

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

SEISED of the "Submissions on Objection to Question Put by Defence in Cross-examination of Witness TF1-227", filed on 14 April 2005 on behalf of Prosecution (" Motion");

CONSIDERING the "Joint Defence Response to Submissions on Objection to Question Put by Defence in Cross-examination of Witness TF1-227 and Motion to Rule on Additional Information and Order of Witnesses", filed on 19 April 2005;

CONSIDERING ALSO the "Prosecution Submissions in Response to Relief Requested by Defence in their Reply Dated 12 April 2005 and in their Response to Submissions Dated 19 April 2005", filed on 25 April 2005

DECIDES AS FOLLOWS

I. PRELIMINARY MATTER

1. As a preliminary matter, the Defence notes that it has filed pages and documents in excess of the limits provided by the *Practice Direction for Filing Documents before the Special Court for Sierra Leone* ("Practice Direction") and seeks leave pursuant to Article(6) of the Practice Direction.
2. Leave is granted in this Decision, but the parties are hereby warned not, in future, to present the Trial Chamber with a *fait accompli*. Application for leave, with reasons, shall be made orally or in writing prior to filing.
3. In their Response, Defence further raises matters outside the ambit of the original objection as detailed hereafter. By leave of the Trial Chamber, these issues are hereby exceptionally considered and ruled upon.

II. PROCEDURAL BACKGROUND

4. An oral objection was raised by Prosecution Counsel in the course of cross examination. As the objection raised important issues of evidence, the rights and limitations of cross examination and the privilege, if any, between the Prosecution and its witnesses, the Trial Chamber ordered both Parties to submit written arguments.

III. SUBMISSIONS OF THE PARTIES

Prosecution objection and submission

5. Prosecution has filed the following objection:
 - (1) As a matter of principle, the question goes beyond the scope of what is permissible in cross-examination being a question relating to the substance of a pre-testimony meeting between a Prosecution lawyer and a witness.
 - (2) Questions relating to pre-testimony meetings between a Prosecution lawyer and a witness ought properly to be limited to the number of such meetings, the dates of the meetings, and their duration, save in exceptional circumstances. Examples of such exceptional circumstances are:

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(a) Where an allegation of misconduct or *mala fides* on the part of the Prosecution is substantiated: that is, where a *prima facie* case for misconduct or *mala fides* is made out by the Defence.

(b) Alternatively, where the Defence is aware, whether through the Prosecution or the witness in answer to questions, of any modification of disclosed statements (whether original, supplemental, or interview or proofing notes) made in the course of a pre-testimony meeting.

6. The Prosecution refers to Rule 90(F), and submits that in controlling the mode of interrogating witnesses - so as to "make the interrogation [...] effective for the ascertainment of truth" - the Chamber may be guided by the general principle which is articulated in Rule 90 (H) and Rule 90 (G) of the Rules of the ICTY and ICTR respectively. They state that "Cross examination ought not to be used to support a fishing expedition. Such cross-examination clearly goes beyond questioning which is 'effective for the ascertainment of truth' and is liable to be a waste of the court's time."

7. Prosecution mainly relies on the decision in the case of the *Prosecutor v. A. Bizimungu and others* ("*Bizimungu Decision*").¹

Defence Response

8. The Defence draws a distinction between the Rules of the Special Court, and Rule 90 (H) of the Rules and Procedures of the ICTY/ ICTR which contain specific provisions for cross examination.

9. The Defence reply notes that the *Bizimungu Decision* stated, *inter alia*, that:

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

but

"The Chamber however notes that a presumption exists that Counsel perform their duties in accordance with the ethical principles that govern the legal profession in their respective countries and that apply, mutatis mutandis, before the Tribunal. This includes Counsel's conduct during preparatory meetings with witnesses".²

10. The Defence submits that "not all members of the Prosecution holding interviews with witnesses are necessarily members of the bars of their respective countries, and are thus not bound by any national ethical rules", which we understand to mean rules of professional ethics.

11. Further, the Defence state they cannot verify if the preparatory meeting in issue was done by a person admitted to the Bar.

12. The Defence avers that the *Bizimungu Decision* is based on the rules of the ICTR, and there is no equivalent rule in the Rules of Procedure and Evidence of the Special Court for Sierra Leone and that therefore the *Bizimungu Decision* is not of authority to this Court.

¹ ICTR, *The Prosecutor v Augustin Bizimungu et al*, Case ICTR-00-56-T, Decision on Bizimungu's Urgent Motion Pursuant to Rule 73 to Deny the Prosecutor's Objection Raised during the 3 March Hearing, 1 April 2005.

² *Ibid.*, para. 34 and 35.

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13. The Defence further disputes that the Prosecution submission on Rule 90(F), "which limits the scope of cross-examination on pre-testimony meetings between Prosecution Counsel and their witnesses [...] will generally not be relevant neither to the issues nor to credibility". They submit that such a finding is in contradiction of the Rules of the Special Court "because the Provisions of Rule 90(H) of the ICTR were omitted from our Rules". Thus, they argue, the Special Court provisions allow questions on a "broader basis than merely the subject matter of the evidence in chief". They submit they are not obliged to seek leave to pursue such questions.

14. The Defence further raises issues concerning the filing of additional witness statements and the order of the witnesses.

III. DELIBERATIONS

Prosecution Objection to Defence Question

15. It is common ground between the parties that there is no precise rule in our Rules of Procedure and Evidence equivalent to Rule 90(H) of the ICTR. The powers and duties of the Special Court are contained in Rule 90(F) which provides:

The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

- i. Make the interrogation and presentation effective for the ascertainment of the truth; and*
- ii. Avoid the wasting of time.*

16. The Trial Chamber has a duty to both ascertain the truth and avoid wasting time on matters of evidence where there is no other specific provision. Rule 89 (B) imposes a duty on the Trial Chamber to

[...] apply rules of evidence which will best favour a fair determination of the matter before it consonant with the spirit of the Statute and the General principles of law"

17. The Trial Chamber also has to bear in mind the primary duty to ensure a fair trial. To quote Archbold International Courts Practice, Procedure and Evidence paragraph 8 – 48(a):

The concept of a fair trial is the cornerstone of the work of the ad hoc International Tribunals. The overriding consideration in all proceedings before international criminal courts is the fairness of the proceedings, as provided for in Articles 20(1) and 19(1) of the ICTY and ICTR Statutes respectively, "The Trial Chambers shall ensure that a trial is fair". As was held in Prosecutor v Tadic, Judgement, ICTY Appeals Chamber, July 15, 1999, para. 43: "This provision mirrors the corresponding guarantee provided for in international and regional human rights instruments: the International Covenant on Civil and Political Rights (1966) (ICCPR), the European Convention on Human Rights(1950), and the American Convention on Human Rights (1969). The right to a fair trial is central to the rule of law: it upholds the due process of law".

[...] A fair trial demands that certain minimum requirements are met to protect the rights of the accused, as set out in Articles 20 and 21 of the ICTR and ICTY Statutes respectively.

The rights of victims must also be taken into consideration, but "the Tribunal's Statute makes the rights of the accused the first consideration, and the need to protect victims and witnesses the secondary consideration" (Prosecutor v Brdanin, Decision on third motion by Prosecution for protective measures, November 8, 2000, para. 13; also see, Prosecutor v Tadic, Decision on the Prosecution's motion requesting protective measures for witness R, July 31, 1996 at 4).

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The principle of a fair trial must not result in there being an excessive infringement on the rights of the Prosecution, for example, to conduct effective cross-examination of the Defence witnesses (see, *Prosecutor v Blaskic*, Decision on the defence motion for protective measures for witnesses D/H and D/I, September 25, 1998).

[...] The Statute and Rules must be read to include the rights of parties to be heard in accordance with the judicial character of the Trial Chambers. See, *Prosecutor v Jelusic*, Judgement, Appeals Chamber, July 5, 2001, para 27.

18. With that general duty imposed upon this Trial Chamber, we are of the opinion that the Trial Chamber should not ignore its duty of upholding the general principles of fairness in the proceedings incumbent upon it by holding that the absence of an equivalent Rule 90 (H) precludes the Trial Chamber limiting cross-examination.

19. We cite with approval the juxtaposition posed by Hon. Judge Jorda in *The Prosecutor v. Blaskic*³. He drew a parallel to a defence Counsel being asked "what exactly happened in your relationship between the witness that you are offering and yourself", to the Defence cross-examining a Prosecution witness "to see what happened within the confidential relationship between the Prosecutor and the witness". His Honour held that such line of questioning was "not appropriate" (ex tempore ruling).

20. We consider the Trial Chamber may follow the principles enunciated in the *Bizimungu* Decision. Unless there are specific and substantiated allegations of misconduct on the part of Counsel,

"[t]he Chamber concludes that questions relating to pre-testimony meetings between the Prosecutor and witnesses, while permissible, must in the absence of any substantiated allegation of misconduct be limited to the number of such meetings, the dates of the meetings, and their duration."⁴

21. We note that use of the word "Counsel" in the decision and Defence Counsel's submission that not all Prosecution interviewers who speak to witnesses are bound by the ethics of a Bar.

22. The Rules define "Prosecutor" as "The Prosecutor appointed pursuant to Art. 3 of the Agreement between the United Nations and the Government of Sierra Leone".

23. Article 3 (3) of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court provides *inter alia*:

The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases.

24. The highest level of professional competence and experience brings with it an awareness that those under their control must act in a professional, competent and ethical manner. It carries a duty to supervise and ensure conformity with such standards.

³ *The Prosecutor v. Blaskic*, Case No. IT-95-14-T, Transcripts, 21 August 1997, pp. 1812-1813

⁴ *Bizimungu* Decision, para. 37.

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25. Unless the contrary is shown by way of a specific allegation of misconduct on the part of Prosecution staff any questions relating to pre-testimony meetings between Prosecution staff and witnesses are similarly restricted as ruled above.

26. For the foregoing reasons we answer the objections as follows:

- (1) We uphold the objection and find the question goes beyond the scope permissible in cross-examination.
- (2) Unless the contrary is shown by way of a specific allegation of misconduct on the part of Prosecution staff any questions relating to pre-testimony meetings between Prosecution staff and witnesses are similarly restricted as ruled above.

Motion to Rule on Additional Information and Order of Witnesses

27. In their submissions in reply, Defence Counsel raised two further issues concerning the character of the "additional information" documents served on the Defence on the grounds of Rule 67(D) and seeks orders in this regard.

28. We restate that any replying submission should not be used as a means of seeking other relief. This practice will not be allowed in future.

29. Defence Counsel seeks the following rulings and consequential orders:

- (1) That late service of additional information upon defence counsel in accordance with the continual disclosure obligations of Rule 66(A)(i) is prejudicial, and such disclosure should be made 42 days before the witness be called or at least 2 weeks before the witness is called, and
- (2) The list of witnesses intended to be called be provided 14 days in advance.

30. The Trial Chamber considers the written submissions made and the related oral submissions made in Court on 22 April 2005.

31. The Trial Chamber has concurrently given a decision on a defence motion on disclosure of all original witness statements, interview notes and investigators' notes pursuant to Rules 66 and 68.⁵ That decision has pertinent issues of law relevant to the issues to the present decision. We refer in particular to paragraph 16 thereof.

32. The Defence argue that Rule 67(D) provides that "if either party discovers additional information or materials which should have been produced earlier that party shall promptly notify the other". They submit that "discover" should not be interpreted to covering the situation of finding additional information as is the current practice. Such additional information is already obtained, it cannot be "discovered."

⁵ *The Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-T, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, 4 May 2005.

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33. In its Response to the new issues raised, the Prosecution outlines the logistical matters that lead to late proofing, undertakes to make every effort to disclose any additional material as early as possible, and submits that there has been no breach of Rules 66 and 68.

34. As stated in a decision of Trial Chamber I in the case of the *Prosecutor v. Norman and others*⁶, Rule 67 "requires reciprocal disclosure".

35. Rule 67(D) imposes a duty on both parties. The time provided for such reciprocal disclosure is provided in Rule 67(A) "as early as reasonably practicable and in any event prior to the commencement of the trial."

36. That time has now expired. The duty of disclosure on Prosecution is now not under Rule 67(D) but Rule 66(A)(ii). We consider that Rule 67(D) does not apply. However, the Prosecution is under a continuing duty to disclose exculpatory material throughout the case as provided by Rule 68(B) and as confirmed by the jurisprudence of the Special Court⁷.

Late Service

37. We repeat the view of this Chamber stated in its *Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68*⁸ at paragraph 16:

"The role of the Trial Chamber. It is the role of the Trial Chamber to enforce disclosure obligations in the interests of a fair trial, and to ensure that the rights of the Accused, as provided in Article 17(4), to have adequate time and facilities for the preparation of his or her defence and to examine, or have examined, the witnesses against him or her, are respected.

Late Disclosure: Where evidence has not been disclosed or is disclosed so late as to prejudice the fairness of the trial, the Trial Chamber will apply appropriate remedies, which may include the exclusion of such evidence. The specific remedy applied may vary from case to case".

38. We agree with the observation of the ICTR in the case of the *Prosecutor v. Bagosora and others* and do not:

[b]elieve 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.⁹

39. The Trial Chamber cannot impose one inflexible time limit applicable to the many possible allegations and situations that arise in a Trial. We consider the Court would not be acting in the

⁶ *The Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T, Ruling on disclosure of Witness statements, 1 October 2004, para. 2.

⁷ *The Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T, Ruling on disclosure of Witness statements, 1 October 2004, para. 2.

⁸ *The Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-T, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, 4 May 2005.

⁹ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Certification of Appeal Concerning Will-say Statements of Witnesses DBQ, DP, DA, 5 December 2003, para. 10.

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interests of the proper administration of justice or of an expeditious hearing if it imposed a definite period of notice applicable to all and every case.

40. Late notice of further statements which contain new allegations is curable by allowing time to the Defence to properly prepare.

41. Defence Counsel in their oral submission went further than in their written submission stated above, and submitted that the witness ought not to give evidence at all¹⁰.

42. In the Case of *The Prosecutor v. Sesay and others*, Trial Chamber I of the Special Court observed:

*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.*¹¹

And further:

*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 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 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."*¹²

43. There has been no allegation of any deliberate violation of the disclosure Rules. We are of the opinion that under the present circumstances a refusal to hear a witness would not be the appropriate remedy for late disclosure of a witness statement. Further, we re-state paragraph 20 of our *Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68*.¹³

44. For the foregoing reasons, we are not prepared to allow 14 days in every case where disclosure is made near or at the time a witness is called. Such a ruling would be inflexible and amount to an amendment of the Rules of Procedure and Evidence which is outside the powers and jurisdiction of the Trial Chamber. Each application must be assessed on its own facts.

45. The second submission by Defence relates to the list of witnesses supplied by Defence. The Trial Chamber notes the compliance of the Prosecution with the order of 9 February 2005 and the provisional list of 10 witnesses. In the absence of definite evidence from Defence that witnesses other than those listed pursuant to the order of 9 February 2005 were called there are no grounds for any order in relation to the listing and order of witnesses.

¹⁰ Transcripts of 22 April 2005, page 47 line 21 ff.

¹¹ *The Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Ruling, 3 February 2005, para. 4.

¹² *The Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Ruling, 3 February 2005, para. 19.

¹³ *The Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-T, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, 4 May 2005.

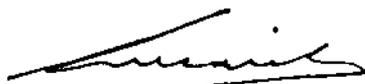
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46. However, the Trial Chamber restates the obligation on the Prosecution to give adequate time to prepare to the Defence.

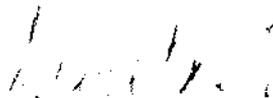
FOR THESE REASONS

1. Leave is given to file pages in excess of the limits provided in Article 6 of the "Practice Direction for Filing Documents before the Special Court for Sierra Leone".
2. The Prosecution's first objection is upheld;
3. The Prosecution's second objection is upheld;
4. The Defence request for 14 days notice of disclosure of all Prosecution statements of additional information is refused;
5. The Defence request seeking listing of witnesses is refused.

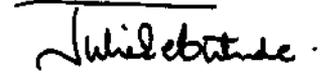
Done at Freetown, Sierra Leone, this 15th June 2005



Judge Richard Lussick



Judge Teresa Doherty
Presiding Judge



Judge Julia Sebutinde

