



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

**SEIZED** of the Oral Objection made by the Office of the Prosecutor (“Prosecution”) on the 21<sup>st</sup> of November, 2005;

**CONSIDERING** that on the 22<sup>nd</sup> of November, 2005, the Trial Chamber delivered an oral Ruling denying the Objection;

**NOTING** that the Trial Chamber indicated at that time that a reasoned written Ruling on this matter would be delivered in due course;

**THE TRIAL CHAMBER HEREBY ISSUES ITS WRITTEN REASONED RULING:**

## I. BACKGROUND

1. On the 21<sup>st</sup> of November 2005, during cross-examination of Prosecution Witness TF1-045 by the Counsel for the First Accused, Issa Sesay, the Prosecution objected to the Defence questioning about pre-testimony meetings between the said witness and the Prosecution’s investigators.<sup>1</sup>

2. In support of the Objection, the Prosecution submitted that, consistent with the jurisprudence of Trial Chamber II in the AFRC Trial, and in particular the *Decision on Objection to Question Put by Defence in Cross-Examination of Witness TF1-227* of the 15<sup>th</sup> of June 2005 (“AFRC Decision”), at paras. 19-25,<sup>2</sup> save for exceptional circumstances, i.e. substantiated allegations of misconduct from the Prosecution or modifications of disclosed statements made in the course of a pre-testimony meeting, such questioning should be limited to the number, the dates and the duration of the meetings.

<sup>1</sup> RUF Transcripts, 21 November 2005, page 91ff.

<sup>2</sup> *Prosecution against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Kanu*, Decision on Objection to Question Put by Defence in Cross-Examination of Witness TF1-227, 15 June 2005, at paras. 19-25.

3. In essence, the Prosecution was claiming some kind of privilege for pre-testimony meetings between it and its witnesses analogous to the lawyer-client privilege. This is the only logical inference deducible from its reliance on the AFRC Decision, judging from paragraph 4 thereof, which states:

“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.”

4. The Prosecution further submitted that the line of questioning pursued by the Defence went beyond the scope of what is permissible in cross-examination as the AFRC Decision indicates, in that the questions related to the substance of pre-testimony meeting between the Prosecution and the witness.

5. In response to the said objection, Counsel for Sesay submitted that the Prosecution's case involves an extensive disclosure of supplemental and additional witness statements, and it is therefore part of the Defence case to assess the nature of these additional statements. Counsel also submitted that the only effective remedy in its possession in order to undertake this assessment is indeed the cross-examination of the witness concerning his meetings with the Prosecution.

6. Counsel for Kallon submitted that in the particular case relied upon in the AFRC Decision, namely, *Prosecution against Augustine Bizimungu*,<sup>3</sup> there was an allegation of misconduct on the part of Prosecution raised by the Defence, but which is not the case with regards to the present objection raised by the Prosecution.

7. Counsel for Gbao endorsed the submissions of Counsel for the First Accused, and, submitted that limiting the right of the Defence to question a witness during cross-examination on his statements given to the Prosecution should be considered only a case-by-case basis.

## II. MERITS OF THE OBJECTION

8. As a preliminary issue, the Chamber observes that the objection, as formulated, fails to specify and particularize the questions put by learned Counsel for the First Accused to the witness which, in the Prosecution's submission, “as a matter of principle, go beyond the scope of what is permissible in

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<sup>3</sup> *Prosecution against Augustine Bizimungu at al.*, Case No. 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 (“Bizimungo Decision”).

cross-examination” and the extent, if any, to which such questions, as alleged, do relate to the substance, as distinct from the procedure adopted in recording the alleged statements. In the Chamber’s opinion, this distinction is crucial since, given the permissible latitude of cross-examination adopted by the Court, it cannot accept any limitation on cross-examination as to the procedure adopted in taking down statements from Prosecution witnesses.

9. We observe that the objection, founded as it seems on the AFRC Decision, rests upon the presumption that the Prosecution/witness relationship is analogous to the Lawyer/Client relationship rooted in the English common law tradition. The Chamber notes the *Bizimungu* Decision on the Prosecution/Witness relationship as not being the same as the Lawyer/Client relationship.<sup>4</sup>

10. From the Chamber’s perspective, the precise issue for determination as to the merits of the objection is whether the premise upon which it is grounded is valid. For the sake of completeness, we re-state here what we understand to be the main thrust of the Prosecution’s argument: The Defence should only be permitted to question prosecution witnesses, except for substantiated allegations of misconduct, on issues about the number of meetings, dates and duration. In essence, as already noted, the Prosecution is canvassing the proposition that the right of the Defence to cross-examine prosecution witnesses must be subject to the qualification that the area of pre-testimony meetings between the prosecution and its witnesses is, as it were, prohibited territory, (excluding allegations of prosecutorial misconduct), except in respect of matters such as number of meetings, dates, and duration.

11. The Chamber notes that apart from the AFRC Decision, the Prosecution has not produced any other case-law authority for what, in this Chamber’s considered opinion, is a novel proposition of law. The only conceptual or doctrinal basis for such a proposition seems to be some presumed analogy between the Lawyer/Client privilege and the Prosecution/Witness relationship. We hold that it is settled law that the Lawyer/Client relationship derives from, or rests, on *rationales* that are entirely distinct and unrelated to that of the Prosecution and its witnesses.

12. For the purposes of this Ruling, suffice it to say that the Chamber’s understanding of the Lawyer/Client privilege, as it is applicable in the classical common law setting, is designed to afford a direct protection to confidential communications from the client to the attorney when the client is

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<sup>4</sup> *Id.*, paras 29-31.

seeking legal advice and assistance. The logic of the privilege is that insulating those communications from the discovery process assures the client that his communications cannot be used against him, and thus encourages him to be more candid with his lawyer. In our view, the Prosecution/Witness relationship bears no juridical affinity with the Lawyer/Client relationship in terms of its doctrinal objective and thrust and we fail to see how any such relationship could be said to exist between a witness and the Prosecution. No such relationship exists between the Defence and any of their witnesses, except for the Accused himself.

13. Work product of the Prosecution in the preparation of its case, which may not be disclosed because of its personal or internal nature, do not in our considered view extend to preclude the disclosure of any other relevant matters relating to interviews and proofing sessions between the Prosecution and any particular witness.<sup>5</sup>

### III. CONCLUSION

14. The Chamber wishes to emphasize that, as a matter of law, a proper legal foundation must be established during cross-examination as a precondition for tendering a witness' out-of-court statement to show prior inconsistency with his oral testimony. This is now the established practice of this Chamber as embodied in its *Decision on Disclosure of Witness Statements and Cross Examination*.<sup>6</sup> Needless to mention that this practice applies to both the CDF and RUF trials.<sup>7</sup> We also do not perceive any inconsistency between the said practice and the degree of latitude permissible in cross-examination in establishing prior inconsistencies within the scope of the principle enunciated by the AFRC Decision.

<sup>5</sup> *Prosecutor against Issa Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL05-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005, paras 20-21, 28, 34. See also *Prosecutor against Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL04-14-T, Ruling on Disclosure of Witness Statements, 1 October 2004.

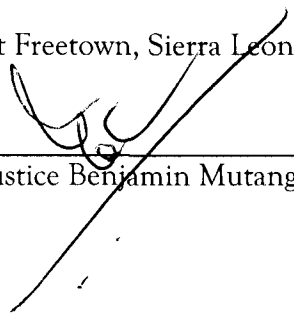
<sup>6</sup> *Prosecutor against Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL04-14-T, Decision on Disclosure of Witness Statements and Cross Examination, 16 July 2004 para. 21.

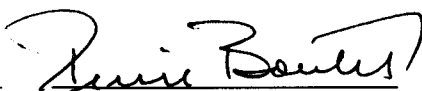
<sup>7</sup> *Prosecutor against Issa Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL05-15-T, Decision on Prosecution Motion Objecting to Defence Submissions of Witness Statements with Inconsistencies Marked, 27 October 2005, para. 19.

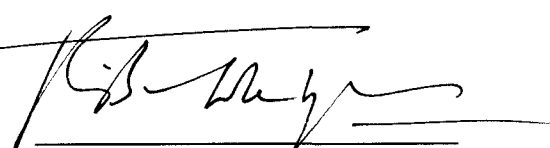
IV. DISPOSITION

15. Based on the foregoing considerations, the Chamber finds that the Objection lacks merit. It is accordingly overruled.

Done at Freetown, Sierra Leone, this 27<sup>th</sup> day of February, 2006

  
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Hon. Justice Benjamin Mutanga Itoe

  
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Hon. Justice Pierre Boutet  
Presiding Judge  
Trial Chamber I

  
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Hon. Justice Bankole Thompson

