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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before: Justice Richard Lussick, Presiding Judge
Justice Teresa Doherty
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 6 March 2009

PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON THE DEFENCE MOTION FOR THE DISCLOSURE OF THE IDENTITY OF A CONFIDENTIAL 'SOURCE' RAISED DURING CROSS-EXAMINATION OF TF1-355

Office of the Prosecutor:
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Defence Counsel for Charles G. Taylor:
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Terry Munyard
Andrew Cayley
Morris Anyah

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") sitting pursuant to Rule 16 of the Rules of Procedure and Evidence ("Rules");[1]

RECALLING the Trial Chamber's oral ruling of 14 January 2009 wherein the Defence was directed to file written submissions following its oral application that Witness TF1-355 ("Witness") be compelled to name a certain person or persons alluded to in the course of his evidence;[2]

SEISED of the "Defence Motion for the Disclosure of the Identity of a Confidential 'Source' Raised During Cross-Examination of TF1-355" filed on 23 January 2009 ("Motion");[3]

NOTING the "Prosecution Response to the Defence Motion for Disclosure of the Identity of a Confidential Source raised during Cross-Examination of TF1-355" filed on 05 February 2009 ("Response");[4]

NOTING ALSO the "Defence Reply to Prosecution Response to Public Defence Motion for the Disclosure of the Identity of a Confidential 'Source' raised during Cross-examination of TF1-355" filed on 10 February 2009 ("Reply");[5]

RECALLING the Trial Chamber's oral Decision on 19 February 2009 wherein the Trial Chamber dismissed the Motion with reasons to follow;[6]

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 26*bis*, 54 and 73 of the Rules;

DELIVERS the following reasoned Decision based solely on the written submissions of the parties:

I. INTRODUCTION

1. On 14 January 2009 during cross-examination of Witness TF1-355, Counsel for the Defence referred to a statement made by the witness in another proceeding ("RUF Transcript").[7] In the RUF

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[1] Justice Richard Lussick is unable to sit.
[2] *Prosecutor v. Taylor*, SCSL-03-1-T, Transcript 14 January 2009, pp. 22520-22522.
[3] SCSL-03-01-T-714.
[4] SCSL-03-01-T-719.
[5] SCSL-03-01-T-728.
[6] *Prosecutor v. Taylor*, SCSL-03-1-T, Transcript 19 February 2009 p. 24054.

Transcript as well as during the proceedings in court, the witness stated that "some members of ECOMOG had facilitated his trip from Liberia to Sierra Leone in 1997".[8] Counsel for the Defence asked the witness to disclose the identity of the person or persons who had facilitated his entry into Sierra Leone but the witness declined to name the person or persons, stating instead that that information was privileged and confidential.[9] The witness further explained that some of the un-named persons who facilitated his trip to Sierra Leone were currently serving as military officers in the Federal Army of Nigeria and that he was afraid of compromising their current positions by disclosing their identities.[10]

2. Defence Counsel then appealed to the Trial Chamber to compel the witness to answer the question by disclosing the person or person's name, stating that the Defence was entitled to know that information and that the witness' answer was relevant to shedding light on his motivation in visiting Sierra Leone at the material time. The Trial Chamber declined to entertain Counsel's oral application, directing instead, that he file written submissions.

II. SUBMISSIONS

Motion

3. The Defence seeks an Order compelling the Witness to disclose the identities of the persons who facilitated his trip to Sierra Leone in 1997 which information the Witness refused to disclose during his cross-examination on 14 January 2009 on grounds of confidentiality and privilege.[11]

4. It argues that no journalistic privilege attaches to the information withheld by the Witness; rather, "[a] fundamental distinction must be drawn between *information* given to a journalist by a 'source' and an *act* by a person facilitating the movement of another in and out of a country".[12] The Defence submits the Witness interacted with the unnamed persons outside of his capacity as a journalist. It argues that the Witness failed to establish any compelling reason why privilege should be upheld at the expense of the Accused's right to a full and proper cross-examination as the act for

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[7] *Prosecutor v. Sesay et al*, SCSL-04-15-T, Trial Transcript 28 October 2004 ("RUF Transcript").
[8] RUF Transcript, 28 October 2004, p.67, ln 24-25; *Prosecutor v. Taylor* SCSL-03-1-T, Transcript 14 January 2009 pp.22505, ln 22-p.22506, ln 9-10.
[9] *Prosecutor v. Taylor* SCSL-03-1-T, Transcript 14 January 2009 pp.22501, ln 6-8.
[10] Ibid, Transcript 14 January 2009 pp.22506, ln 11-18.
[11] Motion, para. 3.

which the Witness pleads privilege – assisting his passage into Sierra Leone in 1997 – was a harmless act by military personnel which is highly unlikely to jeopardise their present positions.[13] The Defence submits that the persons the Witness refuses to name are ECOMOG personnel for whom anonymity should only be resorted to in exceptional circumstances according to the European Court of Human Rights in the *Ven Mechelen* case.[14]

5. The Defence submits further that journalistic privilege is not absolute and, in the present circumstances, it should yield as the information sought suggests reasonable doubt as to the guilt of the Accused insofar as it goes to the credibility of the Witness regarding his motivation for his trip into Sierra Leone, and insofar as it will help the Defence pursue its line of defence that ECOMOG were channelling arms from Liberia to the CDF and Kamajors in Sierra Leone during this period.[15]

6. Assuming, *arguendo*, that journalistic privilege attaches to the information in question, the Defence submits that it must be balanced with the interests of justice and fair trial rights. The Defence submits that the Trial Chamber may seek guidance from the ICTY Appeals Chamber in the *Brdjanin* case which underscored the need to balance: (a) the public interest in accommodating the work of war correspondents and (b) in having all relevant evidence before the court.[16]

7. The Defence submits that should the Trial Chamber consider it necessary to protect the identities of the persons, less restrictive measures such as closed session or private session could be employed.[17]

8. Finally, the Defence notes that the Prosecution has not made any Rule 66(B) application with respect to the information sought and submits that it must therefore be deemed to have waived its right to claim privilege at this late stage. It submits this would unduly impede the Defence's right to full and proper cross-examination.[18]

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[12] Motion, paras 11-13.
[13] Motion, paras 14-16.
[14] Motion, paras 14-16 citing in support of the distinction between civilian and military informants *Van Mechelen and Others v. The Netherlands*, European Court of Human Rights (55/1996/674/861-864) 23 April 1997.
[15] Motion, paras 16-18.
[16] Motion, paras 19-24 citing *Prosecutor v. Brdjanin*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 at para. 46.
[17] Motion, paras 25-26.
[18] Motion, paras.27-30.

Response

9. The Prosecution submits the Motion should be dismissed as the Defence has failed to establish the relevance of the individual names of the Witness's facilitator/s. The Prosecution argues that the Defence arguments relate to ECOMOG as an entity and the Witness's relationship with it rather than to the individuals the Witness refuses to name. Moreover, the Prosecution submits that no limitation was placed on the Defence to explore these issues with the Witness during cross-examination and in fact, the Witness provided many details regarding, *inter alia*, the circumstances in which he contacted ECOMOG, the motivation for his trip to Sierra Leone and his awareness of accusations that ECOMOG was supplying arms to the CDF in Sierra Leone during cross-examination.[19]

10. The Prosecution submits that in the event the Trial Chamber considers that the names of the individuals are relevant, the Witness may invoke journalistic privilege for the following reasons:

(i) The Witness was acting in his capacity as a journalist performing a newsgathering function at the time of his trip to Sierra Leone, a conflict zone.[20]

(ii) The Defence misapplies the scope of journalistic privilege and erroneously argues that a distinction should be drawn between a facilitator who provides assistance and a journalistic "source". The Prosecution submits that according to domestic and international jurisprudence, the term "source" should be interpreted broadly to cover those who provide the facilities and conditions to allow newsgathering to be carried out, in particular a journalist who receives assistance to travel to a conflict zone to gather information, as well as those who provide information. It suggests that the public interest of protecting privilege in similar relationships has been recognised by this Chamber and the Appeals Chamber.[21]

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[19] Response, paras. 4-7.
[20] Response, paras 8-9.
[21] Response, paras 10-18 citing in support of the assertion that this Chamber and the Appeals Chamber have recognised similar relationships *Prosecutor v. Brima et al*, SCSL-04-16-T-389, "Decision on the Prosecution's Oral Application for Leave to be Granted to Witness TF1-150 to Testify without being Compelled to Answer any Questions in Cross-Examination that the Witness Declines to Answer on the Grounds of Confidentiality Pursuant to Rule 70(B) and (D) of the Rules" 16 September 2005, para. 20; *Prosecutor v. Brima et al.*, SCSL-04-16-AR73, "Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality" 26 May 2006 at para. 33; and, *Prosecutor v. Brima et al.*, SCSL-04-16-AR73. "Decision on Prosecution

(iii) The Defence erroneously argues that civilian and military facilitators should be distinguished. The Prosecution argues that the *Van Mechelen* case cited is not on point as there is no analogy to be drawn between anonymous witnesses who are members of the Police Authorities and journalistic sources from within a military structure such as ECOMOG who have no links to the Prosecution and no frequent duty to give evidence in open court. Further, it submits that military sources may be exposed to an even greater risk than civilian sources.[22]

11. The Prosecution submits that while journalistic privilege is a qualified rather than an absolute privilege, the Defence has failed to show that the importance of the evidence outweighs the significant public interest in protecting the public watchdog role of the press, in particular in situations of armed conflict, and fails to meet either branch of the test set out by the ICTY Appeals Chamber in the *Brdjanin* case, *viz* (1) that the evidence sought is of direct and important value in determining a core issue in the case, and (2) that the evidence sought cannot reasonably be obtained elsewhere.[23]

12. The Prosecution submits that even absent journalistic privilege, the Trial Chamber may exercise its discretion to refuse the request under Rule 54 which is discretionary in nature. It argues that the Trial Chamber may refrain from exercising its discretion in the current circumstances where the information is of no/or limited relevance and/or probative value, where the Defence have been afforded the opportunity to cross-examine the Witness, and where the Trial Chamber is able to deal with matters of reliability, credibility and weight at the end of the trial.[24]

13. Finally, the Prosecution submits that the Defence argument that it is in breach of its disclosure obligations is frivolous as the Prosecution does not have and has never had the information sought.[25]

Reply

Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality" 26 May 2006 – Separate and Concurring Opinion of Hon. Justice Robertson QC", 26 May 2006 at para. 28.

[22] Response, paras 19-20 with reference to *Van Mechelen and Others v. The Netherlands*, European Court of Human Rights (55/1996/674/861-864) 23 April 1997.

[23] Response, paras. 21-27 citing *Prosecutor v. Brdjanin*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 at para. 46.

[24] Response, para. 28.

[25] Response, para. 29.

14. The Defence submits that the Prosecution Response is without merit.

15. It submits that the Prosecution assertion that the information is not relevant is flawed as the information is relevant to properly cross-examine the Witness on his relationship with the unnamed persons within ECOMOG and whether they were facilitating him as a spy or had links with arms smuggling to the CDF.[26]

16. The Defence submits that the Prosecution misstate the evidence in suggesting that the Witness went to Sierra Leone as a journalist and therefore journalistic privilege should apply. It argues that this is a factual issue which requires disclosure of the particulars sought.[27]

17. The Defence argues that the Prosecution relies on jurisprudence for its broad definition of "source" which does not assist the present case in the context of the Accused's right to a fair trial. Similarly, the Prosecution's suggestion that there is no analogy to be drawn between police witnesses and ECOMOG personnel is mistaken.[28]

18. The Defence submits that on the balance of interests, it has satisfied the *Brdjanin* two-prong test and on the totality of the evidence and that it is in the interests of justice that the names of the persons who assisted the Witness into Sierra Leone be disclosed.[29]

19. Finally, the Defence argues that the Prosecution submission that it is not in breach of its disclosure obligations is disingenuous as it is clear from the Witness's testimony in the RUF proceedings that there was certain information that he did not intend to divulge.[30]

II. APPLICABLE LAW

20. The Trial Chamber is cognisant of Article 17(4)(e) of the Statute which states:

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

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[26] Reply paras 3-4 incorporating by reference Motion para. 22.
[27] Reply para. 5.
[28] Reply, paras 6-7.
[29] Reply, paras 8-9.
[30] Reply para. 10 citing *Prosecutor v. Sesay et al*, SCSL-2004-15-T, Transcript, 28 October 2004, p. 64.

[...]

> e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses have against him or her;

21. The Trial Chamber is also cognisant of Rule 26*bis* of the Rules which states:

> The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

III. DELIBERATIONS

22. In considering the issues, the Trial Chamber is of the view that it must first determine if the evidence sought to be adduced is relevant. If it is relevant, the Trial Chamber must determine whether the Witness should be compelled to answer or whether he enjoys a privilege by virtue of being a journalist. If the Witness does enjoy journalistic privilege, the Trial Chamber must then consider the extent of that privilege and whether it may be overridden in the interests of justice in the instant case.

Relevance of the information:

23. The Trial Chamber finds the information sought to be disclosed is relevant. The names of the ECOMOG personnel are relevant to allow the Defence to adequately test the evidence and credibility of the Witness, in particular in relation to the Defence allegation that the persons the Witness refuses to name helped him because he was a spy or had links with arms smuggling to the CDF.[31]

Whether the Witness has journalist privilege in relation to the information withheld:

24. The Trial Chamber is satisfied that the Witness testified that he was acting within his capacity as a journalist when he entered Sierra Leone and that this is not, as alleged by the Defence, a factual matter which requires the disclosure of the particulars sought. The Witness testified in examination-

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[31] Motion, para. 22.

in-chief that at the time of his trips to Sierra Leone in 1997, he was a Managing Editor at the "National Newspaper" (from August 1997 until the time it was shut down)[32] and that during this period he published several articles on the involvement of the Government of Liberia in the conflict in Sierra Leone.[33] On cross-examination, the Witness testified that following his return from Sierra Leone he published an article on his findings sometime in November, 1997.[34] Also in cross-examination, the Witness confirmed his testimony given in the RUF trial in which he stated that he made a promise, "as a journalist", to those who took him from Liberia to Sierra Leone.[35] The Trial Chamber is also satisfied on the basis of this same evidence that the ECOMOG personnel whom the Witness refuses to name facilitated his entry into Sierra Leone *in order to* pursue journalistic activities.

25. The Trial Chamber is of the opinion that a wide definition of a journalistic "source" should be adopted and that no principled distinction can be drawn, as suggested by the Defence, between a "facilitator" and a "source" insofar as both types of persons assist journalists in producing information which might otherwise remain uncovered. The extension of privilege to journalistic sources stems from the right to freedom of expression and serves to protect the freedom of the press and the public interest in the free flow of information.[36] As stated by the European Court of Human Rights, "[w]ithout such protection, sources may be deterred from *assisting* the press and informing the public on matters of interest."[emphasis added][37] Further, both a "facilitator" and a "source" may run similar risks to personal safety and/or face other reprisals as a result of their willingness to assist a journalist in his or her reporting. This is especially true in situations of conflict, where tensions are heightened, where the threat of violence may be imminent and where "accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well."[38] Similarly, a journalist reporting from a conflict zone who is forced to testify as to his or her sources may put his or her own

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[32] Transcript, 12 January 2009, p. 22278:24, p. 22344:1
[33] Transcript, 13 January 2009, pp. 22295-22295, 22304-22307, 22333-22337.
[34] Transcript, 14 January 2009, pp. 22534-22535.
[35] Transcript, 14 January 2009, p. 22504-22505.
[36] *Goodwin v. United Kingdom*, [1996] ECHR at para. 39; *Prosecutor v. Brima et al*, SCSL-04-16-AR73, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006, Separate and Concurring Opinion of Hon. Justice Geoffrey Robertson, QC, at para. 28; *Prosecutor v. Brdjanin*, ICTY-IT-99-36-AR73.9 (Appeals Chamber), Decision on Interlocutory Appeal, 11 December 2003 at paras 35, 37-38.
[37] *Goodwin v. United Kingdom*, [1996] ECHR at para. 39.
[38] *Prosecutor v. Brdjanin*, ICTY-IT-99-36-AR73.9 (Appeals Chamber), Decision on Interlocutory Appeal, 11 December 2003 at para. 36.

life at risk by shifting from the role of an observer of those committing human rights violations to being their target.[39]

26. The Trial Chamber finds that the *Van Mechelen* case[40] cited by the Defence to support the assertion that anonymity for military personnel should only be resorted to in exceptional circumstances is distinguishable from the present circumstances. The ECOMOG personnel whom the Witness refuses to name, while members of a military structure, have no direct link to the prosecution of crimes nor a general duty to give evidence in open court as was at issue in that case.[41]

27. The Trial Chamber therefore finds that the unnamed persons are journalistic "sources" as they are persons who provided assistance or the conditions for a newsgathering function to be carried out and that the Witness has journalist privilege in relation to their names.

Whether witness's journalistic privilege should be overturned:

28. Journalist privilege is not absolute. The European Court of Human Rights has held,

> Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.[42]

29. According to Justice Robertson of the Appeals Chamber, journalistic privilege must yield in cases where the identification of the source is necessary either to prove guilt, or to prove a reasonable doubt about guilt.[43]

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[39] *Prosecutor v. Brdjanin*, ICTY-IT-99-36-AR73.9 (Appeals Chamber), Decision on Interlocutory Appeal, 11 December 2003 at para. 43.

[40] *Van Mechelen and Others v. The Netherlands*, European Court of Human Rights (55/1996/674/861-864) 23 April 1997.

[41] "The balancing of the interests of the defence against arguments in favour of maintaining the anonymity of witnesses raises *special problems* if the witnesses in question are members of the police force of the State, who owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution – for these reasons alone their use as anonymous witnesses should be resorted to only in exceptional circumstances – in addition, it is in the nature of things that their duties, particularly in the case of arresting officers, may involve giving evidence in open court." *Van Mechelen and Others v. The Netherlands*, European Court of Human Rights (55/1996/674/861-864) 23 April 1997

[42] *Goodwin v. United Kingdom*, [1996] ECHR p.1 [emphasis added].

[43] *Prosecutor v. Brima et al*, SCSL-04-16-AR73, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006, Separate and Concurring Opinion of Hon. Justice Geoffrey Robertson, QC, at para. 33.

30. The ICTY Appeals Chamber in the *Brdjanin* case has held that in order for a Trial Chamber to issue a subpoena compelling a war correspondent to testify, a two-pronged test must be satisfied wherein the petitioning party must demonstrate that:

(1) the evidence sought is of direct and important value in determining a core issue in the case, and that;

(2) the evidence sought cannot reasonably be obtained elsewhere.[44]

31. The Trial Chamber is not satisfied that the information sought meets the above mentioned standards.

32. The Trial Chamber is not satisfied that the withheld information is of "direct and important value in determining a core issue in the case" according to the *Brdjanin* standard. The ICTY Appeals Chamber opined in that case that "[t]he adoption of this criterion should ensure that all evidence that is *really significant* to a case is available to Trial Chambers."[45] [Emphasis added]. The Trial Chamber finds accordingly that the first branch of the test set out in *Brdjanin* is not satisfied. As the branches are conjunctive, the Trial Chamber need not examine whether the evidence sought might reasonably be obtained elsewhere and finds that the Defence argument in this respect must fail.

33. The Trial Chamber is of the view that obliging the Witness to divulge his sources without a compelling reason to do so would set an uncomfortable precedent and could threaten the ability of journalists, especially those working in conflict zones, to carry out their newsgathering role.[46] The Trial Chamber finds no justification in the instant case to overturn the Witness's journalistic privilege and notes further, that any questions of the reliability of evidence based on unnamed sources will be dealt with as a matter of weight in light of all the evidence adduced at the end of trial.

Trial Chamber's discretion under Rule 54:

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[44] *Prosecutor v. Brdjanin*, ICTY-IT-99-36-AR73.9 (Appeals Chamber), Decision on Interlocutory Appeal, 11 December 2003 at para 50.

[45] *Prosecutor v. Brdjanin*, ICTY-IT-99-36-AR73.9 (Appeals Chamber), Decision on Interlocutory Appeal, 11 December 2003 at para. 48.

[46] *Prosecutor v. Brdjanin*, ICTY-IT-99-36-AR73.9 (Appeals Chamber), Decision on Interlocutory Appeal, 11 December 2003 at paras. 39-40.

34. Having found that the Witness's journalistic privilege should not be overturned in the given circumstances, the Trial Chamber finds the Prosecution's argument that the Trial Chamber should refrain from exercising it's discretion under Rule 54 is rendered moot.

Less restrictive measures:

35. The Trial Chamber is of the view that no less restrictive measures would properly satisfy journalistic privilege protection. As outlined above, the underlying rationale behind the journalistic privilege is to ensure freedom of expression and the public interest in the free flow of information. The question, therefore, is not only a matter of whether the persons the Witness refuses to name would be exposed to any real danger by being named in Court, which, as argued by the Defence, might adequately be compensated for by eliciting the information in closed or private session.[47] Rather, the anonymity of the Witness's sources is essential to ensure that the newsgathering function of journalists, especially in situations of conflict, is not threatened. This necessarily requires that, in the absence of an overriding interest to the contrary, journalistic sources remain confidential to all other parties except the journalist.

Defence submission on Rule 66(B):

36. The Trial Chamber finds the Defence argument that the Prosecution must be deemed to have waived its right to claim privilege pursuant to Rule 66(B) is unfounded as there is no indication that the information withheld by the Witness has ever been given to the Prosecution.

FOR THE ABOVE REASONS and

PURSUANT to Rule 73(A) of the Rules;

HEREBY DENIES THE MOTION

Done at The Hague, The Netherlands, this 6th day of March 2009.

[47] Reply, paras. 25-26.

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Justice Teresa Doherty

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]