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(281-300)

IN THE SPECIAL COURT FOR SIERRA LEONE

Before: Judge Bankole Thompson

Registrar: Mr Robin Vincent

Date filed: 26th May 2003

Case No. SCSL 2003 – 09 – I

THE PROSECUTOR

Against

AUGUSTINE GBAO also known as AUGUSTINE BAO

RESPONSE TO PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE

Office of the Prosecutor

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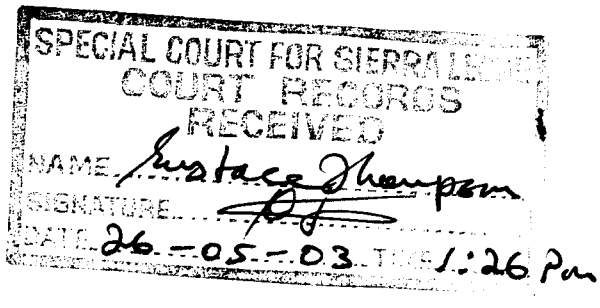

Procedural matters

1. On 16th May 2003, His Honour Judge Thompson rejected the Defence request for the suspension of any ruling on protective measures in other proceedings, but granted Defence Counsel 7 days to respond to two motions. The learned Judge notes that the subject of protective measures is one of extreme importance, while stating that it is a common and accepted practice in international criminal law. The Defence leaves it in the discretion of the Court as to whether there should be an oral hearing on this matter, and therefore, also taking into account the importance of the issue to a fair trial and the freshness of the debate before this Court, we request the Court's and the Prosecution's understanding with regard to the length of these submissions and accordingly request the Court's leave to go beyond the page limit indicated in the Registry's Directive on the Filing of Motions. We further request that the matter should be heard, whether orally or in writing only, before the full Trial Chamber.

2. The response to the Prosecution's first motion is filed separately from but simultaneously to this motion. In its second motion, the Prosecution requests eleven orders for protective measures.

The legal context and principles

3. The Special Court for Sierra Leone is a creature of international law, having been established by a treaty between Sierra Leone and the United Nations.[1] The United Nations is an international organisation with a separate legal personality, having treaty-making capacity.[2] Its treaty making capacity is limited to its mandate in the United Nations Charter.[3] The mandate of the United Nations is inter alia to *maintain international peace and security in conformity with the principles of justice and international law.*[4] The maintenance of

[1] Done at Freetown on 16th January 2002, on the request of the Security Council of the United Nations in its resolution 1315 (2000) of 14 August 2000
[2] See the Reservations for Injuries to United Nations Personel.
[3] Done at San Francisco on 26 June 1945 and entered into force on 24 October 1945.
[4] See Preamble to the UN Charter.

international peace and security requires that the greatest care is taken to ensure that any collective measures taken for its maintenance adopt the highest respect for established principles of international law and justice as defined by customary international law and treaties.

4. While the issue of protective measures is common in proceedings before international criminal tribunals, international criminal proceedings are not common, but a developing arena of jurisprudence. While the first recorded trial before an international tribunal was that of Peter von Hagenbach in Breisach, Germany, in 1474 for 'offences against the laws of God and Man', international criminal proceedings before the Nuremberg and Tokyo Tribunals were the first of their kind. They have formed the impetus and framework for recent international practice, but were set up by the victors of the Second World War in a jurisprudential environment where military trials were the norm and the pillars to the right to a fair trial were already in place, but where the concept as international human rights lawyers understand it today had not yet been fully developed and crystallised into the annals of international jurisprudence. The judges at Nuremberg and Tokyo did not have the benefit of the major human rights instruments concluded after World War II.[5] The cold war stopped the development of international criminal procedure for half a century until the International Criminal Tribunals for the Former Yugoslavia and for Rwanda were established by Security Council resolutions in 1993 and 1994 respectively. East Timor's Human Rights Court followed with little publicity of its proceedings. These tribunals have had the benefit of 50 years of developments in international human rights law, catapulted by the remembrance of the atrocities of two World Wars and the periodic reminder of

[5] The Universal Declaration of Human Rights of 1948, the Geneva Conventions on the Laws of War of 1949 and their Additional Protocols of 1977, the International Covenant on Civil and Political Rights of 1966, the European Convention on Human Rights of Human Rights of 1950, the American Convention of Human Rights of 1969, and the African Charter on Human and People's Rights of 1980: see Annex.

the brutality of mankind. The last eight years have seen an explosion in the jurisprudence and literature in international criminal law and procedure.

5. After this modest beginning, the Special Court for Sierra Leone has been established as the next model of international criminal procedure and perhaps the last opportunity to lay the foundations of the future jurisprudence of the International Criminal Court. A heavy burden rests on the judges of the Special Court as guardians of international justice, in that on issues of fundamental importance to the credibility of international criminal proceedings such as the question of protective measures before us now, they have the discretion and the freedom to accept and consolidate or depart from the practice of the other ad hoc tribunals. This is a freedom that, it is respectfully submitted, must not be taken lightly, as the foundations of international criminal law and procedure are being laid and the maintenance of peace demands that states and peoples can have faith in the credibility of international criminal process. As Chitty noted almost a century ago:

> The object of criminal provisions is not vengeance for the past, but safety for the future; and to the furtherance of this design every man is bound to contribute.[6]

6. The Prosecution would contend that the practice of the ICTR as they understand it should be adopted by the Special Court. It is submitted that while this jurisprudence can serve as a useful guide to this Court, the appropriate practice is the one that most faithfully reflects established principles of international law and justice. Consistency with the jurisprudence of other tribunals is useful for future defendants, but it is too early in the development of international criminal law to say that it is necessarily always desirable. The concrete is still being set and it should be set without structural defects.

7. There are, it is submitted, differences between the Special Court and the other tribunals that are not without significance for present purposes. The ICTY and for ICTR were established at times when one could not definitively state that

[6] Chitty, *A Practical Treatise on the Criminal Law*, 1816, vol 1, at 3.

the dangers in question had ceased. Leaders were still at large, people were still losing their lives. In the former Yugoslavia armed conflict continued. In Rwanda the conflict followed decades of ethnic tension that had already reached boiling point four years before at the time of the attack of the RPF in 1990. Massacres had occurred periodically in the past. The events of 1994 engulfed almost the entire population of the country in a bloodbath of hatred between two groups, in a society so well structured that it was divided into prefectures, communes, sectors and cellules. There was no-one to trust and nowhere to hide. The conditions under which these tribunals were established were unique and in the words of Rule 69 of the Rules of the Special Court combined with those of the Trial Chamber in *Prosecutor v Tadic*: exceptional *par excellence.*

8. Moreover, the credibility of these tribunals was more difficult to challenge even philosophically. They were the direct product of the UN Security Council, the body entrusted by the world with the maintenance of international peace and security. It could have been argued, despite remonstrations to the contrary,[7] that their birth was truly a sacred trust of mankind. This was quite unlike Nuremberg, which for many was victor's justice, the winners trying the losers in a farce of showmanship. The jurisdiction of this Court will be the subject of a separate motion in due course, but it suffices to say at this juncture that institutionally at least the dangers of the wrong perceptions being created are far greater with the Special Court than they were with the Yugoslavia and Rwanda models. The Nuremberg legacy and victors justice are sounds in the distance threatening to emerge for an institution which was the result of an agreement between an international organisation, the United Nations, and the government of Sierra Leone, one of the parties to the conflict.

9. The potential perceptions that loom place the onus on the Court to demonstrate that it will be a credible and reliable institution, impartial and faithful to the highest standards of fairness to the accused. The establishment of a Truth and

[7] Melosovic did not lose the opportunity to announce at the time of his plea that the tribunal before which he appeared was illegal because it had not been established by the representative General Assembly, but by the undemocratic and unrepresentative Security Council.

Reconciliation Commission in parallel to this Court is also a demonstration of its stated aim of peace and reconciliation in Sierra Leone. Such peace and reconciliation is only possible if the accused is not railroaded into a conviction through the establishment of principles, such as those requested by the Prosecution which place the Defence in a position of substantial disadvantage and virtual impossibility of performance. The Prosecution would have us learn the case against the accused and find the contrary evidence while our energies are focused on examining other evidence in court on our feet. They would wish us to carry out such investigations in their full view and place on us time constraints that would require even greater financial and human resources than they themselves have. The Defence does not dispute that the safety of all witnesses must be protected, but not at the cost of preventing the accused a reasonable opportunity to have his innocence revealed in an equal contest of skill and honour, and not at the cost of depriving the public of their right to know that the truth is being arrived at through fair process.

10. The protective measures requested by the Prosecution seek limitations on disclosure to the public and the Defence. The Defence is principally concerned with and takes issue with those measures, constituting an unreasonable infringement of the right to a fair trial.

11. The link between disclosure of prosecution evidence to the defence and the right to a fair trial is manifest in a system where the prosecution have the lion's share of the budget, free and totally unrestricted access to the sources of their instructions, considerable access to the wisdom, technology and experience of the prosecutors in other tribunals, the full cooperation of the government, a full year's head start and complete control over the pre-disclosure investigations. As Steyn LJ noted in the English Court of Appeal:

> ... in our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to a fair disclosure is an inseparable part of his right to a fair trial.[8]

[8] [1995] 1 Cr App R 191, at 198

Similarly, in *Jespers v Belgium*,[9] the European Commission on Human Rights stated that:

> As regards the interpretation of the term 'facilities' [in Article 6(3)(b) of the European Convention on Human Rights and Fundamental Freedoms of 1950], the Commission notes firstly that in any criminal proceedings brought by a state authority, the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery with considerable technical resources and means of coercion ... In particular, the Commission takes the view that the 'facilities' which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purpose of preparing his defence, with the results of investigations carried out throughout the proceedings. Furthermore, the Commission has already recognised that although a right of access to the prosecution file is not expressly guaranteed by the Convention, such a right can be inferred from Article 6 paragraph 3(b) ... Any investigation which [the prosecution] causes to be carried out in connection with criminal proceedings and the findings thereof consequently form part of the 'the facilities' within the meaning of Article 6 paragraph 3(b) of the Convention ... In short, Article 6 paragraph 3(b) recognises the right of the accused to have at his disposal, for purposes of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities.

The right to a fair trial contains three fundamental components of relevance for present purposes, namely:

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

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[9] (1981) 27 DR 61

These aspects of the right to a fair trial have become firmly entrenched into the international law requirements of justice. They form part of the fair trial provisions of most of the major international human rights treaties and instruments.[10]

12. These three principles of the right to the fair trial are expressed to be minimum rights or guarantees. Only the public hearing is subject to limitation. There is no permitted limitation or derogation to the minimum guarantees of adequate time and facilities or the right to examine witnesses. It is therefore submitted that in terms of international human rights law while protective measures for witnesses may be employed to create a fair balance with the accused's right to a fair trial they cannot limit the minimum guarantees within that right, not subject to limitation except through derogation in times of public emergency, but must be consistent with them.

13. Furthermore, it is respectfully submitted that these minimum guarantees of a right to a fair trial have become established principles of customary international law. Principles repeatedly contained in widely representative treaties, particularly human rights treaties, can form the basis of the emergence of a rule of customary international law, if supported by some state practice outside the treaties affirming the principles. There can be little doubt that the provisions in international human rights instruments on the right to a fair trial have been otherwise widely reflected in the practice of national courts around the world and generally accepted in the *opinio juris* of states as custom.

14. It is further respectfully suggested that in an international tribunal such as this one, where the allegation of victor's justice might easily be levelled at the Court, both politically and in the minds of the public at large, in deciding on the appropriate protective measures for witnesses, it is not only important to respect international minimum guarantees in relation to a fair trial, but also to be mindful of the public perceptions created and the consequent results on peace and reconciliation of not affording the greatest possible protection to the

[10] See Annex for specific provisions of the various instruments.

rights of the accused, while preserving the safety of victims. Any doubtful application of international human rights standards in the Special Court is counterproductive to the general purpose underlying the Court of advancing peace and reconciliation in Sierra Leone.

15. The principles developed in the ICTY and ICTR have not been the subject of a consistent jurisprudence. It is submitted that some of the decisions in the Rwanda Tribunal clearly constitute an unlawful limitation on the right to a fair trial and in particular the minimum rights to time and facilities to prepare and to examine witnesses.

16. It is respectfully submitted that one is not merely concerned with a balance between the rights of the accused and the protection of victims. Restrictions on the right to a fair trial, in addition to not infringing on the basic minimum guarantees, must, it is submitted, further be strictly necessary and proportionate to their aim, i.e. witness protection. Thus, in *Rowe and Davis v United Kingdom*, it was held that:

> Only such measures restricting the defence which are strictly necessary are permissible under Article 6 (1)[11]

17. The fact that the Rwanda Tribunal has adopted different approaches to the ICTY and even within its own jurisprudence, while employing measure of general application to all witnesses, raises serious questions over whether the Tribunal has given serious consideration to the question of necessity and proportionality in its jurisprudence. It is submitted that where less restrictive measures have been employed in the ICTR, for the Prosecution to adopt the ICTR practice, it should justify why the least restrictive measures employed in that Tribunal or in the ICTY should not be employed here. It is submitted that its reasoning for stating that this Court is more akin to the Rwanda Tribunal for the purposes of protective measures is wholly inadequate.

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[11] *Rowe and Davis v United Kingdom*, (2000) 30 EHRR 1

18. Moreover, it is submitted that the onus is squarely on the Prosecution to establish exceptional circumstances for the purpose of protective measures.[12]

> Further, it is submitted that the inclusion of the words 'exceptional circumstances' in Rule 69 is not accidental. The circumstances pertaining in Sierra Leone at the time of the establishment of the Court have not worsened and it must not therefore have been envisaged that there would be protective measures in all cases and without distinction. This militates against the adoption of a general blanket ruling on protective measures without the prosecution justifying in a particular case and with respect to particular witnesses, why such measures are necessary[13]

19. It is suggested that the approach of the ICTY in examining protective measures on a case by case basis is the correct approach and more consistent with a faithful respect for the minimum guarantees in the right to a fair trial and the principle of proportionality. The ability of the defence to prepare for trial should only be curtailed to the extent absolutely necessary and no more. The prosecution need only produce a schedule setting out in the case of each witness or category of witnesses the justification for protective measures and the extent to which they are required. A blanket rule on non-disclosure of identity creates a protective measure that is arbitrary and not proportionate to the needs of particular witnesses. It in effect shifts the burden of establishing

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[12] *Prosecutor v Brdanin and Talic*

[13] See *Prosecutor v Brdanin and Talic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, at para 11 (TC):

In the opinion of the Trial Chamber, the prevailing circumstances within the former Yugoslavia cannot by themselves amount to exceptional circumstances. This Tribunal has always been concerned solely with the former Yugoslavia, and Rule 69(A) was adopted by the judges against a background of ethnic and political enmities which existed in the former Yugoslavia at that time. The Tribunal was able to frame its Rules to fit the task at hand; the judges who framed them feared even at that time that many victims and witnesses of atrocities would be deterred from testifying about those crimes or would be concerned about the possible negative consequences which their testimony could have for themselves or their relatives. Accordingly, the use by those judges of the adjective 'exceptional' in Rule 69(C) was not an accidental one. To be exceptional, the circumstances must therefore go beyond what has been, since before the Tribunal was established, the rule – or the prevailing (or normal) circumstances in the former Yugoslavia. As was made clear in the Tadic Protective Measures Decision, the circumstances of each case must be examined.

the foundation for protective measures in individual cases from the Prosecution to the Defence.

Objections to specific orders sought by the prosecution

(A) A general order for disclosure of identifying data 21 days *before the testimony of that witness*

20. It is respectfully submitted that the principle in paragraph 23(a) of the Prosecution motion does not create a fair balance between the accused's right to a fair trial and those of witnesses and victims and would constitute a clear violation of the minimum guarantees in the right to a fair trial. The identity of witnesses is central to the preparation of the defence.[14]

21. The suggested measure, in using the date of testimony rather than the date of trial as a point of departure, would, it is submitted, be a violation of the accused's right to adequate time and facilities to prepare for trial. The accused is entitled at a minimum to understand the exact nature and weight of the untested evidence against him a reasonable time before the trial begins, so that he can identify any flaws in that evidence in sufficient time to strategise the challenge to the prosecution evidence as a whole, plan his defence and allocate resources. This is, it is suggested, inherent to the adversarial system. If the prosecution's suggested measure were applied in a general manner to all witnesses, it would have the effect that by the beginning of the trial, the Defence would not know the identity of the majority or a large proportion of the witnesses, handicapping the Defence in ascertaining the strengths and weaknesses of the prosecution evidence.

22. Further, the suggested measure would be a violation of the accused's right to adequate facilities to prepare for trial, because counsel would be expected to

[14] See *Kostovski v Netherlands*, 1989 Series A No 166, para 25 (The European Court of Human Rights): 'How can one conceive of the accused being afforded an equitable trial, adequate time for preparation of his defence, and intelligent cross-examination of the Prosecution witnesses if he does not know from where and by whom he is accused?'

address his mind in a significant way to preparing for trial and investigations in relation to a large proportion if not the majority of the witnesses, at a time when he is fully absorbed mentally and physically in advocacy and the conduct of the trial itself, in particular, oral arguments, cross-examination and reacting to the day to day developments in a trial. It is not without significance to note that some of the prejudice to the accused has been lessened in the ICTR by virtue of its practice of running more than one set of proceedings and sometimes three in one chamber, thereby leaving gaps in the continuity of the trial and enabling the Defence to catch up in the preparation of cross-examination through further investigations;

23. Further and or in the alternative, the suggested measure would violate the accused's right to examine witnesses against him. The strength of individual witness testimony can hinge on the identity of that witness and his or her possible motivation for giving testimony. As the European Court of Human Rights noted in *Kostovski v Netherlands*:

> If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful, or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious.

Conducting a defence is not an artificial exercise where one addresses each piece of the jigsaw puzzle in turn. One requires the full picture of the identity of witnesses pre-trial in order to prepare for the cross-examination of those witnesses. The testimony of the difference witnesses may be inter-linked and time may be required to discover the real motivation for a witnesses testimony, having regard in particular to his relationship with the accused and other prosecution witnesses.

24. Furthermore, other prosecution witnesses may through cross-examination help enlighten the court as to such motivation of a particular witness. The accused will be severely handicapped in his ability to challenge the evidence of one witness through the cross-examination of other witnesses. This will inevitably lead to the need for witnesses to be recalled and inhibit the effectiveness of cross-examination of witnesses, which should in principle be carefully planned and conducted with a comprehensive knowledge of the evidence. This is exacerbated by the fact that the order of witnesses is often difficult to completely control since this is a matter of professional judgment for the Prosecutor at trial, influenced by a number of factors including the testimony of other witnesses, the ability of particular witnesses to appear in the order envisaged etc. All this ultimately means wasted time and costs through adjournments and the recalling of witnesses, as well as an impingement on the impact of a line of cross-examination.

25. Further and or in the alternative, it is submitted that the suggested measure applied in a general manner to all witnesses would lead to a situation where the ability of the defence to prepare for trial is severely inhibited as compared to the ability of the prosecution to prepare for trial since the defence would be significantly limited in the preparation pre-trial, while the prosecution case is mainly prepared pre-trial. This is an unjustified infringement of the principle of equality of arms. While the prosecution may be subject to similar protective measures at the time the defence case is presented, in the normal course of events, the Prosecution will already at that stage have a clear map of its case, have prepared it and presented it, and will only be reacting to any suggested flaws in that case. Again, while the all trials suffer from this imbalance to a lesser degree, this is normally remedied by giving the defence the adequate time to prepare pre-trial and imposing stringent duties of disclosure on the Prosecution, that which the suggested measure would partially remove.

26. The Prosecution places great reliance on Rule 69(C) and the fact that it refers to 'sufficient time before the witness is called'. It is respectfully submitted that this is not in fact an invitation to use the time of the calling of the witness as such as the general basis for any time for disclosure. It is rather merely a

recognition of the fact that special rules on anonymity may have to be applied in relation to particular witnesses in very special circumstances and further that some witness statements may only become available during trial. Such recognition is important because a blanket rule on disclosure of the identity of a witness before trial technically prohibits the exceptional admission of additional evidence during trial and exceptional protective measures for particular witnesses.

27. The Prosecution further relies on the assertion that the disclosure of identification data 21 days before testimony as opposed to trial has become the prevailing practice in the ICTR. Thus, in paragraph 9 of their motion, the Prosecution avers that:

> In particular regarding delayed disclosure of the identity of victims and witnesses, the language of this Court's Rule 69(C) is most consistent with the Rule of the ICTR, which gives the Court flexibility to balance the needs of the victims and witnesses and the rights of the Accused, and with the practice of the ICTR, which also uses the date on which a witness is to be called to testify, not the commencement of trial, as the triggering event for disclosure of identifying data. See, e.g., *Prosecutor v Rukundo*, ICTR-2001-70-I, 24 October 2002, paragraph 22; see also *Prosecutor v Zigiranyirazo*, ICTR 2001-73-I, 25 February 2003, paragraph 17.

While there are cases in the ICTR where such a draconian general measure of protection has been taken, it is respectfully submitted that it does not constitute the universal practice of the ICTR and is wrong, being a disproportionate infringement of the right to a fair trial. It is noteworthy that one of the two decisions cited by the prosecution in support of its request for an order of disclosure of identifying data 21 days before trial did not make that order. In *Prosecutor v Rukundo*, the Trial Chamber states at paragraph 22 that:

> The Chamber does not however propose any time frame for rolling disclosure at this point in time where the details of the trial are not yet known. Accordingly, the Chamber orders that: the names, addresses and other

> identifying information of the victims and witnesses, as well as their locations shall be kept under seal of the Tribunal and shall not be disclosed to the Defence until further order.

In other cases, not referred to in the Prosecution brief, a more reasonable solution than that suggested by the Prosecution has been adopted, which is moreover more consistent with the practice of the ICTY, the Rules of Procedure and Evidence of the International Criminal Court and the requirements of natural justice. Thus, in *Prosecutor v Bagilishema*, the ICTR ordered the following:

> The Prosecutor is authorized to withhold disclosure to the Defence of the identity of the witnesses and to temporarily redact their names, addresses, locations and other identifying information from the supporting material on file with the Registry, until such time as the said witnesses are under the protection of the Tribunal.
>
> RECALLS that, pursuant to Rule 69(C) of the Rules, the identity of the witnesses shall be disclosed by the Prosecutor to the Defence in sufficient time prior to trial to allow adequate rime for preparation of the defence.[15]

In *Prosecutor v Kanyabashi*, the ICTR ordered:

> (7) Subject to the provisions in Rules 69 and 75 of the Rules and to paragraph 6 above, the Prosecutor is ordered to disclose to the Defence the identity of the said protected victims and witnesses as well as their non-redacted statements within thirty days prior to the trial in order to allow the Defence a sufficient amount of time to prepare itself.[16]

In *Prosecutor v Bagambiki*, the ICTR ordered that identifying data be lodged with the Registry until the Tribunal was sure that the victims and witnesses were under the protection of the Tribunal or 21 days before their testimony, whichever was earlier.[17] It is respectfully submitted that the solution adopted

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[15] *Prosecutor v Bagilishema*, Decision on the Prosecutor's Motion for Witness Protection, 17 September 1999, para 10 of Disposition.
[16] *Prosecutor v Kanyabashi*, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, 6 March 1997, para 7 of Disposition.
[17] *Prosecutor v Bagambiki*, Decision Relative a la Requeste du Procureur en Prescription de Mesures de Protection de Victims et de Temoins a Charge, 3 March 2000, para 3 of Disposition.

in *Prosecutor v Kanyabashi* was the fairest and most consistent with the practice of the ICTY and the rules of natural justice.

28. The jurisprudence of the ICTY, while normally requiring justification in relation to each witness or witness category, rather generally supports the position of a reasonable period before trial as opposed to before testimony.[18]

(H) An Order requiring the Defence to provide to the Chamber and the Prosecution a designation of all persons working on the Defence Team who, pursuant to paragraph 23(f) above, have access to information referred to in paragraphs 23(a) through 23(e) above...

29. It is respectfully submitted that it is for the Registry to confidentially control the identity of the Defence team members. It is both unnecessary and potentially prejudicial to a fair trial for the Prosecution and the Trial Chamber to be appraised of the identity of all Defence team members. The Prosecution will not afford the same courtesy to the Defence, and even if it did the Defence would not have the same resources to monitor the activities of the Prosecution as vice versa. There is no reasonable justification for this request.

The Defence also reserves its right to apply to the Trial Chamber to amend or remove protective measures.

IT IS HEREBY REQUESTED THAT THE TRIAL CHAMBER BE CONSTITUTED FOR CONSIDERATION OF THE PROSECUTION MOTION IN WRITING OR ORALLY AT ITS DISCRETION AND THAT:

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[18] See e.g. *Prosecutor* v *Dusko Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995 (not less than 30 days in advance of a firm trial date); *Prosecutor v Brdanin and Talic*, see note 1212 *supra*, at para 33 ('The prosecution accepts that, although the greater the length of time between the disclosure and the time when the witness is to give evidence, the greater the potential for interference with that witness, the time to be allowed for preparation must be time before the trial commences rather than before the witness gives evidence'); *Prosecutor v Banovic*, Order for Protective Measures, 13 December 2001 (Considering that the Defence may commence the preparation of their cases and will be in a position to further investigate the statements of these witnesses at a reasonable time prior to the commencement of the trial).

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

Professor Andreas O'Shea
Counsel for Mr Gbao

SIGNED

DATED 26th May 2003, at Freetown

ANNEXURE

RELEVANT PROVISIONS OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

*The Universal Declaration of Human Rights provides in Article 11(1) that:

> Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a *public trial at which he has had all guarantees necessary for his defence* [emphasis added]

*The International Covenant on Civil and Political Rights provides in Article 14 that:

> (1) ... In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice...
>
> (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (b) to have adequate time and facilities for the preparation of his defence ...
>
> (e) 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;

*The European Convention on Human Rights and Fundamental Freedoms provides in Article 6 that:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

   ....

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

   (b) to have adequate time and facilities for the preparation of his defence;

   (d) to examine and have examined witnesses against him and to obtain the attendance and examination of such witnesses on his behalf under the same conditions as witnesses against him.

*The American Convention on Human Rights of 1969 provides in Article 8 that:

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. Every person accused of a criminal offence ... is entitled, with full equality, to the following minimum guarantees:

   (c) adequate time and means for the consideration of his defence;

(f) the right of a defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who might throw light on the facts;

5. Criminal proceedings shall be in public, expect in so far as may be necessary to protect the interests of justice

*African Charter on Human and Peoples' Rights provides in Article 7:

1. Every individual shall have the right to have his cause heard. This comprises:

...

(c) The right to defence, including the right to be defended by counsel of his choice.