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SCSL-2004-16-T  
(8846-8851)

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**SPECIAL COURT FOR SIERRA LEONE**

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**TRIAL CHAMBER II**

Before: Justice Teresa Doherty, Presiding Judge  
Justice Richard Lussick  
Justice Julia Sebutinde

Registrar: Robin Vincent

Date: 25 May 2005

PROSECUTOR

Against

Alex Tamba Brima  
Brima Bazy Kamara  
Santigie Borbor Kanu  
(Case No.SCSL-04-16-T)

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**DECISION ON THE CONFIDENTIAL JOINT DEFENCE MOTION TO DECLARE  
NULL AND VOID TESTIMONY-IN-CHIEF OF WITNESS TF1-023**

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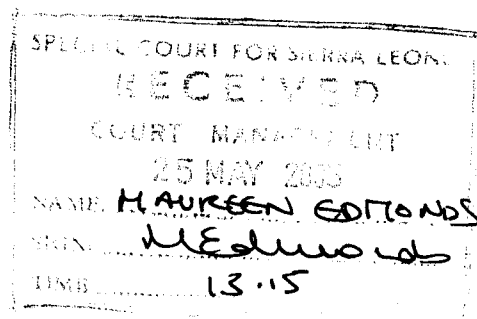
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**TRIAL CHAMBER II** (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”), composed of Justice Teresa Doherty, presiding, Justice Richard Lussick and Justice Julia Sebutinde;

**SEISED** of the “Confidential Joint Defence Motion to Declare Null and Void Testimony-in-Chief of Witness TF1-023 due to Violation of Rule 75 and 79”, filed on 14 March 2005 on behalf of all three Accused in this Trial (“Motion”);

**CONSIDERING** the Prosecution Response, filed on 4 April 2005, and the defence Reply, filed on 8 April 2005 (“Response”);

**DECIDES AS FOLLOWS** based solely on the written submissions of the parties pursuant to Rule 73 (A) of the Rules of Procedure and Evidence of the Special Court (“Rules”).

## I. SUBMISSIONS OF THE PARTIES

1. The Defence submits that the Trial Chamber, contrary to Rule 79(B) of the Rules, did not make public the reasons for going into closed session on 10 March 2005. It further contends that the Trial Chamber extended the scope of the underlying protective measures granted to witness TF1-023, ordered by Trial Chamber I by ordering the said closed session on 10 March 2005. Consequently, the Defence requests that the portion of the testimony of witness TF1-023 given in closed session on 10 March 2005 be declared null and void.

2. The Prosecution submits in response that the closed session was ordered in response to an extraordinary situation as the witnesses notified the Trial Chamber that she had been threatened the previous day. In such extraordinary situations, the Prosecution submits, the Court may rely upon its inherent jurisdiction rather than referring the matter to the Trial Chamber which had previously granted the protective measures to the witness. It was in the interest of justice to act immediately to protect a witness. Further the Defence has not suffered any prejudice as a result of the alleged procedural breaches and therefore the relief sought is wholly disproportionate and should therefore be dismissed in its entirety.

3. The Defence in its Reply restated its previous submission and replied to the Prosecution response stating “an underlying situation cannot be qualified as extraordinary” and/or since closed sessions are “created for extraordinary situations” the Court is not exempt from its obligation under Rule 79 (B). The Defence further submits the ruling varies an order of Trial Chamber I and therefore is in breach of Rule 75 (F) (i) and (G). The inherent jurisdiction of the Court cannot be as “easily” invoked as the Prosecution submits. The relief, having in mind Rule 75 is proportionate.

## II. DELIBERATIONS

### *Reasons for closed Session*

4. On 10 March 2005 the Trial Chamber deemed it to be necessary to go into closed session, as witness TF1-023 informed the Judges of being threatened on 9 March 2005. The Presiding Judge



ordered a closed session and gave the reasons only shortly later, viz “The reason this closed session has been called is because of the serious nature of the allegations”<sup>1</sup>.

5. Rule 79 (B) of the Rules provides

*“[the] Trial Chamber shall make public the reasons for its order”.*

This is a mandatory provision but does not specify when such reasons are to be made public. In particular it does not stipulate that they are to be stated at the time the order is pronounced.

6. Rule 79 (B) imposes a mandatory obligation on the Trial Chamber to make public the reasons for its order, that is to make the reasons known. In contrast to Rule 79 (A), the obligation is not to make the reasons known to “the press and the public”. The obligation under 79 (B) is wide, it obliges the Trial Chamber “make public the reasons” viz to have a reason made on record and publicly available.

7. Further, if there is a defect, it can be cured by compliance with Rule 79(B) by the Trial Chamber publicising its reason.

8. The Trial Chamber notes that no exception was taken by Defence Counsel at the time the Trial Chamber ordered a closed session. In fact Defence Counsel permitted the witness to be examined in chief without objection. At the end of examination in chief, all Defence Counsel evinced an intention to cross-examine but not at that time. They indicated that leave of the Court would be sought at a later date to recall the witness. This Trial Chamber considers and holds that the clear decision on the part of Defence Counsel to permit examination in chief to continue and indicate that they would seek leave to cross-examine at a later date knowing they would later apply to have the evidence adduced in closed session declared null and void is not in keeping with the professional standards this Court expects of Counsel in their duty to the Court.

9. The Trial Chamber adopts the words of the ICTR in *the Prosecutor v Casimir Bizimungu* that “parties should act diligently and expeditiously whenever there is an alleged violation of the Rules”<sup>2</sup>. Further, the relief requested by the Defence interferes with the Court’s duty pursuant to Rule 89 (B) to apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

10. In effect Defence Counsel seeks to have part of the evidence adduced in examination in chief expunged from the record.

11. As noted, the Defence did not raise an objection at the time notwithstanding the provisions of Rule 5 of the Rules of Procedure and Evidence:

*“Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber or the Designated Judge may grant relief if the non-compliance has caused material prejudice to the objecting party.”*

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<sup>1</sup> Transcripts, 10 March 2005, page 6 line 3.

<sup>2</sup> *The Prosecutor v. Casimir Bizimungu et al*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion for Appropriate Relief for Violation of Rule 66 (TC), 4 February 2005, para. 10.

12. The Defence does not adduce any evidence to show material prejudice was caused to any accused by the order for a closed session that could be a basis for the remedy sought in this Motion. They rely on an alleged breach of Rules 79 (B) and 75 (F) (i) and (G).

13. Rule 5 obliges an objecting party to:

- (1) raise the objection at the earliest opportunity and
- (2) show that the non-compliance has caused material prejudice before relief may be granted.

The Defence has not complied with either of these pre-conditions nor have they explained their non-compliance.

*Authority of Trial Chamber II to order Closed Session*

14. Rule 54 gives a Judge or the Trial Chamber the power to issue such orders as may be necessary for the conduct of the trial. Rule 54 provides:

“At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial”.

15. Further, the Defence submitted that the Trial Chamber had no authority to order a closed session, as such authority was with Trial Chamber I pursuant to Rule 75 (G) (i) of the Rules and further Rule 75 (H) did not apply. We consider there is no validity in this argument, and to hold otherwise could lead to cumbersome delays in the proper running of both Trial Chambers of the Special Court.

16. The provisions for closed sessions are contained in Rules 75 (B) (ii) and Rule 79. Rule 75 (A) deals with the provisions for protection of witnesses and allows a Trial Chamber to order a closed session as one of several protective measures to “prevent disclosure to the public or the media of the identity or whereabouts of a victim or witness”. Variations of protective measures are provided in Rule 75 (G) and applications must be made to the Chamber “remaining seized of the first proceeding”. The decision to order protection of a witness by way of a closed session must be implemented in accordance with Rule 79. The powers to order a closed session in Rule 79 are independent of Rule 75. Rule 79 vests powers in “[T]he Trial Chamber” - that is the Trial Chamber hearing a case - to order the exclusion of the press and the public. It is distinguished from “any Chamber, however constituted, remaining seized of the first proceedings” as provided for in Rule 75(G).

17. In their response, Prosecution submit that in any event the Motion seeks a remedy entirely “disproportionate to the alleged mischief”.<sup>3</sup> In support they point to the lack of evidence of any

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<sup>3</sup> Prosecution Response, para. 9.



prejudice suffered by the Defence as a result of the alleged breach. In reply Defence argues “violation of this Rule in itself, according to the apparent purpose of the drafters, causes prejudice to the Accused”.<sup>4</sup> And “[T]he fact that the order was consistent with Rule 17 [...] does not prevent the invocation by the Defence of Rule 79 (B) and/or Rule 75”.<sup>5</sup>

18. We do not see the relevance of Rule 17; it may be the Counsel intended a reference to Article 17 of the Statute of the Special Court of Sierra Leone. Neither Party refers the Trial Chamber to any precedent or authority holding that the doctrine of proportionality applies to remedies for alleged breach of procedure in the International Criminal Tribunals. The doctrine is more commonly applied in argument and decisions relating to enforcement of human or constitutional rights. However, given the continuing development of the jurisprudence of the International Criminal Tribunals we are of the opinion that the Trial Chamber is entitled to ask itself the question whether the expunging of evidence – not challenged by cross-examination or as a breach of procedure at the time it was adduced – is a proportionate remedy for an alleged breach of a procedural provision.

19. The concept of proportionality involves a court weighing up the remedy sought to the alleged breach or wrong suffered.

20. Defence say (we assume) that there was a breach of Article 17 of the Statute but do not say which of the several rights enshrined therein was breached or why the only remedy must be expunging of evidence.

21. We consider the Trial Chamber may look at the application and interpretations of international treaties and conventions by other International Courts. The Trial Chamber is entitled to consider the jurisprudence of other jurisdictions, a practice commonly adopted by the International Criminal Tribunals<sup>6</sup>. We note the similarity of the provisions of Article 17 of the Statute to Article 6 of the European Convention of Human Rights (ECHR). We draw a contrast to Article 17 (2) of the Statute and Article 6 (1) of the ECHR both providing for a “fair and public hearing”. Article 17 (2) of the Statute is “subject to measures ordered by the Special Court for the protection of victims and witnesses” and Article 6 (1) of the ECHR empowers a Court to exclude the press and public for reasons enumerated therein.

22. Cases show that Article 6(1) of the ECHR has to be given a broad and purposive interpretation.<sup>7</sup> Article 6(1) of the ECHR was considered by the English House of Lords in *R v A (No.2) 2002*, 1 A. C.45. The Court observed that:

*“[...] it is well established that the right to a fair trial in Article 6 is absolute. [...] The only balancing permitted was in respect of what the concept of a fair trial entails; account may be taken of the familiar triangulation of the interests of the accused, the victim and society. In that context proportionality has a role to play.”*

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<sup>4</sup> Defence Reply, para. 19.

<sup>5</sup> *Ibid.*

<sup>6</sup> *The Prosecutor v. Dragoljub Kunarac et al*, Case No. IT-96-23, Trial Chamber, Judgement, 22 February 2001, para. 454 ff.; *The Prosecutor v. Ferdinand Nahimana et al*, Case No. ICTR-99-52-T, Trial Chamber, Judgement and Sentence, 3 December 2003, para. 1074 ff.

<sup>7</sup> E.g. *Moreira de Azvedo v Portugal*, 13 E.H.R.R. 721, at para. 66

The criteria for determining the test of proportionality have been analysed in similar terms in the case law of the European Court of Justice and the European Court of Human Rights.

23. We consider that the Trial Chamber may consider if the remedy sought is proportionate to the mischief alleged. In the circumstances of this case, the expunging of evidence for an alleged breach of a procedural rule is disproportionate, particularly as it was not challenged at the time and was cured. Further, we note Rule 5 does not specify what relief the Trial Chamber may grant and we consider such relief must be proportionate to any material prejudice caused. In any case, no material prejudice has been established by the Defence, and thus there are no grounds for granting relief.

24. We note the duty imposed on the Trial Chamber to consider the rights of the accused and the victim. We endorse the rulings of other International Criminal Tribunals which emphasise the rights of the accused. However, in the context before us we consider that:

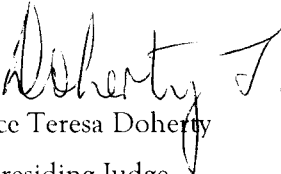
- (1) there was no breach of Rule 75 or 79 (B),
- (2) the Defence did not comply with Rule 5 to invoke the Trial Chamber powers to grant relief, and
- (3) in any event the remedy sought is disproportionate to any alleged breach.


#### FOR THESE REASONS

The Trial Chamber dismisses the Motion.

Justice Julia Sebutinde gives a separate dissenting opinion.

Done at Freetown this 25<sup>th</sup> day of May 2005.

  
Justice Teresa Doherty  
Presiding Judge

  
Justice Richard Lussick

