

**SPECIAL COURT FOR  
SIERRA LEONE**

Case No. SCSL-2004-16-PT

**TRIAL CHAMBER II**

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

Registrar: Robin Vincent

Date filed: February 22, 2005

**THE PROSECUTOR****against****SANTIGIE BORBOR KANU**


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**KANU – REPLY TO PROSECUTION COMBINED RESPONSE TO DEFENCE REQUEST FOR AN  
 ORDER NOT TO DISCLOSE PHOTOGRAPHY, VIDEO AND AUDIO RECORDING OF THE TRIAL  
 TO THE PUBLIC AND/OR THIRD PARTIES**

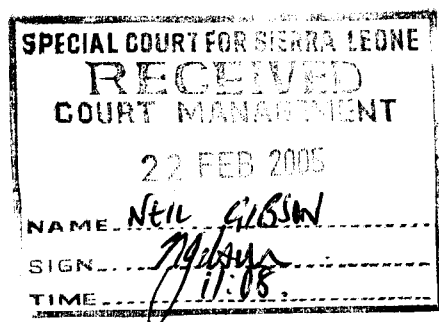
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## I INTRODUCTION

1. On February 11, 2005, the Defense filed its “Kanun – Request for an Order Not to Disclose Photography, Video and Audio Recording of the Trial to the Public and/or Third Parties,” (“**Defense Motion**”) to which the Prosecution responded in its “Prosecution Combined Response to Defence Request for an Order Not to Disclose Photography, Video and Audio Recording of the Trial to the Public and/or Third Parties” (“**Prosecution Combined Response**”) on February 17, 2005. In response to this, the Defense hereby files its “Kanun – Reply to Prosecution Combined Response to Defence Request for an Order Not to Disclose Photography, Video and Audio Recording of the Trial to the Public and/or Third Parties.”

## II UNDUE PREJUDICE TO THE DEFENSE CASE

### *Witnesses Will Be Influenced*

2. Contrary to the Prosecution’s contention in para. 6 of its Combined Response that, given the fact that the judges are “able to ponder independently without prejudice to each and every case which will be brought before them,” it is the Defense argument in its Motion that not the judges, but rather witnesses could be exposed to external influences which may distort the truth-finding process. Thus, the judges’ independence does not form part of the Defense motion.

### *Weight Given to Dock Identification*

3. In para. 7 of its Prosecution Combined Response, the Prosecution sets out that international law gives little weight to mere dock identification. In arguing so, the Prosecution bases its argument on *Prosecutor v. Tadic*, IT-94-1-T, Judgment of May 7, 1997, para. 546 (attached as authority to Prosecution Combined Response), where the ICTY Trial Chamber indeed states so.
4. Nevertheless, the underlying facts of the Tadic case, on which this statement was based, are considerably different from the facts in the case against the AFRC accused. In Tadic, the Prosecution confronted witnesses with thirteen photographs, among which a photo of the accused, and then asked witnesses to identify the accused. The Trial Chamber heard an expert, Dr. Willem A. Wagenaar, on his opinion of the admissibility of the format of this photospread procedure, and the expert indicated that this procedure was generally an unbiased opportunity to identify the accused.

5. However, the request as formulated in the Defense Motion does not concern identification by witnesses of the accused's photograph through photospread procedure. The Defense Motion concerns the request that no images of the Accused be disseminated to the public and/or other third parties so as to prevent the witnesses from seeing images of the Accused through the media or other sources before they are being called at trial.
6. The Tadic defense argued before the ICTY that, given the fact that Tadic's photographs had been widely publicized throughout the four year trial, no reliance should be placed on the witnesses' identification of the accused Tadic. The expert Dr. Wagenaar agreed with the Defense. The Trial Chamber, however, rejected the defense submission "in view of the convincing testimony of these witnesses that they had not seen any such media pictures of the accused before being shown the photospread."<sup>1</sup> Therefore, the Trial Chamber rejected this argument on the basis that it was convinced that the witnesses had not seen any images of the accused in the media before their identification of the accused through the photospread procedure. Accordingly, the Tadic decision provides support to the Defense request in question.
7. Therefore, the Defense asserts that disclosure of the accused's image will have prejudicial effect to the Defense case, and thus requests the honorable Trial Chamber to grant the Defense Motion so as to prevent witnesses from being influenced through the media and other sources with the Accused's identity.

#### *Timing of the Filing*

8. The Prosecution states in para. 8 of its Combined Motion that it is "surprised" by the timing of the filing of the Defense Motion. The Defense wishes to indicate that this matter only becomes relevant in view of an upcoming trial, particularly considering the media coverage in the RUF/CDF trials, which makes probable that the national media will also become interested in the case against the AFRC Accused from the start of the trial onwards. The Defense thus contends that the timing does not underscore the Prosecution's position in this.
9. As observed, media attention has been paid to the CDF and RUF trials which are currently before Trial Chamber I. Until the start of those trials, the media have not widely publicized on those accused, nor on the AFRC accused. It was only when the actual trials started that the media became interested on a large scale in the CDF and RUF accused. It is this background that made the Defense decide to only bring this

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<sup>1</sup> *Prosecutor v. Tadic*, IT-94-1-T, Judgment of May 7, 1997, para.552 (footnotes omitted).

Defense Motion forward before the actual start of the trial, anticipating the same media coverage.

*Less Restrictive Means*

10. In para. 9 of its Combined Response, the Prosecution opts for less restrictive means. The Defense argues, however that the requested measures are not very restrictive, in the sense that the trial is still open to the public, and that if any right of the public be violated, it is rather caused by the fact that the public does not have full access to the Prosecution witnesses' identities, than that it is restricted because the public is not allowed to distribute and to have access to images of the Accused.
11. In supporting its argument for less restrictive measures, the Prosecution refers to *Prosecutor v. Mejakic et al.*, in which the ICTY Trial Chamber dismissed a similar motion.<sup>2</sup> The underlying facts again differ from the facts in the case against Kanu. In the first place, the Mejakic defense motion was filed during the pre-trial phase, while the Defense Motion is filed at the threshold of the start of the trial proceedings. In the second place, in the case of Mejakic, the Trial Chamber had already issued various Orders permitting the release of audio and video recordings of the proceedings, after explicit requests by certain officials of the press had been submitted to the Trial Chamber.<sup>3</sup>
12. For these reasons, the Defense should not be held to request for alternative, less restrictive, measures than the ones requested for in its Defense Motion.

*Conclusion*

13. In conclusion, the Defense holds that, in contrast to what the Prosecution holds in its Combined Response, undue prejudice will be suffered by the Defense if the Defense Motion be dismissed.

### III RIGHT TO A PUBLIC TRIAL

14. It is the Defense contention that the 'right' to a public trial is a right which primarily pertains to the Accused, and accordingly should be primarily interpreted from the perspective of the Accused in terms of fair trial rights. The public community as such, being no party to the proceedings, has no independent standing as to this right. This is also evidenced by the wording of Article 17 of the Statute ("the accused shall be

<sup>2</sup> *Prosecutor v. Mejakic et al.*, Case No. IT-02-65-PT, Decision on Dusko Knezevic's Request Pursuant to Rule 81(D), July 28, 2004 ("Mejakic Decision").

<sup>3</sup> See *Prosecutor v. Mejakic*

entitled to a fair and public hearing”). The Rules which the Prosecution invokes, namely Rules 78 and 88, merely refer to the fact that the sessions shall be held in public (Rule 78) and that the judgments shall be pronounced in public (Rule 88(A)). This has no bearing on the Defense request that images of the Accused should not be distributed during the trial proceedings.

15. Interestingly, the SCSL Trial Chamber in *Prosecutor v. Norman*, indicates that the requested measure “does – to a minor extent – negatively affect the public nature of the trial and the possibility of the public to fully follow the proceedings, and, consequently the right of the accused to a public hearing.”<sup>4</sup>
16. Therefore, accordingly, to also Trial Chamber I, the right to a public trial is part of the broader principle of fair trial. Thus, the current request by the Accused actually concerns a request to diminish part of this notion of public trial, in order to ensure the broader principle of fair trial.
17. The Prosecution acknowledges in para. 14 of its Combined Response that the preference for a public hearing is not absolute, but can be balanced against other mandated interests, such as the duty to protect victims and witnesses. The Defense asserts that in this line of reasoning, and in balancing the notion of public trial against the right of the Accused to a fair trial, the latter should outweigh the first.

#### IV REQUEST IS BROAD

18. The Prosecution in para. 15 of its Combined Response indicated that it was unclear whether the Registry was included in the Defense reference to ‘third parties.’ The Defense hereby clarifies that its request does not include the staff of the Registry.

#### V RELIEF SOUGHT

19. It is for the reasons set out above that the Accused respectfully requests the honorable Trial Chamber:
- (i) To prohibit photography, video and audio recording of the Accused by third persons during the trial proceedings; and

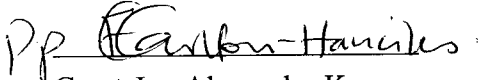
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<sup>4</sup> *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, June 8, 2004, para. 39 (underlining, GJK).

- (ii) To direct the Registry not to publish or disclose photographs, video and audio records of the Accused to the media or other third persons;
- (iii) Or to take any other reasonable measure the honorable Trial Chamber deems appropriate to prevent that Prosecution witnesses, prior to their testimony at trial, will have access to such images.

Respectfully submitted,

Done on this 22<sup>nd</sup> day of February 2005

  
Geert-Jan Alexander Knoop  
Lead Counsel