.

Q. So in other words, as an expert you can -- you are affirming that with regard to this particular witness that even though he now exhibits symptoms of mental disorder or mental aberration, yet his reality testing remains intact?

A. Yes, exactly. Yes.

JUDGE BOUTET:

Q. I would like to know a bit more about this mental aberration. I thought mental -- PSTD now, as we understand, is described and qualified as one of those mental disorders recognised by science; am I right?
A. Yes, and to be honest I would not talk about -- I mean, although it is, as you have stated, it is a mental disorder, I would not see this witness or I would not -- let's put it this way, that post traumatic stress disorder is --
JUDGE THOMPSON:
Q. Perhaps we should assist you a little. Would it necessarily follow from your finding that the possibility of -- because of the mental disorder symptoms and mental aberration symptoms, in the foreseeable future would the reality testing remain intact? Or is it possible that the reality testing can shatter, so to speak in the process because of the mental disorder? Disorder. Because it would seem as if your finding perhaps is limited in time, but you cannot predict beyond the observations that you have made. That's what I wanted to know whether there would be some limitation on that categorical finding of reality testing in the light of your finding of mental disorder and aberration?
A. Yes, I see what you mean. I think -- what I want to say the word mental aberration is maybe not really the best word in this case, since what I want to say is that post traumatic stress disorder is a disorder that is rather common with people who went through these events. It is categorised as a mental disorder indeed. But it is also

more -- I would not say -- I would not see it really as an aberration. People often say it is a more normal reaction to very abnormal circumstances. Concerning his reality testing, again it is true I can only make my assessment from the contacts I have with him now, but I have no indication that this would change in the future.

Q. Yes, that's what I wanted to get at, Whether there is A possibility of change --

A. Yes.

Q. -- In the reality testing.

JUDGE BOUTET: Just to avoid any confusion. You have not observed, from what I hear, any mental aberration on the part of this witness.

THE WITNESS: Yes, exactly.

MR JORDASH: Two questions occur to me following Your Honours' questioning. May I have the Chambers leave to ask those questions? It's about reality testing. Only two. If it may help, I certainly can take the same position as my learned friend, Mr Cammegh, that I do not oppose the Prosecution's application in its totality if that helps to expedite.

PRESIDING JUDGE: Yes, Mr Jordash, you may ask your questions. You have the leave of the Court.

MR JORDASH: I am grateful, thank you.

Q. This witness suffers from, looking at the first set of symptoms, flashbacks and recurrent recollections of events.

A. Yes, yes.

Q. There is no way, is there, of you being able to assess

those flashbacks and recurrent recollections in terms of whether they are true or whether they are fictionalised; is that correct?

A. No, that is also not -- I mean, I don't see it as my role to check these things. I mean, the flashbacks I observed because he explained this to me.

Q. How then are you able to say that this is a person who, just looking at your expression, whose reality testing stays intact if you can't assess whether the flashbacks are accurate?

A. More so -- first of all, in general when -- in general with these people -- with people suffering from PTSD, the flashbacks are what happened to them. My assessment about reality testing is something I made my conclusion after conversations with him about normal real life. But I have no indications to believe that the flashbacks he describes are not true, because I don't observe only -- any other indication that he cannot distinguish between reality and fiction.

Q. So, reality testing relates to conversations about ordinary events and not as relates to the more traumatic events which he relates during his testimony.

A. Well, obviously they relate to both. Yes.

Q. But in terms of being able to assess his reality testing as to normal events, you have spoken to him about those?

A. Yes.

Q. But you have not spoken to him and are not able to assess whether his recurrent recollections of the abnormal events he describes are accurate; is that correct?

A. Well, I am not in a position to -- I mean, I can listen to a witness, but I am not in a position to -- it's not my role to judge whether what he is telling me is true or not. I can only say in general his reality testing is okay.

Q. Okay thank you.

MR JORDASH: Thank you, Your Honours.

JUDGE THOMPSON: Thank you, Ms Michels. Is there anything you want to ask.

MR HARRISON: No there is not.

JUDGE THOMPSON: Okay, thanks. Well thank you, Ms Michels, we are very grateful to you for your testimony. You are released. Yes, counsel.

MR HARRISON: There is nothing else the Prosecution intend to tender in pursuit of this application.

JUDGE THOMPSON: Right. Learned counsel for the first accused, could we have your clear and unequivocal position in respect of the Prosecution's application now that you have heard the evidence?

MR JORDASH: Well, Your Honours ruled in the renewed -- in the Prosecution's application for renewed protective measures that the risk of retraumatisation was a factor which related to why you deemed it necessary for child witnesses to give evidence via video link.

JUDGE THOMPSON: Yes, quite right. One of our orders.

MR JORDASH: On the basis of what Ms Michels has said, there is a real risk of retraumatisation irrespective of this witness's age and on that basis I don't --

JUDGE THOMPSON: You do not oppose the application.

MR JORDASH: Neither for a video link or a person to be present with the young boy.

JUDGE THOMPSON: Right, thank you. Mr Cammegh or Professor O'Shea?

MR CAMMEGH: Well, as I stated just now, I concede --

JUDGE THOMPSON: Yes, go ahead.

MR CAMMEGH: I concede the Prosecution's application for the same reasons.

JUDGE THOMPSON: Right, thank you. And learned counsel for the second accused.

MR NICOL-WILSON: Your Honour, we have no objections, even though we have certain reservations pertaining to the ability of the witness to testify. We have no objection so far for the witness to testify by closed circuit camera and to have the presence of a psychologist.

JUDGE THOMPSON: Thank you.

[Trial Chamber confers]

JUDGE THOMPSON: We will now move onto the Defence application. We will hear that.

MR JORDASH: Do Your Honours have a bundle prepared including a table which indicates the evidence to be adduced by the Prosecution in relation to this witness and when that evidence was served? It should be a attached to Your Honours' ruling at 23rd June 2004 and also relating to the compliance report filed by the Prosecution dated 11th May 2004.

JUDGE THOMPSON: Continue, Mr Jordash.

MR JORDASH: Thank you, Your Honour. The application is for the exclusion of evidence which has been served, as I

mentioned earlier, on 9th October 2004, the 19th and the 20th October 2004, and 10th January 2005. It is the view of the Defence that these additional pieces of evidence amount to additional statements which, pursuant to Rule 66, ought to have been disclosed by 26th April 2004, which was the date Your Honours set for service of the Prosecution evidence. Any evidence to be served after that date would be subject to a showing of good cause by the Prosecution pursuant to Rule 66. I particularly rely upon Your Honours' ruling of the 23rd July 2004 in this case. The essence of that ruling was that any new statement alleging entirely new facts would fall into the category of additional witness statements. Your Honours, of course, will appreciate that in relation to that application Your Honours decided that the evidence sought to be excluded was in fact supplemental. And this application, I would submit, is different to the evidence sought to be excluded in that instance and can be categorised as new. Entirely new.

Looking at that judgment, particularly at paragraph 9, Your Honours set out what the Defence needs to show to prove a breach of Rule 66. And the Chamber observed that, "It is evident that the premise underlying the disclosure obligations is that the parties should act bona fides at all times. 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."

Your Honours go on in paragraph 11 to then quote with approval the case of Bagosora at the ICTR case number ICTR 98-41-T decision on the admissibility of evidence witness DP, 18th November 2003. And set out the procedure by which the matter is to be decided. Firstly, "By a comparative assessment of the new or allegedly new evidence and then specifically such a comparison involves analysis of the original statement of the witness, including any reference of the event in question in the indictment and the pre-trial brief of the Prosecution, consideration of notice to the Defence that the particular witness will testify in the event and the extent to which the evidential material alters the incriminating quality of the evidence of which the Defence already had notice."

My submission is -- our submission is that upon analysis of that kind the evidence is clearly new and clearly additional and the Prosecution -- and the Prosecution ought to have shown good cause and what we respectfully submit is that the evidence should be excluded.

The prima facie proof required is set out in the table we have prepared. Now, the evidence which was served before 26th April 2004, before the cut-off point, if I can use the vernacular, is contained in the first four columns of the table. And that evidence, as we can see from the section of the compliance report, the Prosecution alleged -- or the Prosecution asserted that

the evidence of this witness would relate to counts 1, 2, 3, 4, 5, 6, 8, 9, it says 19, but I think that's a typing mistake, it should be 10, 11, 12 and 13. I think in order to properly understand how the evidence, the new evidence, has altered this witness's evidence one has to break down those assertions into a consideration of what direct evidence this witness would have given prior to the statement of 9th October and thereafter against Mr Sesay. In short it is this, there would have been direct evidence - and I am looking at the first column of the table, 31st January 2003 statement, the first statement of this witness, there would have been direct evidence of the killing of a man called Fonti Kanu, which was attributed to Sam Bockarie with Mr Sesay being present and so arguably participating in some way such as by encouragement. That would have been evidence which related to counts 3 to 5, direct evidence against Mr Sesay. The evidence also would have related to the assaulting of Johnny Paul Koroma's wife. Again the same observations I make in relation to Mr Sesay said to have been present, which would have been direct evidence supportive of counts 10 to 11; physical violence. It is interesting to note that -- I beg your pardon, let me start again.

If we move then to 23rd February, again we have a repeat of the allegation which is somewhat changed, but it is an allegation now of Mr Sesay killing Fonti Kanu. So that would have been direct evidence again unchanged from 31st January 2003, direct evidence of killing

relating to counts 3 to 5. And we also have there an allegation of Issa Sesay giving an order for Operation Spare no Soul which again would have been direct evidence of physical violence supportive of counts 10 to 11.

24th February no evidence -- no direct evidence against Mr Sesay. 24th February 2003, repeat of the Fonti Kanu allegation and importantly, looking at the fourth column PG 38/9718, "Issa Sesay often visited the Defence HQ, but witness did not know what he went there to do." And that was the Defence HQ in the Buedu. It is important to underscore that particular aspect of this witness's evidence up until 24th February 2003, as he appears to be saying, "Well, I have given this direct evidence killing of Fonti Kanu, the issuing of the Operation Spare No Soul order and the beating of Johnny Paul's Koroma's wife, but I cannot say anything indirectly about Mr Sesay." And that was the state of the evidence up until 24th February 2003. Supportive in reality of counts 3 to 5, 10 to 11.

The new allegations, served from 9th October 2004, effectively amounts to eight new allegation against Mr Sesay. 9th October, first new allegation is an attack by Sesay in Makeni. It's alleged that he used small boys in that attack. New direct evidence which the Prosecution rely upon to support count 12, conscription of child soldiers.

Number two, new allegation, is an attack on Koidu, looking an the fourth column and Mile 91, again it is alleged he moved with small boys. A new allegation,

direct evidence against Sesay, again in support of count 12.

Number three, new allegation, on 19th and 20th October 2004 it is alleged that Sesay was at the Bunumbu training ground where this young man alleges he went when first captured by -- well, when he had been captured by the rebels, he says, on the third occasion he had been captured. It is the first time he mentioned that Sesay was present during the -- at the training ground. It's the first time he mentioned that Sesay was giving orders at the training ground. We have, therefore, a new allegation of, in effect, forced labour and the use of child soldiers, supportive of count 12 and supportive of count 13.

The fourth new allegation contained in this evidence arises from the statement of 10th January 2005 alleging that Sesay was in Koidu Town when he was first captured. He had his own group of small boys. Another new allegation supportive of Count 12. Wholly new, The Defence would say. There is no allegation contained in the first statements that Mr Sesay had any small boys units. Now we have a number of allegations so far that he had.

Number five new allegation is that contained on 10th January again. He was a based in Koidu Town, his boys would take women and would stay with them in their houses. So we have new allegation in support of count 6 to 9, sexual violence. The Prosecution will use that evidence to invite the Chamber to infer that the women

were being held against their consent in a house undoubtedly for the purposes of sexual violence. That's a new allegation. A new allegation contained within that description of abductions supporting Count 13.

Number seven new allegation arises from over the page on the table, Issa Sesay came before witness's group attacking Daru. Sesay first went to Quiva where he shot a small boy who was his security because he did not show respect. A new allegation of direct participation in killing supportive of counts 3 to 5.

And finally number 8 new allegation ordering, it is said by this witness, on 10th January 2005 the burning of Koidu Town which supports the Prosecution's counts 3 to 5, the killing counts, 10 to 11 the physical violence counts and count 14 the destruction of property counts. So, to summarise, we have moved from a position on the 24th February 2003 to this witness testifying directly -- sorry, testifying as to direct evidence against Sesay supportive of counts 3 to 5 and 10 to 11, involving only two allegations of direct offences: Fonti Kanu -- sorry, three. Fonti Kanu, the beating of JPK's wife, the operation Spare No Soul, with only minimal, if that, evidence of indirect participation in anything else as indicated by the witness's assertion that he did not know why Sesay came to the headquarters, to a position now where there is direct evidence sought to be led by the Prosecution in relation to counts 3 to 14, and obviously I have left counts 1 to 2 out of this argument because in both cases there was evidence to be adduced which would

support counts 1 and 2 which are the all encompassing counts. So, just concentrating on the individual counts from 3 to 14, the Prosecution now seek to adduce evidence in support of those counts. And what we have, I would submit, is a number of new allegations containing new locations, containing new crimes, containing new specific details which the defence are being expected to have to deal with at this late stage. New allegations of killing, new allegations of the use of small boys, new allegations of the burning of property, new allegations of abductions, new allegations of sexual violence.

Now, referring to Your Honours' judgment of 23rd July 2004, looking at paragraph 14 of Your Honours' decision, Your Honour decided that decision against the Defence looking at subsection paragraph 3 of 14, "That indeed the second statement cannot objectively be legally categorised as an entirely new statement having regard to its contents in relation to the original statement of the witness in that second statement is congruent in material respects with the matters -- with matters disposed --" Sorry, I beg your pardon, "with matters deposed to in the entire original statement dated 2nd February 2003." And my submission is straight forward, that the evidence contained in the later witness statements could not properly be categorised as congruent in material respects. Such a finding, I would respectfully submit, would effectively give the Prosecution carte blanche to effectively serve witness statements, which cover a large area of Sierra Leone, with little indication of evidence

of direct participation in events. Thereafter, to do what they have done here, serve a great deal of evidence of direct participation and effectively say, "Well it is congruent because it relates to the overall picture of what the witness would have said." They would be in effect using the generalised evidence of this witness and effectively inviting the Chamber to say that would be sufficient to be able to allege any new allegation because it relates to the generalised allegations contained in the earlier statements. And the real force, I would submit, in our application is this, that on any analysis, whether number of allegations, number of locations, support for counts, gravity of the allegations, on any analysis of those factors, the bulk of the evidence that this witness will give against Mr Sesay has been served after the date set by this Chamber. And, more importantly, I would submit, most of the new allegations or certainly -- yes, five of the new allegations are contained not in October 2004, but on 10th January 2005, barely a week ago, the Prosecution served the bulk of their evidence of direct participation against Sesay.

My submission is this, that any interpretation of Rule 66, which allows the Prosecution to serve the bulk of their case in relation to any witness, only, in the case of the October disclosure, barely three months ago, but in the case of 10th January disclosure barely a week ago, must be in effect a breach of Article 17 of the Statute which, as Your Honours will fully appreciate,

obliges or provides, I should say, the Defence with adequate time and facilities for the preparation of their defence and the right to know the nature and case against them. And any interpretation of Rule 66 which allows the Prosecution to serve the bulk of their case two months - and in this case one week before the evidence is called - must be a breach of Article 17. I would submit that the right remedy is not to adjourn this evidence, but to exclude it, because contained also in Article 17 is the right to a trial within a reasonable time. And if Your Honours were to rule against me in relation to this then the Prosecution will, in effect, have carte blanche to do this again and again and again. And if the Chambers' response would be to adjourn the witness, this trial effectively would not end for several years, but more importantly, it would say to the Prosecution, "You were entitled to withhold your case from the Defence. You can disclose a small part of it and then a week before the evidence is to be called you can disclose the bulk of it."

Those are my submissions.

JUDGE THOMPSON: Mr Jordash, I remember that at paragraph 10 of our decision of the 23rd we did, in fact, emphasise that it was the Trial Chamber's role to enforce disclosure obligations in the interests of justice and the interests of a fair trial where the evidence has been disclosed -- not been disclosed, quoting, or is disclosed so late as to prejudice the fairness of the trial because we were relying on another authority. That seems to be

one of the principles that we enunciated in our 23rd July decision. Perhaps you need to satisfy me to what extent the -- let's call it for the sake of argument, the late disclosure of these statements have unfairly prejudiced this trial. In other words, what are the particulars of prejudice that we need to take into consideration, if you can give me two or three of those?

MR JORDASH: The first and obvious one would be the fact that we have had no opportunity and could not reasonably be expected to investigate the events listed in 10th January 2005 disclosure. It would be practically impossible to have our investigators investigate those events in the short space. The same would apply to the disclosure of October. What has to be borne in mind --

PRESIDING JUDGE: Just for the purposes of asking, even if the witness, to quote your words, to quote you, is adjourned, even if even assuming --

MR JORDASH: That comes to my second point which is this, the Defence have a schedule, we have a preparatory plan, we have a certain set number of resources in which to conduct our defence. It is based upon the Prosecution case as disclosed to us thus far. Now, if we suddenly are hit with new allegations a week before or two months before, then there is extra work to be done for the Defence. That prejudices the Defence because we don't then have the same opportunity to work on the case which has already been disclosed, we have to divert our resources to work on other aspects. It is an issue of case management, preparation, to be able to investigate

these new allegations, to be able to prepare -- just simply prepare cross-examination of these new investigations takes many, many legal hours. Many, many legal hours which have to come from somewhere. They have to come, not just simply from the budget, but they have to come from the time schedules of the Defence teams which have been in place now for some time. It's difficult enough with the constant flow of supplemental witness statements which require consideration by the Defence, and we have already adjusted our defence preparation in order to deal with those supplemental in accordance and in no way do I seek to go behind Your Honours' order, but those supplemental statements which Your Honours ruled were permissible have to be dealt with. Now what we are having is a wholly new scenario of being almost overwhelmed with new allegations which means that in effect we don't know what the case is against us because the case is growing day by day.

JUDGE THOMPSON: In this case are you saying that we now have more or less a kind of systemic situation whereby we are being overloaded with supplemental statements? It is now more or less a recognised prosecutorial technique; is that what you are saying?

MR JORDASH: It is. It is.

JUDGE THOMPSON: Because we have considered a couple of these, but have we gone the length to which we are justified in concluding that this is now a recognised prosecutorial strategy?

MR JORDASH: It is, but I don't object to -- I don't seek to

go behind Your Honours' ruling as to supplemental statement. If I had sought to do that I would have done it obviously through another route.

JUDGE THOMPSON: Yes.

MR JORDASH: And also, I don't seek to make point about those supplemental statements. If we look at the next witness, TF1-071 there is a great deal of supplemental evidence, most of it again relating to Mr Sesay not discussed in the first statements, but I don't take a point on that because it does -- it is supplemental, as I see it.

JUDGE THOMPSON: Yes, but of course your point is that there is a cut-off point. In other words, where the supplemental statements contain new allegations not germane to the existing counts in the indictment --

MR JORDASH: Yes.

JUDGE THOMPSON: -- and which cannot be, again using our criteria objectively, legally characterised as, you know, connected with the existing charges or allegations in the indictment.

MR JORDASH: Yes.

THOMPSON: The question is really, are these statements new in the sense that they do not relate to the material already that we have before the Court?

MR JORDASH: But also more than that, I think, there must come a point when supplemental statements are of such -- describe such events are so wide in their parameters in the cumulative effect of them that you can objectively look at the evidence and say, "Actually most of this evidence against an accused was served only in the last

few months." And I suppose my application is two-fold in the sense that I would submit that they are new allegations, but if Your Honours are not with me on that, I would submit that it cannot be right that the disclosure rules provide for or allow the Prosecution to serve the majority of their case against an accused after 26th April 2004. Supplemental or new, there comes a point when - and I think that is the most obvious stark point --

JUDGE THOMPSON: But the difficulty here is that Rule 66 creates the obligation for the Prosecution to continuously disclose.

MR JORDASH: Continuously disclose, but not continuously rely upon --

JUDGE THOMPSON: Statement of all additional witnesses.

MR JORDASH: They can disclose it, but not, I would submit, rely upon it. Of course, they have a duty to disclose it, but my application is not that they should be prevented from disclosing it, they should prevented from relying on it as part of their case.

JUDGE THOMPSON: Yes.

JUDGE BOUTET: What if they have -- you have a witness that comes in for the first time while in the witness box speaks about all of these matters they have not been disclosed to you, but the witness all of a sudden has this kind of a recollection because of -- for whatever reason? We have ruled upon that, as you know.

MR JORDASH: I do and it's a matter of degree, I would submit, if the witness came out with, as in Your Honours' ruling

in the CDF trial, if they came out with -- I think it was an allegation of serious burns caused by the placing of plastic on a witness's back.

JUDGE BOUTET: Yes, that was one of the scenarios, yes.

MR JORDASH: As a matter of fact and degree, one can see how that evidence arises from a description -- an original description of the event, it is added detail which supplements, it's normal, it is natural. But this is not, it is not that Mr -- the witness describes Sesay attacking Koidu and then suddenly remembered that he had also had his men abduct women. That almost - I am not conceding anything - but I can see how that might arise if the witness is probed and the detail arises from his evidence. This is new evidence. No mention of Mr Sesay in Koidu, no mention of him having a small boys unit, this not evidence that arises through the retelling of a story, the adding of detail, this is just new.

JUDGE BOUTET: But your position is that this new evidence, as such, if the Prosecution, the way they have been exercising their discretion, or certainly the procedure has been following, they seem to be interviewing all their witnesses prior to their coming to give evidence in Court a few days or a few weeks before. And from what we observed that is where a lot of this supplemental is coming from. And you are saying they have the obligation to disclose because that is part of the rules.

MR JORDASH: Yes.

JUDGE BOUTET: However, they should not be allowed to use it. Essentially that is what you are saying, there is an

obligation of disclosure, but the obligation of disclosure does not include the right for the Prosecution to use that evidence because of its lateness.

MR JORDASH: And I would go further and say it is incumbent upon the Prosecution to recognise when they go through that process, yes, they have to disclose it, but there should be, as ministers of justice, an obligation on them to make an assessment themselves as to whether it is fair to add those new allegation to the case against the Defence. It is not simply something which is in Your Honours' hands, it is in the Prosecution's hands to say, "Five new allegations, a week before the witness gives evidence, we are not going to rely upon this. We will give it to the Defence so that they know what is coming, but we will not adduce this through the witness."

JUDGE THOMPSON: But let me look at it from this short angle. You say we have a discretion to exclude this evidence and we say so. Remember also there is a kind of umbrella provision in our Rules that we can exclude evidence where the prejudicial effect outweighs the probative value. Or, evidence that brings the administration of justice into disrepute. If you invite us to exclude this evidence isn't one way of looking at it to say that you are inviting us to exclude evidence which perhaps must rise to the threshold of evidence whose prejudicial effect outweighs its probative value? Suppose I propose that as the bar of the threshold which we should use as our guide? Would that be too high that you must in fact prove this particular piece of evidence may well be

evidence whose prejudicial effect outweighs its probative value? Would we be right to proceed in that kind of way?

MR JORDASH: No, because it would simply increase the Prosecution's determination to make the evidence as probative as possible, notwithstanding the fact that it was served very late.

JUDGE THOMPSON: Yes.

MR JORDASH: That's why I think a perhaps draconian remedy is the only one which is called for. This, of course, is not simply prejudiced to the Defence. What about 141? We know he is a child witness, we know he has been disturbed from his schooling for two -- on two occasions. We know he suffers from a psychological illness and the Prosecution do not nevertheless seem restrained in serving evidence really late and allowing the Prosecution -- allowing the Defence the opportunity to apply to adjourn the evidence, because that would be the very least thing I would request. And it, I would submit on this particular case, would be the very least thing Your Honours should - and I say this with the deepest of respect - should do. And the impact upon that witness due to the Prosecution's late service and late reliance on the evidence is bad for us, it is bad for the administration of justice, it is bad for that young man. There is no justification for it, I would submit. It may be probative evidence, but that probative evidence was served too late and there has to be a cut-off point, I would respectfully submit.

PRESIDING JUDGE: Yes, may you round up, please?

MR JORDASH: I have finished.
PRESIDING JUDGE: You are finished. Right. Can we take Mr Touray, please.
MR. NICOL-WILSON: Your Honour, we have no application to make.
PRESIDING JUDGE: You have no application to make.
MR NICOL-WILSON: [Inaudible] Mr O'Shea --
PRESIDING JUDGE: Pardon?
MR NICOL-WILSON: Mr O'Shea would like to make an application.
PRESIDING JUDGE: Yes, I know, I was just proceeding. In fact I was going to ask, yes, it was indicated by the Prosecution, that after Mr Jordash Mr O'Shea was going to follow on. But we wanted to take a chronological approach by coming to you first.
MR. NICOL-WILSON: As your Honour pleases.
PRESIDING JUDGE: Yes. Mr O'Shea, do you have anything to add to this?
MR O'SHEA: Your Honour with regard to Mr Jordash's application, I will add nothing to his already forceful and persuasive argument. With regard to the application we wish to make, I am, of course, in your Honours' hands, but I would submit that it would not be fair to Mr Harrison to invite him to respond to both of our applications simultaneously simply because the legal points are different.
MR HARRISON: Mr Harrison would like to do that.
PRESIDING JUDGE: Supposing he can -- supposing he can.
MR O'SHEA: Well, if it's Mr Harrison's preference, then I will proceed.

MR HARRISON: It is.
PRESIDING JUDGE: Yes, we want a reply, because we don't want to push these issues. So you rest your own submissions, your arguments on Mr Jordash's?
MR O'SHEA: No, not at all. As I have indicated to Your Honour, I have quite a different application.
PRESIDING JUDGE: Right. Okay. Can you make the application?
JUDGE THOMPSON: In part anchoring on his submissions, general submissions, because we need to know that so that you --
PRESIDING JUDGE: That's what he said.
JUDGE THOMPSON: Are you anchoring on part of his submissions?
MR O'SHEA: No, non, what I said was, Your Honour, in so far as Mr Jordash's application is concerned I have nothing to add.
PRESIDING JUDGE: Yes.
JUDGE THOMPSON: All right.
MR O'SHEA: In so far as what he has said about the law, I associate with it in so far as it has an impact.
JUDGE THOMPSON: Yes, upon your own.
MR O'SHEA: Yes.
JUDGE THOMPSON: Yes. I mean, we want to get this quite clear because I am familiar with your kind of style in this approach, you know, in your written submissions to you anchor on part of what some other colleague has put forward and then you come with yours. We will need to get that quite clear.
MR O'SHEA: I think the part we can usefully anchor on is with respect to the question of --
PRESIDING JUDGE: Mr O'Shea, what is your application? What

is your application?

MR O'SHEA: Your Honours, the supplemental statement of 10th January 2005 makes the following statement, "The civilians that were brought from Kono to Kailan were handed to the G5. I believe his name was Augustine Gbao. I came to know his name during muster parade as he was introduced for everyone." None of these statements, going back to February 2003, make any reference to Augustine Gbao. This addition is highly significant because in our approach as defence counsel, when we read the statements as they stood before this supplemental statement last week, our impression was that this witness does not touch us and that had a significant impact on our strategy towards this witness. What this additional statement does is it puts Augustine Gbao in a position where he becomes a direct participant in the mistreatment of the civilians in Kailan according to this witness. That is the difficulty, that is the nature of the problem.

I rely first on the right to a fair trial. I rely on Article 17(4)(a). While recognising that 17(4)(a) is limited in that it deals with the essentials of the accusations against the accused, I submit that the essentials of the accusations of the accused include in the first place the charges and basic allegations, as set out in the indictment, and in the second place the essential nature of the evidence which will be used to prove those charges.

I also rely upon Article 17(4)(b) on the right to

adequate time and facilities. I further rely upon Rule 66(1)(a), which I submit must be interpreted not only according to its plain meaning, but also in its context and object and purpose in accordance with Article 31 of the Vienna convention. So I say that there has been a violation of 66(1)(a) because additional witness -- statements of additional witnesses must be interpreted in this case to include this statement because we are effectively faced with a new witness having regard to the object of the provision and its context.

I further rely upon Article 67(D) which provides for the continuing obligation of disclosure and I do so on the basis that that provision is premised on the assumption that reasonable efforts will be made to adduce the essentials of a witness's testimony at an early stage. Now in interpreting those two rules in the context of the statutory provisions, with regard to context I rely on all those provisions which deal with separate and joint trials. In particular, Article 17(4)(1), the right of each accused to be treated equally before the Special Court, and Article 6, the individual criminal responsibility of the accused, Rule 82(A), in joint trials each accused shall be accorded the same rights as if he were being tried separately, and paragraph 22 of this Trial Chamber's decision on joinder, where this Chamber assured the accused that it would proceed with each accused as if they were being tried separately. In my respectful submission, when interpreting the meaning of statements of additional

witnesses it is my submission that that would include a statement or new evidence which effectively has the result the same as if one was dealing with a new witness, that what one has to look at in looking at this context is what would the be the position of Augustine Gbao in a separate trial in these circumstances? Now, our submission on that is that if Augustine Gbao were in a separate trial without the knowledge of the supplementary statement it is very unlikely that the Prosecution would call Witness 141, because witness 141 does not adduce direct evidence of a common plan or design. The most that direct us -- Witness 141 could do is contribute to the issue of widespread and systematic and in terms of the witnesses that the Prosecution has for that purpose it is not the most useful of those witnesses. Even if, in a separate trial, the Prosecution for whatever reason decided to call this witness not knowing about the contents of the supplementary statement, even in those circumstances it would be my submission that this Court would exclude the statement in the supplementary statement because if the Prosecution were conducting an investigation for a separate trial, only for Augustine Gbao, it would be incredulous that the Prosecution would take several statements from the witness knowing that that statement was for the purposes of this trial and not adduce that particular fact.

I remind the Court that we operate without instructions. I know I don't need to do so, but it is significant, because in these circumstances, in my

submission, there is an onus on us, the Defence, on your Honours, and on the Prosecution to exercise extreme caution knowing that the accused is not providing instructions to the Defence counsel.

The prosecution has had an opportunity of some two years to adduce this alleged fact. In the context of a separate trial it would be unbelievable for them to come six days before the witness gives testimony and mention the accused for the first time. That, would in my submission, at least in the eyes of the public, reek of unfairness.

If one has regard to the particular content of the statement, "The civilians that were brought to Kono from Kailan were handed to the G5, I believe his name was Augustine Gbao," there are two possible, very simple and very obvious questions which could have been put by the Prosecution investigators or by the Prosecution counsel during the course of these two years. Number one, when the civilians arrived in Kailan, who was present?

PRESIDING JUDGE: Is it on record that the Prosecution knew about this for the past two years or so?

MR O'SHEA: It is on record that the Prosecution know about the issues in relation to Kailan contained in the previous statements. What I am saying is that dealing with an uninstructed defence, dealing with a vulnerable child witness, and given the significance of the matter, it is in the context of separate trial - and this is the context which I am inviting Your Honours to put yourselves in - incredible that the Prosecution would not

put the question, "Do you know a man called Augustine Gbao?" Or alternatively, "All these events that you have spoken about in Kailan, when these civilians were brought to Kailan who was there? Give us the names of the rebels?" Had those simple questions been put, it is reasonable to think that this evidence would have been within the knowledge of the Prosecution at a much earlier stage. It has not been suggested by the Prosecution that any efforts have been made before six days ago or eight days ago to approach the witness to get significant supplemental information.

JUDGE THOMPSON: Is there a suggestion there of lack of due diligence?

MR O'SHEA: In response to your question, Your Honour, let me be clear. I am not alleging mala fides.

JUDGE THOMPSON: No, I am not suggesting. I did not use the word mala fides.

MR O'SHEA: No, I know you didn't, Your Honour.

JUDGE THOMPSON: Lack of due diligence.

MR O'SHEA: Your Honour, yes.

JUDGE THOMPSON: I am not equating mala fides with lack of due diligence at all.

MR O'SHEA: Your Honour, yes. I simply wanted to make that qualification. I am indeed, because of the nature of the statement in the supplemental statement, I am suggesting that all due diligence on the part of the Prosecution would have led to these aspects coming out at an earlier stage. And I am suggesting that the test to be applied in asking oneself what would a diligent Prosecutor have

done, must be looked at in the context of a child witness and an accused not providing instructions, which the Prosecution have known about for a long time, which is akin, not the same as, but akin to an unrepresented accused for the purposes of the kind of caution that all the parties must exercise.

PRESIDING JUDGE: May you be rounding up, Mr O'Shea.

MR O'SHEA: Subject to any further inventions from Your Honours, that is it. Yes.

PRESIDING JUDGE: Thank you.

[Trial Chamber confers]

PRESIDING JUDGE: Yes, Mr Harrison, I think we will take you before we go on break. I don't know for how long you are likely to be on your feet.

MR HARRISON: It is likely to be quite a lengthy response. There is a -- I should indicate to the Court that there is a point that I would like to take instructions on which ultimately may abbreviate this entire proceeding. If I am asked to proceed now it is going to be a lengthy submission, but there is a point that I am asking for some time to take instructions and then report back to the Court and to my colleague and my learned friends on the other side.

[Trial Chamber confers]

PRESIDING JUDGE: Well, we are with you, Mr Harrison, and we give you an opportunity to look into this issue before you make a reply.

MR HARRISON: Thank you.

PRESIDING JUDGE:

This said, the Court will adjourn to 2.30 p.m. for Mr Harrison to reply to the submissions by the Defence in support of the application. The court will rise, please.

[Luncheon recess taken at 1.10 p.m.]

[HS180105C]

[Upon resuming at 2.55 p.m.]

PRESIDING JUDGE: Good afternoon, learned counsel, we are resuming the session, please.

JUDGE THOMPSON: Mr O'Shea, you may continue with your response.

MR O'SHEA: Your Honours, I need intervene at this stage because a development has taken place during the course of the break. We had a discussion with my learned friend, Mr Harrison, and it would appear that there was a witness statement dated the 9th of October 2004, which neither myself nor Mr Cammegh had in our bundles, but upon inquiry the Prosecution were able to ascertain that we had, or our team had in fact been served with it. That is a matter which I don't dispute.

All I can say is that I apologise to the Court for the inconvenience created by that administrative error which has taken place within our team. Clearly the statement was served upon us but neither myself nor Mr Cammegh had it in our papers and therefore did not have knowledge of it when we were making the submissions that we were making. The statement that I am referring to is a statement of the 9th of October 2004.

JUDGE BOUTET: Which is the same statement that Mr Jordash was referring to this morning or a different one?

MR O'SHEA: I think it was the same statement. There were a number of statements that were mentioned.

JUDGE BOUTET: But he did mention one statement of 9 October.

MR O'SHEA: I think that's right, Your Honour. It didn't occur to me at the time that Mr Jordash was making his submissions, there being a series of statements which were mentioned. Suffice to say this is a statement which was missing from our papers during this trial session. If Mr Jordash can just help me here, I think this is one of the statements he referred to. Yes, it is, Your Honour.

PRESIDING JUDGE: That would be a statement dated what?

MR O'SHEA: It is dated 9th of October 2004, a statement of TF1-141. It is described as a supplemental statement and it consists of five pages. On page 5 the final paragraph reads as follows: "Augustine Gbao was with us in Juru, Niama. He ordered the flogging of a boy, a serious one which resulted in his bleeding all over. He was accused of having diamonds. Augustine Gbao had his own SBUs. His responsibility was to bring civilians who had been captured." So obviously, in the light of our knowledge of that statement now, we have to make certain factual corrections to the way in which we put our submissions to Your Honours.

JUDGE THOMPSON: In other words, you're no longer virtually saying that this is the first time your client has ever been allegedly implicated, because that was the crux of your submission.

MR O'SHEA: Exactly, Your Honours. I think the factual

scenario needs to be adjusted to the following: That the statement of the 9th of October 2004 was the first time that Augustine Gbao is mentioned and then he is mentioned again in a further statement of the 1st of January 2005.

JUDGE BOUTET: Tenth.

MR O'SHEA: Tenth of January, thank you, Your Honour. Tenth of January 2005. Obviously we have had to consider what impact that has upon our submissions.

JUDGE THOMPSON: In other words, there is clearly a change in the factual position from your perspective.

MR O'SHEA: There is clearly a change in the factual position.

JUDGE THOMPSON: Shall we say a revolutionary change.

MR O'SHEA: Well, yes. In the context of my submissions, because I have to say, having harped on about due diligence so much, I have to accord what is due to the Prosecution, which is first of all an apology and --

JUDGE THOMPSON: And indeed, when I said a revolutionary change, I meant perhaps that this might impact very significantly the legal dimension of your submissions.

MR O'SHEA: Well, it does have an impact. It does have an impact and I do not deny that, and I think effectively the goalpost shifted through our own fault.

JUDGE THOMPSON: I commend your candor.

MR O'SHEA: Thank you. And I apologise to the Court as well. We have thought about this in exactly what way this does impact upon our submission and we are now dealing with a situation of two what we say would be additional statements, one of some eight days ago and the other of some two and a half months ago. That, of course, must be

placed in the context of the statements going back to February 2003.

We retain the substance of our submission, but instead of me framing it the way I did, which was to rely upon 66(A)(i), and to essentially go down the route of saying this is a completely new witness, we will rely on 66(A)(ii) and say that the Prosecution has not shown good cause for what we say are additional statements. And here, Your Honour Judge Thompson, this is where I adopt the submissions of Mr Jordash because the significant aspect of the 9th of October statement, as opposed to the latter one which we were discussing earlier, is that the 9th of October statement makes quite a serious allegation. In fact, one that is even described as serious by the witness himself.

So it is in that context that we say this is the first time -- on the 9th of October this is the first time Augustine Gbao is mentioned. The allegation is of a very serious nature, and that therefore this should be classified as an additional statement for which good cause must be shown, and the same with regard to the 10th of January 2005.

All the submissions that I made earlier still apply to the extent that I was talking about the fact that we are without instructions, this is a child witness, when Your Honours are judging the question of due diligence and so on and so forth. And, most importantly, that the part of my submission that I continue to rely on firmly is to invite Your Honours to consider this scenario in

the context of a separate trial.

I hope I have been of assistance and, again, I apologise for this innocent sin, if I can describe it in that way.

JUDGE THOMPSON: Thank you. I think it is time for the Prosecution to reply.

MR HARRISON: Thank you. If I could just indicate at the outset that Mr O'Shea had indicated to me, I think it was last week, the general nature of his application and had I perhaps been more diligent myself I would have noted at that time the confusion that had probably existed in his file. So perhaps I am in part responsible for that confusion.

I am going to be very brief. There is one authority that I am going to rely upon, but I first want to introduce a matter to the Court as being a question of trying to determine how best to reconcile the principle of disclosure, which is part, of course, of trial fairness, and the principle of orality, which this Court has endorsed from the outset of the evidence being heard. One wouldn't think that these two principles would ever come into conflict, but they may in certain instances, but I think they can be reconciled.

What disclosure is all about is making sure that an accused person knows exactly what is going to be said about him before so that he can prepare for it. It's as simple as that. The principle of orality --

JUDGE THOMPSON: Let's get that again. What disclosure is all about?

MR HARRISON: It is as simple as providing all of the information to the accused that can be provided so that they can mount their defence.

JUDGE THOMPSON: Right.

MR HARRISON: The principle of orality simply says that the best evidence the Court is ever going to get is that which it hears before it, where it can judge the demeanour, the actions, the body language, the tone, the words of the witness. And part of the principle of orality is a recognition that witnesses frequently say things that are different, nuanced, subtly changed, completely at odds with what existed in prior statements. And of course, if it is completely at odds that is fodder for cross-examination that every Defence counsel licks his chops at. The obligation that's on the Prosecution is to continuously disclose all of the information that it obtains as soon as it can upon its delivery to the Prosecution.

JUDGE THOMPSON: Just a minute. You say that where the testimony is completely at odds with a statement that had been disclosed, this can trigger off cross-examination later on?

MR HARRISON: Well, generally speaking, as I recall from my years as a Defence counsel, my eyes used to sparkle when that came up.

JUDGE THOMPSON: Okay, continue.

MR HARRISON: But I think part of the reconciling of these two principles has already been done by the Court, and it was done in its decision of 16th of July 2004 in the CDF

case. Now, I did hand up copies of those decisions to the Court's legal officer and I was going to quote paragraph 25 to you, because we say this answers in its entirety the applications of both the first accused and the third accused.

JUDGE THOMPSON: What is the date of our decision again?

MR HARRISON: It is the 16th of July 2004.

JUDGE THOMPSON: Paragraph?

MR HARRISON: 25. If I could read the paragraph to the Court.

JUDGE THOMPSON: Please do.

MR HARRISON: It states: "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's shoulders were not in the brief interview notes does not amount to a breach by the Prosecution of its 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 statement that identify

matters witnesses will testify about at trial, thereby providing the Defence with essential information for the presentation of its case, it is forseeable 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."

That is a traditional remedy available to Defence counsel in instances of late disclosure. The notion that there is wrongdoing in any way on the part of the Prosecution is categorically denied and I'll say nothing more about it.

what I do say, as an alternative to the Court, is this: The Prosecution has to bear in mind the practicalities of this trial and the realities of its witnesses. We've got a young witness that the Prosecution is very concerned give evidence in an efficient and timely manner. We're very concerned about adjournments of this witness or any other witness.

If the Court has any reservations about trial fairness, the fairness of disclosure with respect to the 10th of January 2005 statement, the alternative remedy which the Court could make is the following: To give a direction to the Prosecution not to lead any evidence with respect to the 10 January 2005 statement. Such a

direction would be accepted by the Prosecution. That would provide this Chamber with the opportunity of proceeding with this witness now in the timely and efficient manner which we anticipate the Court wishes the Prosecution to follow.

I said I would be brief and I think that is all I am going to say to the Court.

JUDGE THOMPSON: So, in other words, there are the two options from your perspective: The Court adheres to its decision of 16th of July and faithfully applies its principles enunciated in that decision, or - again you preface this as a matter of practicality - the Court recognises the limitations on the part of the Prosecution in terms of problems of delay and then give appropriate directions.

MR HARRISON: As the Prosecution recognises some of the concerns expressed by Defence counsel -- I don't wish to in any way suggest that Defence counsel have made spurious representations, because I don't think that is, in fact, true.

JUDGE THOMPSON: Right, well, I understand your position perfectly.

JUDGE BOUTET: Before you sit down, your recommendation or suggestion, should the Court decide to -- about the late disclosure and your suggestion that you be directed not to lead evidence about the statement or whatever is contained in the -- presumably you're talking of the 10th of January 2005?

MR HARRISON: Yes. If I wasn't clear on that let me restate it. I am only referring to the 10th of January

statement.

JUDGE BOUTET: Let me finish my comments and I will allow you to speak about it. I haven't checked my notes but my recollection of Mr Jordash's presentation was directed to obviously 10th of January 2005, but also to all the statements that you have disclosed post-24 February 2003, so your suggestion applies only to the one of 10 January, not of 9 October, nor of 19-20 October 2004. Do I understand your position to be that?

MR HARRISON: You do. We join issue head on with Mr Jordash with respect to the earlier statements. It is only with respect to the most recent one that we are prepared to make the representation that we have.

JUDGE BOUTET: Thank you.

PRESIDING JUDGE: Mr Harrison, there is a lingering worry about these disclosures, the late disclosure of statements which effectively prejudice the rights of the Defence under Article 17 to prepare for the defence of their clients. There is a fear expressed by the Defence. That is that a leeway appears to be given -- if we do allow this, it would amount to a leeway given to the Defence to come up at any stage of this trial and keep disclosing on the principle of orality and on the principle of our decision, which you cited and which you stated, on the 16th of July 2004. You read that decision and you saw that there was a lot of caution -- we ourselves were worried about the extent to which we can give an unlimited leeway for the Prosecution to disclose new evidence.

I mean, we are talking about new evidence, evidence which is not necessarily supplemental to that which had already been disclosed to them. That is a lingering worry. What reply would you have to this? Because it is a matter which touches on the rights of the Defence and if we have to proceed on the basis of fairness, we have to draw a balance somewhere as to how late we should keep accepting these disclosures which introduce new elements to what the Defence has already been put on notice and which takes them by surprise.

Even if I were Defence counsel, certainly if I have my calendar, I've been given statements and so on and so forth, if fresh statements keep coming in, certainly I consider that the rights of the Defence have been prejudiced in one way or the other. How do we get around this, Mr Harrison?

MR HARRISON: Yes, and I think this revisits the two principles that I tried to indicate to the Court were the ones that may be in tension here. My suggestion to the Court is as follows: The principle of orality is of such significance and importance as a means of not only conducting procedure but of controlling substantive matters before the Court that it may be the case that this Court will have to at some point revisit that principle. I am not sure it will be wise to do so, but it may be some point in the future when it is necessary.

But at the present time there really is no difficulty, because there has been notice given of exactly what is going to be said, there is no surprise

taking place from the witness's mouth when they are on the witness stand. What would be most offensive is a circumstance or the scenario where some area of interest to the Court in general is not canvassed by the Prosecution, is then canvassed for the first time in court and a whole ream of information comes out for the very first time in open court. That would be quite unfair to the accused.

We are not talking about that situation and so I am saying to the Court that at this particular time you need not revisit the principle of orality and that we can proceed in one of the two manners that I have suggested to the Court.

JUDGE THOMPSON: Learned counsel, remember when Mr Jordash was making submissions he suggested that the best course of action in this situation -- I mean, on his submission based on what they consider a legitimate complaint, was to exclude the evidence completely. You have come up with a compromise, of course, in part relating to the statement of the 10th of January, and concede perhaps halfway that we may well direct you not to lead evidence on that. But then the palliative normally, which is the alternative to exclusion or suppression of the evidence, is an adjournment to enable the Defence to investigate the possibility of rebuttal of what may well be highly incriminating evidence. You foreclose that and of course foreclose that by your submission that we're dealing here with a child witness who may well be in a position in which he needs to attend to certain educational things.

At some point in time, when these various interests conflict, we will need to take a position, and I am a little worried that you foreclosed even the palliative, because if this Court feels strongly, as you have heard Presiding Judge's own perception of it, we may well say perhaps the exclusion remedy may well also be appropriate here. So I do not know whether, in the light of what I have said, you may want to review this strait-jacket that you are putting us in. Don't suppress the evidence in respect of the other two statements, only direct us not to lead that one, but then don't adjourn to give them a chance to effectively prepare their case. Help me out of that dilemma.

MR HARRISON: Yes, it is a suggestion that's really intended to be of assistance to the Court. The practical realities which we are burdened with is that we have dealt with one witness in a week out of 19 that we had intended for this session. We know that the Court is concerned and we acknowledge that with good reason you've admonished Prosecution in the past for perhaps not being as efficient as Prosecution could have been. But this is a way that we are suggesting -- an efficient way of resolving, and if I can put on the record, really on a one-off basis. We are making this suggestion simply because of the unique characterics of this particular witness that you have heard about through the psychologist; you know about the difficulties. The Prosecution does not want to exacerbate those difficulties.

Mr Jordash put the submission before you that in -- as he has quite correctly and perhaps with some wisdom suggested to the Court, that a Prosecutor acting as a minister of justice may well in fact take the view that it would be appropriate to withdraw certain of the evidence so that that witness could testify. So I am really just trying to follow on Mr Jordash's suggestion and provide you with the sort of circle or the -- just continuing on and closing the circle of how we might do that.

JUDGE THOMPSON: I appreciate that, because the Court too has a great burden of trying to work through a tight judicial rope to make sure that we act in the overall interests of justice.

PRESIDING JUDGE: Yes, Mr Jordash?

MR JORDASH: Your Honour, I will be brief. In my respectful submission, this is an application which doesn't depend upon a reconciliation of the two principles enunciated in the past by this Court. What this submission relies upon is the principle of disclosure, that's what it is based upon. We are not talking about a principle of orality. When we get to that point, when the witness is giving evidence and he comes out with evidence which has not been disclosed in written statements, then we are in the realm of the principle of orality.

Until that time, I would submit we are in the realm of have the Prosecution disclosed prior to oral testimony, the material pursuant to Rule 66? In my submission, no, and in my submission there can be no

useful distinction -- I beg your pardon, not useful, because Mr Harrison's proposal is useful because it does seek a solution to the present conflict. But in my respectful submission, there can be no distinction made between the late disclosure in October and the late disclosure on the 10th of January.

Rule 66 and the date set by Your Honours was there for a purpose, and the purpose was to give the Defence, in the Chamber's view, proper notice of the case it would face, proper time to prepare to rebut those allegations and set an onus on the Prosecution to serve that evidence before that date, or show good cause why they haven't.

In my submission we can deal with the principle of orality when we get there. Until that time the question is have the Prosecution abided by the very clear rules set out in Rule 66? If the witness departs from what we have been given in that Rule 66 disclosure, then an assessment can be made at that stage as to whether that oral evidence falls within this Chamber's order in the CDF trial, but I don't submit that we are at that point yet. Those are my submissions.

MR O'SHEA: Your Honours, I agree with Mr Harrison that Your Honours need not revisit the principle of orality. We do not contest the principle of orality as set out in Your Honours decision. We say that this is a different case. This is a case of additional statements. In the case of Mr Gbao, with regard to the statements of the 9th of October and the 10th of January, we are essentially dealing with a situation where the whole story against

Gbao suddenly unravels. It wasn't there in the original statements. That is what makes this case very different from the Norman case.

There are two aspects with regard to due diligence on the part of the Prosecution which need to be highlighted. The first is that this was, in our submission, a case where if the accused is mentioned for the first time there is clearly something very additional about it and the Prosecution ought to have applied for good cause. The second aspect of due diligence is the aspect that even if we are dealing with two and a half months as opposed to eight days, we are still looking at a context of almost two years in which the Prosecution had the opportunity to say do you know Augustine Gbao?

With regard to prejudice to Mr Gbao, and here is where I come to Your Honours's discussion on the appropriate remedy, we are in a particular position --

JUDGE THOMPSON: Yes, learned counsel?

MR HARRISON: The Prosecution takes a view that the Defence are certainly allowed to make a reply but a reply does not lead to brand new submissions on things that weren't raised in the response.

JUDGE THOMPSON: Yes, I understand.

MR O'SHEA: Your Honours, with respect, this was raised by Your Honours, not by my learned friends. It was raised by Your Honour Judge Thompson, because Your Honour Judge Thompson raised the question of is adjournment an appropriate remedy, and that is what I am turning my mind to now.

We are in a peculiar position and I say that because of that peculiar position, adjournment does not cure the problem. This is why: The first time or the time at which Mr Gbao withdrew our instructions from us was in July of 2004, when we began this trial. Before July 2004 we were speaking to Mr Gbao and we did have instructions. I have to say that there's instructions and there's instructions, but, nonetheless, we did have instructions. Had we been in a position to know this information contained in the two later statements prior to July 2004, we would have been in the position to speak to Mr Gbao and put it to him and ask his views on it and perhaps get some direction on investigations. Both of these statements came after July 2004, and even if we are given an adjournment we will be probably in the same position in two months from now as we are today, because we are not in a position to speak to Mr Gbao.

PRESIDING JUDGE: Whose fault that you are not able to speak to -- is it the Court's fault?

MR O'SHEA: Your Honour, in my respectful submission it does not matter whose fault it is because -- yes, it is Mr Gbao's fault, Mr Gbao has made a choice. But the fact that Mr Gbao has made that choice does not remove his right to a fair trial and that is what we are dealing with here. And when we are dealing with the question of what is the appropriate remedy, one has to be not less cautious because the accused has made his own rod, but more cautious because he does not know what he is doing.

JUDGE THOMPSON: So you say that in fact the mischief here is

incurable, so to speak, by an adjournment. Are you suggesting that the prejudice from your perspective is irreparable or could only be remedied by exclusion? Is that what you're saying?

MR O'SHEA: Effectively, yes, Your Honour. I mean, it is always possible that we could try and conduct some independent investigations during the course of an adjournment, but it is not quite the same as being able to talk to the client, and, therefore, in that sense, it is irredeemable. Had the Prosecution acquired this information and disclosed it at a much earlier stage, we might be in a very different position today, and that's significant in our submission.

JUDGE THOMPSON: Thanks.

[Trial Chamber confers]

PRESIDING JUDGE: Learned counsel, the Court will rise for a few minutes. We will come in when we are ready. The Court will rise, please.

[Break taken at 3.35 p.m.]

[Upon resuming at 4.20 p.m.]

PRESIDING JUDGE: Well, we are resuming the session. We thought we would go into a conclave and come out with a solution on this issue, but it is not quite at hand as yet. So we would still face it on advisement and be able to come out with a ruling, either oral or written, in the not too distant a future. In fact, as urgently as we can, so that we will be able to take the evidence of this witness.

All we want to do is to find out from the

Prosecution if we could take the stand-by witness. If you require some time to prepare the scenery for him -- and we also want to find out if the Defence would be prepared to take on the next witness, because we are very disturbed that out of the 19 witnesses who are listed for this session we are only on the first witness after one week of sittings. It is quite disturbing and I think we should move along. Once we clear the way for this other witness, we should be able to proceed and be done with him as well. But since we have all the time we would like to see -- Mr Harrison, are you --

MR HARRISON: There is a witness available. It's TF1-071. That will be in my estimate a lengthy witness, but I leave it to my colleagues to advise you if they are able to deal with that witness at this time.

MR JORDASH: For the first accused, we're ready.

MR NICOL-WILSON: For the second accused, we are ready as well, Your Honour.

MR O'SHEA: We are happy to hear the evidence of the next witness.

PRESIDING JUDGE: Pardon me?

MR O'SHEA: Yes, we're ready.

PRESIDING JUDGE: You're ready. Good, okay.

MR HARRISON: If I could indicate at the outset that there is a brief application to again be made for this witness. Through inadvertence this witness was not recorded as being a category C witness. He has been in subsequent documents submitted to the Court, but in the original witness protection information the Court was given, C was

not put beside his name. I am not sure if any of the Defence counsel are concerned about this witness being treated as a category C witness or not.

MR JORDASH: He clearly falls within category C; yes, I think he does.

JUDGE THOMPSON: Category C is insider witness?

MR JORDASH: Yes, no objections.

JUDGE THOMPSON: He will testify in English, is it?

MR HARRISON: That's correct.

JUDGE BOUTET: Second accused?

MR NICOL-WILSON: No objection, Your Honour.

JUDGE BOUTET: Third accused?

MR NICOL-WILSON: No objection.

MR HARRISON: That being the case, this is a category C witness testifying in English, and I think that was where we had the problems with the voice distortion, so should we -- I leave it to the Court to give instructions on what you wish the Prosecution to do; to have the witness brought in now or to check the voice distortion first.

PRESIDING JUDGE: I think the voice distortion should be checked first and we have to make sure of that before we proceed. So we may have to rise again for a few minutes. When the technical arrangements are through you'll usher us in, please. Once more, the Court will rise and we'll resume when you're ready.

[Break taken at 4.20 p.m.]

[The witness entered court]

[Upon resuming at 4.50 p.m.]

PRESIDING JUDGE: Learned counsel, we are resuming the

session. The technical arrangements appear to be in place. Yes, Mr Harrison?

MR HARRISON: The next witness is TF1-071. I had earlier said, with respect to the last individual we intended to call as a witness, that they would be number 20, but as they were not called and sworn this will be the 20th witness in the trial.

PRESIDING JUDGE: I think you are right, yes. We never called nor swore -- yes, was neither called nor sworn, you're right.

MR HARRISON: To be sworn this witness is a Christian and would ask to be sworn on the Bible.

PRESIDING JUDGE: So this will be the 20th Prosecution witness?

MR HARRISON: Yes, that's correct.

PRESIDING JUDGE: TF1-071.

WITNESS: TF1-071 sworn

PRESIDING JUDGE: The witness will testify in English?

MR HARRISON: That's correct. I apologise for the inconvenience, but the Prosecution feels it is necessary to ask for a brief closed session in order to deal with certain information and we will also be, later on in the testimony, asking for another closed session which will be for a more substantial period of time. We have contemplated this and we've tried to --

PRESIDING JUDGE: You cannot merge them?

MR HARRISON: I'm afraid it would be a situation --

PRESIDING JUDGE: It would be untidy.

MR HARRISON: I beg your pardon?

PRESIDING JUDGE: It would be untidy, would it?
MR HARRISON: I fear it would be very confusing if we were to try to do it in one closed session, because of the length of time and the amount I anticipate being requested ofthis witness. So at the outset I am asking for a brief closed session, which I have already discussed with my friend, and I have taken the guidance from Mr Justice Thompson that I should actually be making this application in closed session, so perhaps I ought not to say anything further.
JUDGE THOMPSON: Well, we certainly will proceed to hear the application in closed session. Before we ask for the necessary adjournment to be made for that purpose, I will request that members of the public gallery retire until tomorrow morning.
PRESIDING JUDGE: We are sorry about this, but it is part of the process, it is part of the procedure in international tribunals. There is very little we can do about this. These are parts of the rights of accused persons and the witnesses as well.
JUDGE THOMPSON: So may we then have the necessary adjustments made to the technology to move us from public session to closed session? We received a signal indicating that we are in closed session. With that assurance, learned counsel, you'll proceed.

[Closed session]

EXAMINED BY MR HARRISON:

MR HARRISON:

Q. Witness, you're 49 years of age?

A. Yes.

Q. Originally from Pujehun District?

A. Yes.

Q. You were captured by the RUF on 3 April 1991?

A. You are correct.

MR TOURAY: Excuse me, Your Lord, I thought he was supposed to make an application.

PRESIDING JUDGE: Yes, you're supposed to make an application.

MR HARRISON: I apologise, yes.

PRESIDING JUDGE: I was taken aback too.

MR HARRISON: I'm trying to be efficient here and forget about the application. I apologise, Mr Touray, you are of course right and thank you for the intervention.

JUDGE BOUTET: I was going to ask you what is the closed session about.

MR HARRISON: Do we have a hint now?

JUDGE THOMPSON: It's a classic example of prosecutorial overzealousness.

PRESIDING JUDGE: It's not that. It is part of fatigue maybe and maybe too many things running through Mr Harrison's mind.

MR HARRISON: Or not enough.

The application is with respect to this witness because we anticipate him giving a considerable amount of information that will identify himself as being a senior

G5 officer of the RUF particularly in the Kono area. It is the Prosecution's concern that because this witness was in the Kono area for such a long time that he will be easily identified if it is known what his position was, and this witness has serious concerns about his personal wellbeing and that of his family should his identity become known. That is the basis of the application.

PRESIDING JUDGE: Any objection to this application?

MR JORDASH: No objection.

MR NICOL-WILSON: No objection, Your Honour.

MR CAMMEGH: Nor from me.

JUDGE BOUTET: I do have a question, however. Does that mean that all of the evidence for this witness will be in closed session?

MR HARRISON: No. What I tried to indicate at the outset, there is going to be a very brief period at the outset; I'd hope this to be less than 15 minutes. We will then go into open session for the bulk of the evidence, but then there is going to be another substantial period of closed session. I estimate that to be likely over an hour.

JUDGE BOUTET: All this having to do with protecting the identity of the witness, but the first part of your evidence-in-chief will be relevant to leading evidence about Kono and his actions in Kono for a period of time?

MR HARRISON: At the outset, right now, it is simply going to be his background information which would identify him as being a G5.

JUDGE BOUTET: Okay and once you've done that we're going to

move out of --

MR HARRISON: Correct.

JUDGE THOMPSON: May we now ask the technicians to make the adjustments to go into public session?

[Open session]

MR WALKER: Court's open session now, Your Honour.

JUDGE THOMPSON: This is the oral ruling of the Chamber on the Prosecution's application.

For the records we need to note that the application was not opposed by the Defence. The Chamber is disposed to grant the application on the grounds of protecting the security of this witness and members of his family. A reasoned written ruling will be given in due course.

We will now move to closed session and we ask the experts to make the necessary adjustments for that purpose.

[Closed session]

[HS180105B 5.05 p.m.]

JUDGE THOMPSON: We've been advised that we're in open session. Is that confirmed.

MR WALKER: That we're in closed session, Your Honour.

JUDGE THOMPSON: That we're in closed session. Thank you. And Mr Harrison, your witness.

MR HARRISON: Thank you.

Q. Witness, you are 49 years of age?

A. Yes.

Q. Originally from Pujehun district?

A. Yes.

Q. Captured by the RUF on the 3rd of April 1991?

A. Yes.

MR O'SHEA: Sorry, Your Honour. Just one moment. While we may have no difficulty with association with the RUF being led, I do have difficulty with the word "captured" being put in the witness's mouth.

MR HARRISON: That's fine. I accept the criticism.

PRESIDING JUDGE: Move from there.

MR HARRISON:

Q. What district are you from?

A. Pujehun.

Q. Did you become a member of the RUF?

A. Yes.

Q. When was that?

PRESIDING JUDGE: No, Mr Harrison, please, take it easy. You're going much faster than we're used to here. You say you're from the Pujehun district. He is from the

Pujehun district, yes.

THE WITNESS: Yes.

Q. Did you become a member of RUF?

A. Yes.

Q. When was that?

A. It was 3rd April 1991.

Q. In what circumstances did you become a member?

A. I was captured in an ambush.

Q. Were you trained by the RUF?

A. Yes.

Q. Where?

A. At Kissy Wolo, Pujehun district.

Q. Prance the Court would like to you spell Kissy Wolo.

A. It is K-I-S-S-Y W-O-L-O, Kissy Wolo.

PRESIDING JUDGE: W.

THE WITNESS: O-L-O.

PRESIDING JUDGE: Kissy W-O-L-O.

THE WITNESS: Yes, sir.

PRESIDING JUDGE: In the Kissy --

THE WITNESS: No, Kissy Wolo township.

PRESIDING JUDGE: That is where you were trained.

THE WITNESS: Yes, sir.

MR HARRISON:

Q. What were you trained as?

A. I was trained as a fighter and later I became liaison officer.

Q. Does a liaison officer go under as an another name?

A. Yes, we call it G5.

Q. What does a G5 do?

A. G5 was a welfare commander, the other name.
PRESIDING JUDGE: You said the G5 was a welfare --
THE WITNESS: Commander for civilians.
JUDGE BOUTET: By this you mean responsible for civilians.
THE WITNESS: Yes, sir.
MR HARRISON: I'm hearing some unusual sounds on my earphones.
Am I the only one?
JUDGE BOUTET: No, no, you are not. Let's move ahead.
MR HARRISON:
Q. Were you always a G5 member?
A. Yes, sir.
Q. Did you receive any promotions in the RUF?
A. I received several promotions.
Q. When was the first promotion?
A. I got my first promotion in 1992 as second lieutenant.
Q. By whom were you promoted?
A. By Corporal Sankoh.
Q. Was there a later promotion?
A. Yes, I got another promotion, that was 1994 as full lieutenant.
Q. By whom were you promoted?
A. Corporal Sankoh.
Q. Was there a subsequent promotion?
A. Yes.
Q. When was that?
A. That was 1997.
Q. To what rank?
A. A captain rank.
Q. By whom were you promoted?

A. Sam Bockarie.
Q. Was there a subsequent promotion?
A. Yes.
Q. To what rank?
A. To a major rank.
Q. In what year?
A. 1998.
PRESIDING JUDGE: To what rank?
THE WITNESS: To a major rank.
PRESIDING JUDGE: Major.
THE WITNESS: Yes.
PRESIDING JUDGE: In 19?
THE WITNESS: 1998.
MR HARRISON:
Q. By whom were you promoted?
A. Sam Bockarie. In the same 1998 I became -- 2000 I became a lieutenant colonel as a G5 for Kono district.
Q. By whom were you appointed?
A. That was done by Issa Sesay.
PRESIDING JUDGE: You said it was G5 lieutenant colonel.
THE WITNESS: Yes, sir.
Q. A G5?
A. I became a lieutenant colonel in 2000 by Issa Sesay. Still I was acting as G5 commander for Kono district.
JUDGE BOUTET: In 1998 you were major, were you then commander G5 -- G5 commander for Kono district.
THE WITNESS: Yes, sir. I was still G5 commander.
JUDGE BOUTET: So what happened? You were promoted but remained in the same --

THE WITNESS: In the same position.
MR HARRISON:
Q. From 1998 to disarmament in what district were you posted?
A. I was still in Kono district.
MR HARRISON: I'm now asking that certain charts be distributed to the Court and a copy to the witness. There should be five charts -- sorry there's three large ones; we'll start with those. And if I can just indicate at the outset that through the courtesy of Defence counsel, what I'm going to do is in this brief closed session simply have the witness identified a very specific portion of the chart. The admissibility of the chart will be left to a later time in open session when certain points, I suspect, will be raised by Defence counsel. I'm only doing this for a limit purpose in the closed session.

The first chart is one titled "command structure, April to December 1998".

Q. Mr Witness, could you please look at the very bottom of the chart. You'll see a row of squares. The fourth square from the right, do you see that?
A. Yes.
Q. Is there an indication of G5 in that box?
A. Yes, I see G5.
Q. Is your name located in that box?
A. Yes.
Q. Just for the sake of clarity, yours is the second name in that box?

A. Yes.
MR HARRISON: That concludes the information from this chart.
JUDGE BOUTET: I'm sorry, Mr Harrison. I didn't have the chart so I couldn't follow you. Which box?
MR HARRISON: On the very bottom row, the fourth box from the right.
JUDGE BOUTET: Okay. G5.
MR HARRISON: The witness indicated that his was the second name in that box. The next chart is again titled "command structure," but the year is 1999.
Q. Witness, could you please look at the bottom row of boxes on this chart.
A. Yes.
Q. Could you look at the third box from the right.
A. Yes.
Q. Do you see the indication of G5 in that box?
A. Yes, I see G5.
Q. Is there a name in that box?
A. Yes, it is my name.
PRESIDING JUDGE: I think it is more precise to say the third box on the right at the bottom of the chart or the chart, rather. The third box from the right on the bottom of the chart. It is more explicit.
MR HARRISON: That is all the information from this chart. The third chart is one titled "command structure for the years 2000, 2001."
Q. Witness, would you please look at the very bottom row of boxes on that chart.
A. Yes.

Q. Would you look at the third box from the right on the bottom.
A. Yes.
Q. Do you see the indication of G5 in that box?
A. Yes, G5 is there.
Q. Do you recognise the name?
A. Yes, it is my name.
MR HARRISON: That concludes the information from that chart during the closed session. There is one final chart that I would ask be put before the witness. It is a chart of a smaller dimension. It has a heading "camps" and the year underneath is 1998.
PRESIDING JUDGE: That would be the fourth chart.
MR HARRISON: That is correct. Being colour-blind I'm going to take a guess that these colours are orange in these boxes. Maybe someone would care to correct me if I'm nowhere near right.
JUDGE BOUTET: That is sort of, sort of.
MR HARRISON: Orange?
PRESIDING JUDGE: No, they are not orange, they are green.
MR HARRISON: Green.
PRESIDING JUDGE: I would call them green.
JUDGE BOUTET: Which one? The bottom or the middle?
MR HARRISON: I'm looking at at middle.
JUDGE BOUTET: Greenish.
PRESIDING JUDGE: Greenish.
MR HARRISON:
Q. Mr Witness, if you could look at the middle row of boxes, the third box from the left in the middle?

A. Yes.
Q. Do you see the heading Tombodu?
A. Yes, I see Tombodu.
Q. Is your name located in that box?
A. Yes, I see my name.
Q. If you go one box to the left of that, the second box, do you see your name in that box?
A. Yes, I've seen it at the bottom, yes.
MR HARRISON: That concludes the information from this chart. That also concludes the information the Prosecution wish to lead in this closed session.
PRESIDING JUDGE: What difficulty do you have, Mr Harrison, tendering these so we don't come back to them?
MR HARRISON: I think there is a point that at least one of the accused wants to make and my suggestion to the Court would be to perhaps leave this to when we do the charts.
PRESIDING JUDGE: Okay, you can go ahead.
MR JORDASH: I would also ask that until the point of admissibility is decided that they be taken away from the witness, please.
MR HARRISON: Yes, of course.
JUDGE THOMPSON: We'll now resume in open session.

[Open session]

JUDGE THOMPSON: We're now in open session, Mr Harrison, please continue.

MR HARRISON:

Q. Witness, where were you in the first months of 1997?

A. In 1997 I was in Liberia in the lower Lofa county, Bopolu.

Q. Why were you there?

A. We were over raided by the Kamajors and the government troops in Pujehun District so we ran over into Liberia.

Q. Did you remain in Liberia?

A. I remained in Liberia for few time.

Q. Did you ever leave Liberia?

A. Yes, I live in Liberia.

Q. I'm sorry, leave?

A. I left Liberia later.

Q. When was that?

A. It was in 1997, somewhere around October, I left Liberia.

Q. And where did you go?

A. I left Bopolu and travelled by the lower Lofa County and came through by the border of Liberia, and through the Kailahun District and from Kailahun I travel to Kenema, there I met Sam Bockarie.

Q. Why did you return to Sierra Leone?

A. We heard by Corporal Sankoh to join the AFRC and through that information, the RUF based in Bopolu asked me to go to Sierra Leone and meet with Sam Bockarie and any other RUF commanders to confirm this information from them.

JUDGE BOUTET: Mr Witness, you said you heard on the radio

that Sankoh had joined the AFRC?

THE WITNESS: Yes, I heard it over the radio. That was the main cause given me and my colleagues ordered me to go to Kenema and find out if it was a true statement.

MR HARRISON:

Q. When you talk about radio, are you referring to a public broadcast?

A. Yes, it was over public broadcast, the BBC, I heard that.

Q. When was that?

A. I heard it on May 28. It was a time I heard the voice of Sankoh.

PRESIDING JUDGE: May 28th of what year?

THE WITNESS: May 28.

PRESIDING JUDGE: Of what year?

THE WITNESS: Yes, October. No, no, May 28

PRESIDING JUDGE: What year?

THE WITNESS: 1997.

MR HARRISON:

Q. Tell the Court in as much detail as you can what that radio broadcast was about?

A. Yes, as I have just said he heard it over the BBC radio and the voice of Sankoh asking the RUF to join the AFRC. Indeed as I heard from him saying the AFRC was not our enemy as soldiers, that we have to join them. Our enemies were only the politicians in Sierra Leone, they were our only enemies, so we should join the AFRC. And in fact he ordered Sam Bockarie, Denis Mingo, alias Superman as part of the troops at that time to lead the troop.

MR HARRISON: I have discussed this with my friends and I'm right in saying they accept this suggestion. I have that radio broadcast here which could be played. I also have in front of me the transcript which I prepared of that radio broadcast and my suggestion is, and I think my friends agree, that we're content to simply use the typed transcript. The witness could review it and that would later become -- or at least the Prosecution would ask that the written transcript become an exhibit in the proceeding.

[Trial Chamber confers]

JUDGE THOMPSON: Learned counsel for the defence, what is your response to the request of the prosecution?

MR JORDASH: It seems a sensible one.

JUDGE THOMPSON: All right. Mr Cammegh, what is your reaction to the Prosecution's request.

MR CAMMEGH: I agree.

JUDGE THOMPSON: Mr Touray?

MR TOURAY: Your Honour, our only worry is that on the transcript this is an SLBS radio, it's not BBC. The evidence says its BBC radio. What we have here is SLBS radio. I don't know the nexus really, at this point.

JUDGE THOMPSON: In other words, there is no nexus between the transcript and the evidence so far.

MR TOURAY: And the evidence. Yes. That's the point.

JUDGE THOMPSON: Shall we hear the Prosecution on that.

MR HARRISON: I think it is a technical matter and the reality is that it was broadcast over various communications. This witness happened to hear it on the BBC; the

transcription is from the SLBS. But if you prefer to have the witness actually hear it and then say yes, that's the one I heard and go through it on the transcript we're quite content with that procedure.

JUDGE THOMPSON: What's Mr Touray say?

MR TOURAY: We are in your hands, Your Honour. We don't want to prolong the proceedings.

JUDGE THOMPSON: We are in the minds that we could hear the radio version and of course, allow the Prosecution to tender this at some subsequent stage, but the Bench would be interested in hearing the radio version.

MR HARRISON: I believe the audio-visual technicians have it ready and set to play. I would ask if they could indicate if they can play it now and I would ask the witness to listen to the broadcast and ask if he recognises it.

JUDGE THOMPSON: Let's begin then, audio experts.

MR WALKER: Preparations are being made now to play the tape, Your Honour.

[Technical difficulty]

MR HARRISON: I understand there might be a few technical difficulties, this being the first time the audio-visual staff have been asked to carry out the such an activity. My suggestion would be that the Court allow me to simply jump over this. Perhaps this evening the audio-visual staff will be able to either let me know what I have done wrong or advise us if, in fact, this is something that cannot be done. I can continue on, jumping this over, but with it in the back of my mind,

returning to it tomorrow morning. And there is a certain amount of information that I think would take about a half hour, and I think that would be a convenient time, if that is acceptable to the Court to terminate the proceedings today.

JUDGE THOMPSON: It sounds reasonable. Let you move on to another episode. We can return to this. Proceed, then.

MR HARRISON:

Q. Witness, let me ask you this question: After you heard this radio message, which we unfortunately didn't hear today, what happened then?

A. As I was just trying to say over, the RUF that were based in the Bopolu in Liberia asked myself and some other colleagues to come over to Kenema and confirm this.

PRESIDING JUDGE: The area based why spell that, please.

THE WITNESS: RUF.

PRESIDING JUDGE: The RUF base where?

THE WITNESS: Bopolu, Bopolu. B-O-P-O-L-U. That was in lower Lofa County.

PRESIDING JUDGE: When did they tell you to go and check on this.

THE WITNESS: The RUF that were based in Bopolu asked me and some other colleagues to go to Kenema.

PRESIDING JUDGE: Mention the colleagues, please.

THE WITNESS: Like Mike Lamin himself was there. Morris Massaquoi was there, Bai Bureh was there, Rocky CO was there and so many other commanders.

PRESIDING JUDGE: To go.

THE WITNESS: To go to Kenema or any other place where I can

find Sam Bockarie and other RUF authorities. So we all agreed that we cannot rely on the information over media, so they asked me to go to Kenema and confirm this from either Sam Bockarie or any other authorities. Indeed, I met with Sam Bockarie and he confirmed this. Yes, it was true.

MR HARRISON:

Q. Tell us when it was that you left for Kenema.

A. I told you it was in October to November I left Bopolu for Kenema and then when I arrived in Kenema, Sam Bockarie on my return to Bopolu he gave 200 dollars to be carried to the other colleagues at Bopolu.

PRESIDING JUDGE: Liberian or US dollars?

THE WITNESS: Yes, American dollars.

MR HARRISON:

Q. Did you go to Kenema with anyone?

A. I travelled to Kenema my second trip along with one Major Rocky.

PRESIDING JUDGE: Your first trip. Was this your first trip.

THE WITNESS: Yeah, I went with one Musa Bendu and one Musa Kamara.

MR HARRISON:

Q. Is it after the first trip that you received this money?

A. It was during the first trip I received the $200.

Q. So what happened next?

A. I was given a letter attached to the 200 dollars instructing all the combatants based in Bopolu to come home and train the AFRC. That was Sam Bockarie's own instructions.

PRESIDING JUDGE: It was his letter?
THE WITNESS: It was given to me by Sam Bockarie.
PRESIDING JUDGE: By who? Written by who?
THE WITNESS: By Sam Bockarie.
PRESIDING JUDGE: Asking?
THE WITNESS: Asking and even instructing all the combatants to return home to Sierra Leone.
MR HARRISON:
Q. What did you do with that letter?
A. The letter was taken to my colleagues at Bopolu, together with the money.
Q. What happened next?
JUDGE THOMPSON: He said the letter was taken. Who took it?
THE WITNESS: The letter was taken to my colleagues.
JUDGE THOMPSON: By?
THE WITNESS: By me.
MR HARRISON:
Q. What happened next?
A. When I arrived at Bopolu, there was a big constraint in security movement by the RUF to travel to Sierra Leone, and I was later sent by the same RUF and some other colleagues like Kuma Hindu [phoen], Bai Bureh, Morris Massaquoi went to Monrovia and we met with the minister at that time was Daniel Chea, asking to have us a transit to Sierra Leone.
Q. What happened next?
A. The minister deployed soldiers along the border by Liberia and Sierra Leone by Kailahun and then we were given the green light to travel.

Q. So what did you do?
A. So Rocky CO and myself, together with Bai Bureh travelled to the last point to enter in Liberia. There we found most of our friends.
MR CAMMEGH: I'm sorry, could I have those names again.
MR HARRISON: Would Mr Cammegh like me to repeat them or would you like the witness? I thin it was Major Rocky and Bai --
THE WITNESS: Bai Bureh, Andrew Kamara [phonetic], Bai Bureh, Morris Massaquoi, myself and so many others.
MR HARRISON: Perhaps this is an opportune time for me to hand up what I would ask be the next exhibit. It is a chart of names with a very brief description of who they are, which has been provided to my friends and perhaps I'll have to invite them to indicate whether any of them objects. I'm under the understanding that they don't. It may abbreviate asking witnesses to repeat names and spellings. If I can just indicate that none of the accused names are in this chart and similarly the earlier exhibit tendered by one of the --
PRESIDING JUDGE: Are you tendering these ones, these charts? Are you tendering them?
MR HARRISON: Yes, I am asking that they become the next exhibit. If Mr Cammegh doesn't have one, I have an extra one in my right hand. I see some of my colleagues are looking at the document. I don't want to take advantage, but I was just going to put the two questions to the witness, but perhaps I should wait for them to finish their consultation.

JUDGE THOMPSON: I can see Mr Jordash wanting to --

MR JORDASH: I'm not quite sure what my learned friend is going to do with this, but I would object to it being used as an exhibit. If it is testimony which this witness will give -- was expected to give, then he can give it orally. If it is something other than that, then I would like to know what it is. The title seems to suggest that it is testimony which the Prosecution expect him to give, but aside from this table, some of this -- well, some of the evidence contained in this table is new to me. It is not contained within the witness statements disclosed and I'm particularly concerned, whilst Mr Sesay doesn't appear as a figure in the name column, there are people referred to in this table who were allegedly performing functions for Mr Sesay. Now, what my real concern is that we go from the witness statements disclosed to us to new evidence in the form of a table disclosed to us at this stage. I don't know what is coming next; new evidence based upon this table. I don't know understand why the Prosecution need this table. If they want to adduce facts about these figures mentioned in the left-hand column, then that can be done orally. It is very dangerous, I would submit, to allow this evidence to go before -- well, to be adduced in this manner.

JUDGE THOMPSON: [Microphone not activated]

MR NICOL-WILSON: Your Honour, we support the position canvassed by counsel for the first accused.

JUDGE THOMPSON: Right, what about Mr O'Shea?

MR O'SHEA: Well, Your Honours, we have received this document before in the sense that it has been shown to us before. I wasn't quite aware that we were going to be putting it in front of the witness or exhibiting it. I do have serious difficulties with it becoming an exhibit. First of all, this is a list of names with a description of roles and to allow this document to be put in front of the witness is, in my submission, a convenient way of avoiding the rule on leading questions, to begin with.

Secondly, what is the source of this document? Who has compiled it? I assume the Prosecution has compiled it. If the Prosecution has compiled it, is the Prosecution giving evidence through this document, or is the Prosecution doing, as Judge Sidhwa said in the case of Rajic, said acting as a scribe taking down the story of a witness, in which case in the opinion of that learned judge, that would be impermissible. And finally, it would be in contravention of the best evidence rule.

JUDGE THOMPSON: Mr Harrison, what is your reply?

MR HARRISON: Exhibit 7 is exactly the same document. It is already an exhibit tendered in exactly the same format which has names and descriptions tendered by a previous witness. We had been under the understanding that because that was by consent, it was agreed that this was an efficient manner in which the Court could proceed. My understanding was that was fine. The purpose of this document is this: A lot of names are uttered. I can't count the number of times we've been having to stop to spell names, ask for names to be pronounced again. This

document gives a name, gives a spelling and gives very brief description which is not in way damaging and, in our submission, is an efficient way to proceed. The two questions I was going to put to the witness were: How was this prepared and his role in it.

PRESIDING JUDGE: If this document is exactly as Exhibit 7, why is it necessary?

MR HARRISON: It is exactly the same format with new names.

PRESIDING JUDGE: If it is, why is this necessary? Why don't we rely on what is already an exhibit?

JUDGE THOMPSON: Well, let me buttress that. If it is exactly the same format, then that is not the objection, the objection is the content and also that this document purports to say that these are names that this particular witness would refer to in his testimony, and Mr O'Shea's position is that it would be impermissible if it is prepared by the Prosecution and they seek to tender this through the witness, then as in the case that has been cited, the Prosecution is acting as a scribe. Why not respond to that objection.

MR HARRISON: Yes, I could put the questions to the witness that he is the one who prepared it with the assistance of the Prosecution, but the information is coming from him, prosecution puts it in this format.

JUDGE THOMPSON: I believe that would partially dispose of their objection.

MR HARRISON: I said I would pose those questions from the outset.

JUDGE THOMPSON: Perhaps I shouldn't speak for them, but left

them speak for themselves.

MR JORDASH: It wouldn't dispose of my objection, Your Honours. If it is prepared by the witness alone, that might be one scenario. If it is prepared by the witness alongside a Prosecutor, that is a different scenario and the latter scenario would involve, if we seek to challenge this evidence, a cross-examination of the Prosecutor who assisted this witness in preparing the document. As my learned friend Mr O'Shea said, it is a clear way of avoiding leading questions prohibition.

Secondly, if my learned friend wants simply a list of names to go before Your Honours, I'm not sure I would object to that, and then when the witness mentioned the name in his evidence Your Honours and the rest of us could be referred to the name on the list and we'd all save time in terms of spelling. But it cannot be right, I would submit, to have names which we are hearing for the first time. I look over the page to Colonel Jibao, CSO for Issa Sesay. Now, I don't know what this witness will say about Colonel Jibao. I also don't know what other witnesses may say about Colonel Jibao. He may be the biggest cause of atrocities in Sierra Leone during the period of the indictment. I don't know. And that's what I object to. If the witness has something to say about Colonel Jibao, then let him say it without assistance from the Prosecution as part of his evidence in chief.

JUDGE THOMPSON: In other words, you're submitting in a way, if I could put it colloquially, that there is more in

this that meets the eye.

MR JORDASH: Potentially. Perhaps it is the thin end of a dangerous wedge.

JUDGE THOMPSON: All right.

PRESIDING JUDGE: The three Defence teams are objecting to the admission of this document at this point in time

[Trial Chamber confer]

JUDGE THOMPSON: Learned counsel, on both sides. It is the decision of the Chamber at that point in time that it not be advisable to receive this particular document of evidence at this point in time.

PRESIDING JUDGE: So the objection is sustained for now.

MR JORDASH: Your Honours, thank you. For clarity sake, I do remember this being done through Mr Johnson --

MR HARRISON: Mr Johnson was subject to a confidential -- it was only subsequent, but I'm not sure that there is any ruling dealing with subsequent communications about that person's name. He was originally subject to a witness protection order.

MR JORDASH: He gave evidence in public.

MR HARRISON: But I'm not sure if there was anything subsequent that took place.

PRESIDING JUDGE: Anyway the ruling is that we will proceed.

MR JORDASH: What I was about to say was that there may be times when tables such as this contain evidence which is in no way contentious, and of course I would --

PRESIDING JUDGE: We've ruled. Please let's proceed at this point in time.

Yes, Mr Harrison.

MR HARRISON:
Q. Witness, you indicated the people that you went to Sierra Leone with. What did you do when you got to Sierra Leone?
A. Yes, when I got to Sierra Leone, I met with Sam Bockarie at Kenema. As I've been saying here, he give the order for the RUF --
PRESIDING JUDGE: We have all that.
THE WITNESS: Okay, okay. Then from Kenema we were there and later he asked us to go to Freetown. The main reason of Sam Bockarie sending us to Freetown was that he said since the AFRC have taken over power he has not seen any outside or international community welcoming the AFRC as the legitimate government and even with the local community issues, like the civilians in the country welcomed the government of AFRC. It was only done by Corporal Sankoh. This has confused he, Sam Bockarie. He was not thinking that AFRC was a government that was recognised. So he gave us another letter that was taken to Issa Sesay. At that time Issa was representing him in Freetown. The content of the letter which he gave us in favour was that we, the RUF, should retreat from Freetown and start to come to Kenema, Kailahun and Makeni, because he felt very sure that --
MR CAMMEGH: I'm sorry. How are we supposed to get this down? It is now quarter past 6.00 and my fingers are getting very tired. Could the witness please just break it down a little. This is very important.
PRESIDING JUDGE: We have the first meeting where they were

sent a letter.
THE WITNESS: To Liberia.
PRESIDING JUDGE: To Liberia, Bockarie containing confirmation and $200. Confirmation that the announcement of Foday Sankoh was true.
THE WITNESS: Yes, was very true.
PRESIDING JUDGE: Now you're talking of another trip.
THE WITNESS: Yes, this is the second trip, from Kenema to Freetown.
JUDGE BOUTET: In your evidence before you went there you said you had been to the Defence Minister in Liberia and you were allowed to cross the border to Sierra Leone and that's where we moved to elsewhere. Did you move back to Sierra Leone?
THE WITNESS: No, you see I've already passed that stage. I've already explained this that --
MR HARRISON: If I can just interject.
Q. Witness, can you just start from October/November 1997. Where did you go then?
A. October 1997?
Q. October or November 1997?
A. We took from Kenema to Freetown.
Q. Okay. How many trips had you made to Kenema in 1997?
A. From Liberia.
Q. Yes?
A. I can remember I made only two trips.
Q. When was the first trip?
A. The first trip was to come and find out whether it was Corporal Sankoh himself gave the order.

Q. When was that?
A. I came October.
Q. When was the second trip?
A. The second trip was in the same October.
Q. The second trip you go to Kenema?
A. Yes.
Q. How long were you there?
A. Just there for a few, few weeks, then later Sam Bockarie send us to Freetown to Issa and other commanders in Freetown.
MR HARRISON: I think Mr Cammegh may have been dropping a not subtle hint. He might have been reminding me about the time?
PRESIDING JUDGE: We're waiting for you to get to a particular point.
MR HARRISON: This is a convenient time.
PRESIDING JUDGE: We're left in the air like that.
MR HARRISON: All right. Well, I'll proceed, if you wish.
PRESIDING JUDGE: To see Issa Sesay and other commanders in Freetown. Did you go to Freetown?
THE WITNESS: Yes, I went to Freetown.
PRESIDING JUDGE: With who?
THE WITNESS: With one Major Rocky.
PRESIDING JUDGE: Okay. I think we can end it there.
MR HARRISON: It is agreeable.
PRESIDING JUDGE: Tomorrow we will get along with what happened in Freetown.
MR HARRISON: Actually, we won't do that at beginning, but we will do something that will be of interest to the Court

before that.

PRESIDING JUDGE: Well, you are the navigator.

MR HARRISON: I fear the ship is without a rudder.

PRESIDING JUDGE: I understand there is a new aircraft that will be conveying 555 passengers. I hope it will be safe to convey passengers to their safe destination. Anyway, well, Mr Witness, we're going to suspend the session here. We'll continue with you tomorrow morning at 9.30.

THE WITNESS: Okay.

PRESIDING JUDGE: Is that all right?

THE WITNESS: It's okay.

PRESIDING JUDGE: Well, before Mr Cammegh's fingers completely collapse, we better rise and resume session tomorrow at 9.30. Good night.

[Whereupon the hearing adjourned at 6.23 p.m., to be reconvened on Wednesday, the 19th day of January, 2005, at 9.30 a.m.]

EXHIBITS:

WITNESSES FOR THE PROSECUTION: