

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO.: SCSL-04-15-T
TRIAL CHAMBER I

THE PROSECUTOR
OF THE SPECIAL COURT
v.
ISSA SESAY
MORRIS KALLON
AUGUSTINE GBAO

6 JULY 2004
1008H
CONTINUED TRIAL

Before the Judges:

Mutanga Itoe, Presiding
Bankole Thompson
Pierre Boutet

For the Registry:

Mr. Robert Kirkwood
Ms. Maureen Edmonds
Mr. Geoff Walker

For the Prosecution:

Mr. Luc Côte
Ms. Lesley Taylor
Mr. Abdul Tejan-Cole
Ms. Boi-Tia Stevens

For the Accused Issa Sesay:

Mr. Timothy Clayson
Mr. Wayne Jordash

For the Accused Morris Kallon:

Mr. Raymond Brown
Ms. Wanda Akin
Mr. Melron Nicol-Wilson

For the Accused Augustine Gbao:

Mr. Andreas O'Shea
Mr. John Cammegh

Court Reporters:

Ms. Gifty C. Harding
Ms. Susan Humphries
Ms. Roni Kerekes

P R O C E E D I N G S

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MS. EDMONDS:

All persons having anything to do before the Special Court Trial Chamber draw near and give your attendance.

MR. PRESIDENT:

The session resumes. And, Mr. Clayson, I think we should start with you.

MR. CLAYSON:

Yes. Well, Mr. Jordash, we'll address you on the point that you left upon yesterday afternoon.

MR. PRESIDENT:

Mr. Jordash, yes.

MR. JORDASH:

We've considered overnight and we are grateful for the time as to whether Mr. Sesay will make an opening speech at this time.

Rule 84, as Your Honours will appreciate, and I quote, the beginning of it states: "At the opening of his case, each party may make an opening statement confined to the evidence he intends to present in support of his case."

At this time the Defence do not have a fraction of the evidence which we intend to present in support of Mr. Sesay's case. We have requested on numerous occasions that the Prosecution comply with their Rules 66 and 68 obligations.

JUDGE BOUTET:

Mr. Jordash, I would like you to focus on whether or not at this time the Accused is or is not making an opening statement. And we have heard all of these arguments yesterday, and I don't want to hear at this particular moment anything about disclosure. This is another issue. We -- you will be allowed to speak to that later.

MR. JORDASH:

Well, what I'm seeking to do is to apply to adjourn the decision as to whether we make an opening speech at this time or --

JUDGE BOUTET:

It's an opening statement, not an open speech.

MR. JORDASH:

Opening statement -- whether we make an opening statement at this time or an opening statement at the beginning of our case. We are not in a position because of the lack of disclosure of the evidence, which we say will support our defence, to make an opening -- well, to make a decision at this time whether it is right to make an opening speech now or whether we should make an opening speech at the end of the Prosecution case and the beginning of our case.

1 We do not, and the rule -- and the terms of Rule 84 are clear that the speech should be confined to
2 the evidence we intend to adduce. We have a small, small fraction of that evidence. Any speech we
3 were to try to give in the absence of a resolution of this disclosure --

4 MR. PRESIDENT:

5 Mr. Jordash, my colleague has drawn your attention to the issue of disclosure which you are raising.
6 From what you are saying, do we understand you as forfeiting your rights at this point in time to make
7 an opening statement?

8 MR. JORDASH:

9 No, I was saying --

10 MR. PRESIDENT:

11 Are you postponing -- are you saying you are postponing the possibility of making an opening
12 statement pursuant to Rule 84?

13 MR. JORDASH:

14 No, I'm applying to Your Honours --

15 MR. PRESIDENT:

16 Look, I wanted to -- I just wanted to let you know, you know, that you have the possibility of making --
17 Mr. Sesay, or yourself on his behalf, has a possibility of making an opening statement at this point in
18 time, just as he has a possibility of making an opening statement just before the commencement of
19 the case for the Defence. So if you cannot make it now, you could as well do it, you know, at a later
20 stage when you will be opening the defence, the case for the Defence.

21 MR. JORDASH:

22 Well, I would respectfully submit that there is a third option which is the option I'm trying to explain to
23 Your Honours which is that the purpose of making a Defence opening speech is to outline to the
24 Court, as I understand it, the evidence which we will adduce in support of our case. The point I'm
25 making is that we are not able to make a decision whether it's right to make a speech --

26 MR. PRESIDENT:

27 And the point -- the point the Tribunal is also making, Mr. Jordash, is, you know, that if at this time you
28 are complaining that the material has not been disclosed to you then you have the option of making
29 the statement at a time when all the material would have been disclosed to you, and this would be
30 appropriately be situated, you know, at a time when you might be opening your defence. Do you think
31 that such an approach, you know, substantially prejudices the presentation of the case for the
32 Defence?

33 MR. JORDASH:

34 Well, it might. To be forced to make a speech at the beginning of our case as opposed to having the
35 option which is the --

36 JUDGE BOUTET:

37 Mr. Jordash, you are not forced to make an opening speech. And I would again say it's an opening

1 statement. The Rules provide that normally it should be done after the case for the Prosecution,
2 obviously after the evidence has been adduced. Now, if you or your client want to make that opening
3 statement now, this is your decision and, therefore, you have to live with the facts as they are
4 because the procedure normally provides this is done after the evidence has been adduced. Now you
5 are complaining that "we are forced", well, you are not forced, you have the option of making it now
6 with the facts as you have them or making that opening statement after the case of the Accused -- the
7 Prosecution has been in, and at that time you will not have these arguments to make because all the
8 evidence will be in. So, this is the choice and the option you have to make at this time. And this is
9 why we've granted you and your client the time to think about it last night.

10 MR. JORDASH:

11 Well, I can only --

12 JUDGE THOMPSON:

13 Mr. Jordash, may I -- consistent with what my learned brother, Judge Boutet has said, my position is
14 that I am not in any mood to want to speculate as to what prejudice or lack of prejudice your client
15 might experience if you don't have all the material at this stage. I am sure that situation may well be
16 one of the situations that the law envisages, whereby it makes provision for an election either after the
17 Prosecution have made their opening statement, or at the beginning of the presentation of the case
18 for the Defence. And I think that it is sort of futile for us to engage in a battle of metaphysical
19 speculation as to whether you have enough material now to enable you to determine whether you
20 want to exercise your right to an election. This seems to me to be an unnecessary quibble. As far as
21 I am concerned, the position for determination now is this: are you electing -- is your client electing to
22 make a statement at this point in time?

23
24 My recollection is that this Court decided yesterday that an opening statement from your client can be
25 made or is only permissible within the parameters of Rule 84 and that we are not allowing your client
26 to make a statement outside the parameteres of Rule 84.

27
28 The question is, as far as I understand it, are you prepared to take advantage of that opportunity or
29 are you postponing the opening statement of your client to the time when he might begin to present
30 his case? Those are the two options available to us because we went on yesterday also to discuss
31 the question of who will make the opening statement and we heard Professor O'Shea talk about his
32 client as to sharing the work, but in your case I think the question is are you now in a position to make
33 an election?

34 MR. JORDASH:

35 No.

36 JUDGE THOMPSON:

37 You are not?

1 MR. JORDASH:

2 Within the terms of Rule 84, no.

3 JUDGE THOMPSON:

4 No, in other words -- in other words, you are not prepared to make an opening statement at this point.

5 MR. JORDASH:

6 Within the terms of Rule 84 we cannot and we don't.

7 JUDGE THOMPSON:

8 Well, then, of course *cadit quaestio*, we proceed with trial and --

9 MR. O'SHEA:

10 Well, Your Honours, before Your Honour, you know, finally --

11 MR. PRESIDENT:

12 I hope this -- that issue is not joined to this because we are going to call you at your own time.

13 JUDGE THOMPSON:

14 Yes, you are right.

15 MR. PRESIDENT:

16 I hope we have -- at your time. Please, can you -- Mr. O'Shea, can you --

17 JUDGE THOMPSON:

18 Yes, we just want to resolve --

19 MR. PRESIDENT:

20 Mr. O'Shea, can you --

21 MR. O'SHEA:

22 I'm trying to assist the Court, Your Honours.

23 JUDGE THOMPSON:

24 Well, then, in the case of -- shall I --

25 MR. O'SHEA:

26 And I am not -- I hope Your Honours will hear me.

27 JUDGE THOMPSON:

28 No, no, no, no. I recognise that this is a joint trial, but each Accused person is represented separately
29 here. We want to have it clearly on record what Mr. Jordash's legal position is on this issue, and
30 when we finish that we'll come to your client.

31 MR. O'SHEA:

32 Well, Your Honours, I would respectfully ask that you hear me before --

33 JUDGE THOMPSON:

34 At this point in time?

35 MR. O'SHEA:

36 No, simply hear the reason why I'm on my feet. That is all.

37

1 JUDGE THOMPSON:

2 All right.

3 MR. O'SHEA:

4 I am merely standing to attempt to assist the Court here. I would simply like to make a suggestion,
5 because I understand the difficulty of what Mr. Jordash is putting forward and the reaction of Your
6 Honours and I believe that I am in a position to assist to this extent that my suggestion would be that
7 we proceed to Mr. Gbao. It may very well be that once we proceed to Mr. Gbao, it may give the team
8 for Mr. Sesay some time to consider their position and that also may shed light on --

9 MR. PRESIDENT:

10 We shall not -- we shall -- we shall -- we shall not go back to that. I understand Mr. Jordash's position
11 and I suppose Mr. Clayson shares that view that in the absence of a full disclosure he is not in a
12 position to making an opening statement (*sic*). That is a resume of what he is saying. And we have
13 said, you know, that he has the option to make the opening statement now or at the beginning of the
14 case for the Defence.

15

16 So, we have -- we have it on record that he has said that he is not prepared to make an opening
17 statement now for reasons which I have stated. You know, he says there has been no full disclosure
18 by the Prosecution. So we have it on record. He's not exercising the right, for reasons which he has
19 given, to make an opening statement. So we are calling on you now, you know, to indicate to us --

20 MR. O'SHEA:

21 Forgive me, Your Honour, I was merely trying to assist the Court.

22 JUDGE THOMPSON:

23 I know, I know. I mean --

24 MR. PRESIDENT:

25 But we shall not revisit that issue; it's closed. You see, yes.

26 JUDGE THOMPSON:

27 quite right. Much as I appreciate your intervention, the thing is that these are basics, these are
28 basics. This trial must move on. And we know that most of the time it's Defence counsel who in fact
29 are complaining that the trials are not proceeding at a fast pace. And here we are about to start,
30 we've given our ruling and then we do not have the cooperation of counsel for the first Accused. At
31 the status conference there were clear indications that the right to make an opening statement was
32 being reserved until the -- but now the position has changed. Of course, you have right to revise your
33 position. And so it seems as if to ask the Court to begin to make compromises on these basic
34 questions of procedure, a little -- beats my imagination.

35 MR. O'SHEA:

36 Your Honours, I am --

37

1 MR. PRESIDENT:

2 Mr. Jordash, how do you intend to proceed?

3 MR. JORDASH:

4 Well, simply that we are not in a position, as I've said, to make an opening speech and through no
5 fault of our own we are not able to make it and we don't.

6 MR. CLAYSON:

7 Can I just add a little to this?

8 MR. PRESIDENT:

9 I think the record is very clear on that already. The record, the Court records are very clear on that.
10 We don't need any further emphasis on this.

11 MR. CLAYSON:

12 Can I just add to this that yesterday, of course, as early as I could, I mentioned the gravity with which
13 the Defence viewed the lack of cooperation upon the issue of disclosure by the Prosecution. We are
14 not going to go away from this issue; it's an issue we regard as fundamental to the fairness of this
15 trial. And as soon as can we will invite Your Honours to consider in detail the motion that we
16 submitted and filed on the 31st of May, the Prosecution's response and our additional submissions.

17
18 So it's a matter of the greatest urgency and relevance to the fairness of this trial. That's why we can't
19 decide at this moment in time whether we should be asking the Court to hear an opening statement at
20 this stage or not.

21 MR. PRESIDENT:

22 We've taken note of your remarks and we would address them at the appropriate time.

23 MR. CLAYSON:

24 Yes.

25 MR. PRESIDENT:

26 Yes, Mr. Jordash -- I'm sorry, not mister -- Mr. O'Shea.

27 MR. O'SHEA:

28 Yes, Your Honours, I also appreciate the additional time afforded to me. It has not dramatically
29 changed things from yesterday, but I appreciate your time in any event. So the position today is that
30 Mr. Gbao will make a statement.

31 JUDGE THOMPSON:

32 But perhaps we should address a few remarks to Mr. Gbao before he makes his statement that --
33 because the Presiding Judge has already informed you that you have certain rights guaranteed under
34 the Statute of the Court, and it is my duty to caution you that now that you've elected to make a
35 statement at this point in time, the law limits the substance of such an opening statement to an outline
36 or an overview of what the evidence -- what evidence you intend to present in support of your case.

37

1 The Chamber has already indicated that it has the expressed authority to limit the length of the
2 statement in the interest of justice, but also in the interest of equality of arms, we shall give you ample
3 opportunity to make your statement.

4
5 But I must also caution you that the charges before this Court upon which you and your fellow
6 Accused are being charged are very grave charges; the allegation themselves are extremely serious.
7 The Court will afford you and your fellow Accused all the opportunity and the procedural and
8 substantive due process rights to obtain a fair and impartial trial. It is a responsible which I am assure
9 you will not recoil from, but we'll point out that any attempt on your part to depart from the parameters
10 from Rule 84 will be viewed upon with judicial disfavour by this Court and we shall act appropriately to
11 prevent any diversion from the requirements of Rule 84.

12
13 You are now permitted to make your opening statement.

14 JUDGE BOUTET:

15 Open your mike, please.

16 THE ACCUSED GBAO:

17 Good morning, Your Lordship.

18 MR. PRESIDENT:

19 Good morning.

20 THE ACCUSED GBAO:

21 Let me hasten to tell the people who set up the Special Court -- the countries forming the Special
22 Court and the entire world that we, the inditees, now held as forerunners of the RUF organisation for
23 bearing the greatest responsibility, are not afraid of any court system that constitutionally carry the
24 mandate of the people of Sierra Leone. But we are strongly against the manner in which the Special
25 Court for Sierra Leone was established.

26 JUDGE THOMPSON:

27 Mr. Gbao, I want to emphasise again that this Bench is not prepared to cover ground already
28 adjudicated upon in this forum and in respect of which there is an authoritative decision by a higher
29 forum, namely, the Appeals Chamber of the Special Court.

30
31 We therefore would resist any attempt on your part to try to re-litigate an issue that is already settled
32 as far as this jurisdiction is concerned.

33
34 The legality or constitutionality of the Special Court for Sierra Leone is not an issue before this Court
35 today. Your lawyer was advised yesterday that the issue at this stage is what we call in law, *res*
36 *judicata*. And it is unfortunate that your opening speech or statement pursuant to Rule 84 should
37 commence with an attack on the legitimacy of the Court.

1
2 I must caution you on behalf of the Bench that this Court will resist all attempts to transform what
3 should be a proper adjudication of charges before the Court into a political melodrama.

4
5 We will give you another chance to make an opening statement in conformity with Rule 84, in respect
6 of which I am certain you have been fully advised by your lawyer. But if you insist on going down the
7 path you want to go, this Court will take appropriate action to preserve the integrity of these
8 proceedings consistent with the principles of legality.

9
10 Continue.

11 THE ACCUSED GBAO:

12 Your Honour, it will be very difficult to convince any critical mind that this Court is not political and it
13 will be also very difficult to --

14 JUDGE THOMPSON:

15 I shall again intervene here and advise you that you must keep the contents of your speech --

16 THE KRIO INTERPRETER:

17 Sorry, the interpreter cannot get you clearly because the mike is not on.

18 JUDGE THOMPSON:

19 -- within the limits of the provisions of Rule 84.

20
21 Continue.

22 THE ACCUSED GBAO:

23 Your Honour, I still stand to say there is no judicial -- judicial exercise without politics.

24 JUDGE THOMPSON:

25 I will again interrupt you at this point and tell you that even if that is your own mindset, this Court has
26 been set up with a clear understanding that it must fulfil its mandate as an independent tribunal,
27 guaranteed judicial independence, and not to be influenced by any extraneous considerations, be
28 they political or otherwise; hence, our determination to resist any attempt by anyone, high or low, to
29 allow politics to intrude into the domain of the impartial and dispassionate administration of justice.

30
31 Continue.

32 THE ACCUSED GBAO:

33 Your Honour, the whole world, even the United Nations, knew that the conflict in Sierra Leone was
34 concluded on the basis of no winner no loser and, therefore, the party that set up the Special Court --

35 JUDGE THOMPSON:

36 Again, I must interrupt you. It would seem that you have not been sufficiently sensitised to the
37 importance -- to the importance of answering, in a preliminary way, the gravity of these allegations

1 against you and your fellow Accused.

2

3 Since this Court will not be able to evaluate any political statements that you may want to make, it is
4 difficult for us to allow you to continue in this frame of mind. For this reason, we will not allow you to
5 proceed further with the making of what this Bench deems is a political statement, since Rule 84 does
6 not allow an Accused person to make a political statement in response to the opening statement of
7 the Prosecution.

8

9 Please sit down.

10 THE ACCUSED GBAO:

11 Your Honour, permit me to say something, sir.

12 MR. PRESIDENT:

13 Now, Mr. Gbao, are you prepared to conform to the --

14 THE ACCUSED GBAO:

15 Your Honour, if you don't give me *(overlapping microphones)*.

16 MR. PRESIDENT:

17 Mr. Gbao, listen to me, I'm talking to you --

18 THE ACCUSED GBAO:

19 -- I will walk out of the court with protest that I don't recognise the Special Court.

20 MR. PRESIDENT:

21 Are you prepared to make a statement under Article -- under Rule 84, you know, of the Rules of
22 Procedure?

23 THE ACCUSED GBAO:

24 Your Lordship, what I'm trying to say here is that the Special Court is political and it is politics that
25 even established the Special Court, so if you disallow me from making such a statement pertaining
26 the Special Court --

27 MR. PRESIDENT:

28 Well, you will sit down.

29 THE ACCUSED GBAO:

30 Your Lordship, I'm please --

31 MR. PRESIDENT:

32 Milosevic adopted the same attitude so you will not be -- you will not be the first. You will not be the
33 first; Milosevic did the same thing but he is being tried today. So if you like, you know, it's your option,
34 yes.

35 THE ACCUSED GBAO:

36 I need a neutral organisation to take over this matter. In fact, the Special Court is set up by the
37 parties that are in compliance --

1 MR. PRESIDENT:

2 Please sit down, Mr. Gbao.

3 THE ACCUSED GBAO:

4 So, I don't think that I can recognise the Special Court. *(Microphone not activated)* let them try me --
5 let them take me anywhere --

6 THE KRIO INTERPRETER:

7 The interpreter cannot do his work because the speaker does not put his mike on.

8 MR. PRESIDENT:

9 Yes, Mr. Brown, yes.

10 MR. BROWN:

11 Your Honour, just briefly. Without in any way waiving any of the jurisdictional arguments previously
12 raised on behalf of Mr. Kallon and previously ruled on, I want to make it clear that with all deference to
13 Mr. Gbao, his use of the plural pronoun "we" did not reflect the fact that we have joined in this
14 particular application. I want to make that as clear as I can without in any way infringing on what
15 occurs between the Accused and the Court.

16 MR. PRESIDENT:

17 Well, we are at the -- at a stage where --

18 JUDGE THOMPSON:

19 Is the Prosecution ready to proceed with the calling of their first witness?

20 MR. CLAYSON:

21 I'm sorry, but --

22 MS. TAYLOR:

23 Yes, in answer to Your Honour's question, the Prosecution is --

24 JUDGE THOMPSON:

25 I was talking to the Prosecution. Please sit down, Mr. Clayson.

26 MR. THOMPSON:

27 Yes, Your Honour, the Prosecution is prepared to call its first witness and the witness will be called by
28 my learned friend Mr. Tejan-Cole.

29 JUDGE THOMPSON:

30 Thank you, counsel.

31

32 Mr. Clayson, you wanted to intervene.

33 MR. CLAYSON:

34 Yes. This is the point at which I would ask Your Lordships to rule on the issues of disclosure which I
35 have mentioned previously and which I would wish to address in a little detail.

36

37 Your Lordships know that there is an outstanding Defence motion about this which lists in great detail

1 the issues under both Rule 66 and Rule 68 which the Defence invite you to rule upon.

2
3 Putting it simply, our position is we are not in a position adequately to cross-examine any witness
4 unless and until we are satisfied that we have had proper disclosure of all exculpatory material in this
5 case. We do not know until we have full disclosure of that material the extent to which it cross
6 references, and therefore, it's completely impossible for us to know how we should go about cross-
7 examining any witness until the Prosecution have fully complied with their duties particularly under
8 Rule 68.

9
10 I mentioned yesterday briefly that it was only on Wednesday of last week that we received for the first
11 time any documents of any real relevance in relation to exculpatory material in this case at all.

12
13 I don't know if Your Lordship caught my remark yesterday, but those documents indicate that the
14 Prosecution has done nothing less than pay substantial sums of money to some of the witnesses it
15 intends to call. We have only received documents of that sort, as I say, last Wednesday and they
16 indicate that in the case of important witnesses a substantially different approach is being adopted by
17 the Prosecution from which they've adopted in relation to witnesses who I might call "ordinary
18 witnesses".

19
20 What I mean by this is when I refer to those witnesses who the Prosecution yesterday referred as
21 "insiders"; that is to say, ex-RUF personnel. Those witnesses have been treated materially differently
22 from other ordinary witnesses. We have no complaint whatsoever about the receipt by witnesses of
23 proper expenses or proper remuneration for expenses which they have incurred in the ordinary way in
24 providing witness statements to the Prosecution, but it's a million miles away from that when one sees
25 payments, as in one case, of no less than in total amount four and a half thousand dollars -- four and
26 a half thousand dollars before this matter even gets to trial in relation to a particular witness. That
27 witness is one within the first trial period. And more particularly, I can explain to you in detail, I have
28 copies of the documents for you, but I'm sure you'll accept it from me, that reason given for those
29 disbursements I would say are disingenuous; they are not what you would expect. They include
30 things such as luggage, clothing, and a very non-specific word, "maintenance". A payment, a single
31 payment to one witness for maintenance of 2,000 dollars. Cash for convictions, is that what this is
32 about?

33
34 We heard some very emotive expressions yesterday which made those on the Defence side very
35 angry indeed. Well, I throw one back at the Prosecution, cash for convictions, is that what these
36 payments are about?

1 Now, I have been keen in a few moments to try to get the depth and gravity of these point over to this
2 Court. Our concern has now been heightened to a level at which, as I've expressed a moment ago,
3 we do not feel in the least bit confident that we can properly cross-examine any witness in this case
4 until we've had full and proper disclosure of what this Prosecution has been up to concerning
5 witnesses.

6
7 Can I refer Your Lordships back -- I know Your Lordships will be aware of it -- to the material parts of
8 our filed motion which, as you know, speak in terms about the many different areas in which benefits
9 might be given, promised or held out to potential witness. I speak of things such as payments,
10 amnesties; we've had no hint of whether any promise has been given to any potential witness to the
11 effect that he or she will not be prosecuted if he or she gives evidence to this Court, even though we
12 have asked specifically for that.

13
14 And so we ask now that the Prosecution comply properly and fully and completely, go away, do it's
15 job, and, after, whatever period of time it needs, come back with whatever it should disclose to us.

16
17 Exculpatory material plainly includes anything which may be of assistance to the Defence or which
18 might undermine the Prosecution. That -- I use that term, I'm sure this Court will be more than familiar
19 with it; it's a universal application. It basically means -- putting it in a very simple way -- if it hurts them
20 they should disclose it. And sadly, as this very recent disclosure so clearly demonstrates, they've
21 been incredibly reluctant to give us anything. And the whole fairness of this trial, as I said earlier
22 today, is going to be undermined in a fundamental way if we cannot reasonably be satisfied about this
23 issue.

24 JUDGE THOMPSON:

25 Your point is that they've driven a horse and cart through Rule 68?

26 MR. CLAYSON:

27 I beg your pardon?

28 JUDGE THOMPSON:

29 Have they driven a horse and cart through Rule 68?

30 MR. CLAYSON:

31 Absolutely. I know Your Honours yesterday made it very clear that you wish to protect the
32 defendants' rights to a fair trial perhaps beyond anything else. The avenue to do that is to ensure that
33 the Prosecution fully and properly comply with this duty at this stage because we really are
34 hamstrung, completely impeded in our efforts to defend these defendants if we cannot and the Court
35 cannot reasonably be satisfied on this issue.

36 JUDGE THOMPSON:

37 And you're prepared to put it as high as -- that probably we might be approaching the level of a trial by

1 ambush?

2 MR. CLAYSON:

3 Well, it is -- it is almost trial by --

4 JUDGE THOMPSON:

5 Because from the gravity of the complaints, I am beginning to get the impression that if these
6 allegations are justified we may be getting to that threshold, but I will let you continue to expand on
7 your position.

8 MR. CLAYSON:

9 Well, it doesn't surprise me that Your Lordship speaks in these terms. Indeed, I welcome it and I'm
10 sure the defendants will be reassured by your comment, but as I say -- and I do wish to draw this
11 distinction very clearly -- we have no difficulty at all with proper, modest payments for expenses. One
12 sees in the documents payments to a witness for -- of 5,000 Leones for a meal, 10,000 for
13 transportation; I'm not concerned with those payments at all. But then later in the documents one
14 gets to a point where in relation to two insiders one sees a very different pattern; one sees large
15 payments in dollar. And as I said -- I mentioned, we have the evidence for one witness now a 2,000
16 dollar payment for maintenance. What do we want to see in relation to these issues? Well, it raises a
17 whole host of questions.

18
19 From what fund are these payments being made? Where are the claim forms put in by the witnesses
20 which indicate that they have spent the money for which they are now being remunerated, and the
21 bills that go with those claim forms? Who administers this fund? The Defence -- equality of arms
22 require nothing less than immediate access to this fund, because if it is to be justified -- if these
23 payments are to be justified, we should have access to this fund. Is it a fund administered through
24 this Court? Is it through the Registrar's office or not? Is it discreetly held within the Prosecution? I
25 know of no fund of this sort available to the Defence. And this I don't propose is an exhaustive list of
26 the questions which this disclosure, this modest disclosure raises.

27
28 I'm very glad we've had this minute disclosure because at least it provides the key to open this box,
29 but I hope I have said enough to indicate to Your Lordships just how fundamentally troubled we are
30 about this issue. This is not something which is in any sense other than at the heart of this case. My
31 submission in simple terms is that it has to be resolved before we go any further.

32 JUDGE THOMPSON:

33 Speaking for myself, these are quite serious submissions and probably we need to have the
34 Prosecution to respond and respond equally fully to these serious allegations on the part of the
35 Defence.

36

37 Does anybody else wish to associate before we give them --

1 MS. AKIN:

2 Yes, Your Honour.

3 MR. PRESIDENT:

4 Mr. Clayson, sit down. Yes, go ahead.

5 MS. AKIN:

6 Your Honour, I'm Wanda Akin for the Accused Kallon. And yesterday the Defence for Mr. Kallon also
7 joined in the motion as indicated by Mr. Clayson. And, in addition --

8 JUDGE THOMPSON:

9 So you are associating in the --

10 MS. AKIN:

11 Absolutely, Your Honour.

12 JUDGE THOMPSON:

13 -- with the submissions of Mr. Clayson?

14 MS. AKIN:

15 Yes.

16 JUDGE THOMPSON:

17 Yes.

18 MS. AKIN:

19 And, in addition, Your Honour, on behalf of Morris Kallon, who has filed a motion yesterday, entitled
20 "Morris Kallon urgent concerns about statement by co-accused."

21 JUDGE BOUTET:

22 Counsel, on that last motion you just referred to, I would invite you to be cautious about this matter
23 because we are in a public forum at this particular moment and every material related to that motion
24 had been filed and has been dealt with on a confidential basis. None of that information is in the
25 public domain at this particular moment, so if you wish to pursue that issue we can deal with it, but it
26 should be in a closed session, not in a public forum. Thank you.

27 MS. AKIN:

28 I will be guided accordingly, Your Honour.

29 JUDGE THOMPSON:

30 And in that case then, if you are adopting what Mr. Clayson said, would you adopt everything he said
31 or you want to add something useful?

32 MS. AKIN:

33 I would like to add, Your Honours, that in addition to adopting what Mr. Clayson said concerning the
34 witnesses and the payments that had been made to various witnesses, also with respect to the motion
35 that the Defence on behalf of the Accused Kallon filed yesterday, that we perhaps will have an
36 opportunity to address in a closed session. I would like to expound upon those points in a closed
37 session, but preliminarily here, now, what I would like to indicate is that prior to proceeding with the

1 Prosecution's case, the Defence for Kallon would like to have that particular motion with respect to the
2 statement that is of a confidential nature addressed in a closed session.

3 JUDGE THOMPSON:
4 Very well, the records will reflect that request.

5
6 Learned counsel for the other Accused, do you -- are you associating with the submissions of learned
7 counsel for --

8 MR. O'SHEA:
9 Your Honour, I --

10 JUDGE BOUTET:
11 Mr. O'Shea, your client has his hand raised. I don't know, do you want to consult with him before --

12 JUDGE THOMPSON:
13 Could you resolve that?

14 MR. O'SHEA:
15 Yes.

16 JUDGE THOMPSON:
17 I am allowing you to speak but apparently your client wants to speak.

18 MR. O'SHEA:
19 Yes. Well, well -- shall I find out what the difficulty is and then come back to this point?

20 JUDGE THOMPSON:
21 Yes, please.

22 MR. O'SHEA:
23 Your Honours, Mr. Gbao wishes to address Your Honours again, not under Rule 84, but as I
24 understand it, under Rule 17 of the Statute. He is raising questions about his representation and,
25 therefore, I would invite Your Honours either to hear him on that or allow me to take further
26 instructions to convey the message to you.

27 JUDGE THOMPSON:
28 Learned Counsel O'Shea, do you want a brief adjournment to consult with your client or before we --

29 MR. O'SHEA:
30 If Your Honours would --

31 JUDGE THOMPSON:
32 -- before we hear him or would you rather we hear him straight away?

33 MR. O'SHEA:
34 Yes. Well, let us put it this way, I've had lengthy consultations with him last night. It is not a surprise
35 to me. However, that notwithstanding, perhaps five minutes adjournment might be of assistance then
36 I can clarify the position with him, come back into Court, convey to the Court whatever I have to
37 convey to the Court, and perhaps at that point the Court can hear from Mr. Gbao. Is that a good

1 suggestion?

2 JUDGE THOMPSON:

3 Yes. Well, as an officer of the court, I think we need to give you as much help as we can.

4 MR. O'SHEA:

5 Yes.

6 MR. PRESIDENT:

7 Right, the Court -- the Court will rise for five minutes in order to allow you get into consultations. Court
8 will rise.

9 *(Court recessed from 1055 to 1117H)*

10 MR. PRESIDENT:

11 We resume this session.

12

13 Mr. O'Shea.

14 MR. O'SHEA:

15 Yes, Your Honours, thank you very much for that short adjournment. I think this is a circumstance
16 where it would be appropriate for Your Honours to hear from Mr. Gbao. He has something he wishes
17 to say about his representation. I have also explained to him my professional position which Your
18 Honours will know and understand when you hear what Mr. Gbao has to say and, of course, I can
19 elaborate upon further at a later stage, if necessary, but my suggestion would be that you hear from
20 Mr. Gbao first.

21 MR. PRESIDENT:

22 Well, you remember, Mr. O'Shea, that yesterday I made a cursory reference to your obligation, your
23 obligation of counsel vis-a-vis the Court --

24 MR. O'SHEA:

25 Yes.

26 MR. PRESIDENT:

27 -- and, of course, vis-a-vis your client. But I would like to say here that the obligation you have is
28 towards your client and also towards the Court --

29 MR. O'SHEA:

30 I'm aware of that.

31 MR. PRESIDENT:

32 -- to ensure that justice is done because you are not only a minister but also an official, you know, of
33 the Court, to ensure, you know, that justice is done in a fair and in an expeditious, you know, manner.
34 This said and I hope Mr. Kallon is -- Mr. Gbao is listening to me, we would ask him to -- you are
35 finished. Can we ask him to --

36 MR. O'SHEA:

37 Your Honours, yes. I'd just like to say that I am fully aware of my duty to the Court and I have acted in

1 accordance with that.

2 MR. PRESIDENT:

3 Right. Yes, all right, I think there was a motion on the floor in which we invited the Prosecution, you
4 know, to reply. And this motion and this motion was supported -- was raised by the -- by Mr. Clayson
5 and Mr. Jordash. It was also supported by Mr. Brown for his own client as well. So can we have --
6 can we have the reply from the Prosecution, please.

7 MS. TAYLOR:

8 Your Honour, the issues raised by my learned friends have to do with disclosure and putting aside the
9 issue of the disbursement lists in relation to the Prosecution witnesses that are listed to be called
10 during this first month of trial.

11

12 The Court is currently seized of a motion filed by my learned friend for the first Accused. The
13 Prosecution has responded to that and there has been a reply to that. In relation to any argument
14 that is to be heard in furtherance of those written arguments, it's in my submission that this Court has
15 a motion day, on Friday, should that become necessary and that any detailed argument in relation to
16 that motion that the Court will be assisted by should be heard on the allocated day and that is on
17 Fridays. And in support of that I would note that at the status hearing that was heard in this matter a
18 week and a half ago, there was absolutely no indication from my learned friends that any issue in
19 relation to disclosure -- and I as said, putting aside the disbursement list -- any indication whatsoever
20 that disclosure was going to prevent them from proceeding with the trial.

21 MR. PRESIDENT:

22 So you are also complaining that you have been ambushed?

23 MS. TAYLOR:

24 Not at all. There has been no ambush of my learned friends.

25

26 In relation of the issue of the disbursement lists, the Prosecution disclosed last week a list of all
27 disbursements made -- paid, rather, by the Office of the Prosecutor to the first 16 witnesses that will
28 be called in this trial. The two witnesses that my learned friend Mr. Clayson referred to are listed No.
29 15 and No. 16, that is, at the very end of this month of hearings, and in some respect it's doubtful that
30 we may even reach these witnesses to testify during this period of trial.

31

32 I do not wish to descend into the detail of the material that it was disclosed because the whole point of
33 those disbursement lists is that they are matters for cross-examination. If my friends feel that it is a
34 futile field for cross-examination, that it is, as Mr. Clayson put it, cash for convictions, then they are
35 perfectly entitled to make that forensic decision and to cross-examine those witnesses as to what
36 exactly those payments were for, how did they come to be made and, in effect, the suggestion being
37 put before this Court that their testimony has been bought and therefore their credibility would be very

1 low. They are all matters for my friends to put in cross-examination. There is nothing in -- that even
2 resembles ambush by the Prosecution in disclosing for their benefit material that they may wish to
3 cross-examine on.

4
5 And, as I said, the two witnesses that my friend referred to specifically are listed No. 15 and No. 16. It
6 is not anticipated that we would get to them until the very end of this trial session, if indeed at all.

7
8 And my friend referred to payments for luggage and all sorts of other things. Again, they are matters
9 for cross-examination, but I would point out that in the witness to which he refers where there was a
10 payment for luggage, there was also indicated there that there was a payment for airline tickets and a
11 payment for visa photographs. Now in relation to that one may join the dots as to why they were such
12 a substantial sum of money, as my friend would have it, paid to that witness as opposed to the 75,000
13 Leones paid for the first witness.

14
15 How that amounts to ambush is completely mystifying and the Prosecution reiterates that it has
16 complied with its obligations under Rule 66 and under Rule 68.

17
18 The matters of the disbursements are matters for cross-examination and any other matters raised
19 have been raised in a motion of which this Court is seized and should be heard at the appropriate
20 time, and nothing in that motion or nothing raised by my friend this morning can possibly impact upon
21 the cross-examination of the first 14 witnesses that the Prosecution is now ready to call.

22
23 As Your Honour pleases.

24 MR. PRESIDENT:

25 Thank you. May we have a brief reply from the Defence on this issue, please?

26 MR. JORDASH:

27 The first point is this, that the Prosecution have had an indication of our position in relation to
28 disclosure.

29 MR. PRESIDENT:

30 Let us -- for purposes of our proceedings, let us get things right. They are saying -- we've gotten them
31 to say that -- to be saying that the application does not subject to the fact that it has a place for the
32 first 14 witnesses, you know, who are going, you know, to be called and that there would be a
33 continued, you know, disclosure of these -- of the material which has to be disclosed. I just wanted to
34 re-echo that. Yes, you can go on.

35 MR. JORDASH:

36 Well, just dealing directly with that point, the Prosecution effectively suggest that they disclosed some
37 information but the rest we should try to obtain through cross-examination.

1

2 My learned friend talked about one way of drawing up the dots. Perhaps all that needs to be said to
3 that submission is to refer to Rule 68 and the continuing obligation to disclose any such exculpatory
4 material. There is not a rule which says they can disclose as much as they see fit and then let the
5 Defence, if they can, obtain the rest through cross-examination. It is not enough, I would submit, that
6 that approach be one adopted by the Tribunal. It is a piecemeal disclosure approach which leaves
7 the disclosures beginning and ending in the camp of the Prosecutor. Rule 68 and 66 as well, which
8 we also complain of, the way that the Prosecution have not adhered to the obligation under that Rule,
9 are there to provide valuable protection to the Defence to allow the Tribunal to supervise the
10 Prosecution disclosure.

11

12 It is simply not good enough to say, "We've disclosed some. You've got enough for the first 16, let's
13 get on with things."

14

15 This issue is much bigger than what the Prosecution would like to say. It goes to the root of this trial.
16 What is it that the Prosecution have been offering the witnesses to come to this Court to testify? Not
17 just money, but other inducement to obtain their cooperation.

18 JUDGE THOMPSON:

19 Is it your submission that the Prosecution is not in compliance with both Rules 66 and 68?

20 MR. JORDASH:

21 Well, I will put it further --

22 JUDGE THOMPSON:

23 Is --

24 MR. JORDASH:

25 I beg your pardon. Sorry, Your Honour.

26 JUDGE THOMPSON:

27 Go ahead, go ahead, go ahead.

28 MR. JORDASH:

29 I will put it stronger than that. They haven't even started -- except for this disclosure last week which
30 raises more questions than it answers -- they haven't even started to address their mind to disclosure.

31 We have received nothing under Rule 66 --

32 JUDGE THOMPSON:

33 No, actually my question really, which probably you're going to answer it, let's take Rule 66 first. What
34 -- what particular provisions have they not complied with and in what manner have not complied with
35 this provision, Rule 66?

36 MR. JORDASH:

37 Rule 66.

1 JUDGE THOMPSON:

2 Which particular sub-rule are they in breach of in your submission and how have they so contravened
3 that particular sub-rule?

4 MR. JORDASH:

5 Rule 66(A) sub-section 3.

6 JUDGE THOMPSON:

7 Yes.

8 MR. JORDASH:

9 "At the request of the Defence, subject to sub-rule B, permit the Defence to inspect any books,
10 document, photographs and tangible objects in his custody or control" -- this is just for the avoidance
11 of doubting the Prosecutor -- "which are material to the preparation of the Defence upon a showing by
12 the Defence of categories of or specific books, documents, photographs and tangible objects which
13 the Defence considers to be material to the preparation of the defence."
14

15 In the motions --

16 JUDGE THOMPSON:

17 So that's 66(A).

18 MR. JORDASH:

19 Sub-section 3.

20 JUDGE THOMPSON:

21 Sub-section 3. Right.

22 MR. JORDASH:

23 And the motion filed by the --

24 JUDGE THOMPSON:

25 The particulars of non-compliance?

26 MR. JORDASH:

27 Well, effectively the Defence has indicated in the motion of the 28th of May, 12 categories of evidence
28 which we submit is material to the Defence case.

29 JUDGE THOMPSON:

30 That have not been disclosed pursuant to 66(A)(3)?

31 MR. JORDASH:

32 But it's more than that. The approach should be, in our submission, that initially the Prosecution have
33 the evidence in their possession. They of course can make their own assessments of materiality
34 without the Defence asserting their right --

35 JUDGE THOMPSON:

36 Just a minute.
37

1 MR. JORDASH:

2 I beg your pardon.

3 JUDGE THOMPSON:

4 Go ahead.

5 MR. JORDASH:

6 They can make their own assessment of materiality without the Defence asserting their right to that
7 information -- to that evidence. Once the Defence assert their right to their evidence by listing the
8 categories as is contained within the Rule, it is for the Prosecution to then do one of three things --

9 JUDGE BOUTET:

10 Mr. Jordash, may I ask you, are you re-arguing what you've raised in your motion under 66 and 68, or
11 is this in supplement to your arguments or is this a new avenue that you are exploring at this particular
12 moment?

13 MR. JORDASH:

14 It's based on what -- it's supplementing what has been said in that motion.

15 JUDGE BOUTET:

16 Well, because this motion is already being disposed of at this particular moment by this Court, so if
17 you're adding to it at this particular moment I would like you to be very specific about it because it may
18 change what we are debating about and I would like then at that time to give a proper opportunity to
19 the Prosecution because now you are in reply to the response and now you are opening quite new
20 fields. If that is the case, in fairness to the other side too, I think they should be allowed to -- and if
21 that is the case, maybe this is an issue that we should dispose of Friday rather than today, and I
22 would like -- I would invite you to respond to what the Prosecution has said in their response that what
23 you have raised is or might be applicable to witness No. 16 or 17, and how does that preclude you to
24 proceed at this moment with the first 14 witnesses and then -- that we can carry on with this which
25 may take us indeed to Friday and we can dispose of these issues and allow you on Friday to expand
26 on that motion if this is what you want to do?

27 JUDGE THOMPSON:

28 Yes, and perhaps I should mention -- perhaps that I would say that to my brother, Judge Boutet, that I
29 requested this line of response, and to be fair to Mr. Jordash, I was the one who asked whether there
30 has been non-compliance with Rules 66 and 68. And the reason, of course, I asked was that the
31 submissions this morning were predicated upon on a level of generality and specificity on these non-
32 compliance, alleged non-compliances. But if my brother Boutet is suggesting that we -- this could be
33 addressed in a later forum or context, I certainly would not bother you with further itemising what you
34 thought are the alleged contraventions of Rules 66 and 68, without prejudice to what you need to say
35 to reinforce the position.

36 MR. PRESIDENT:

37 Yes, some new elements which you may have, you know, to accompany your application, you know,

1 so that -- yes.

2 MR. JORDASH:

3 Two aspects to that. Firstly, the issue raised by my learned friend, Mr. Clayson, which goes to the
4 heart of the credibility of each and every witness. The first witness may not receive more than
5 expenses, but they may have received such things as a re-location and other inducements. There
6 were many possibilities; I don't know, because the Prosecution are not saying.

7
8 Secondly, in relation to issues which go beyond credibility but go to evidence, which the Defence say
9 is material to their defence or evidence which may be exculpatory, we complain that we have received
10 nothing under Rules 66 and 68 relating to the substance of the trial rather than credibility. And that is
11 significant and cannot be left, we would submit, until Friday.

12
13 The first witness, for example, talks of a hearing from Johnny Paul Koroma was travelling from the
14 direction of Kabala towards Kono. That is not consistent with our instructions. The Prosecution may,
15 in the categories we've indicated, have information which suggests that indeed that is not the case
16 and that Johnny Paul Koroma was not travelling in February 1998 from Kabala to Kono. Now, there
17 is, I think 12 categories we've listed under Rule 66 and under 68, I think -- just give me a moment.

18
19 Well, item 7, "sub-sections" under Rule 68. We do not know whether the Prosecution have that
20 information because they haven't said; we don't know whether it would relate to the first, the second,
21 the 100th, or the 200th witness. What the Prosecution's now attempting to do is force this trial ahead
22 whilst maintaining their position on disclosure which is, "You can't have it," and then later on perhaps
23 disclose it in a piecemeal way that they are seeking to do with the cash for convictions payments, and
24 then take advantage of the fact that the Defence has not been able to put this information to
25 witnesses as we've gone along.

26
27 This evidence may -- we don't know -- relate to the first witness. I'm repeating myself but it's
28 important. Until the Prosecution deal with this evidence and give us what they have, which is material
29 or exculpatory, how can we possibly present our case to the witnesses they intend to call?

30 JUDGE THOMPSON:

31 But why are you alleging that they have exculpatory material and why are you so positive that they
32 have exculpatory material? Doesn't -- isn't there a burden on you to identify, with some specificity,
33 what this material is? Because if you know for sure that they have some exculpatory material, doesn't
34 the doctrine of equality of arms perhaps really require that you should indicate or identify the particular
35 material that you consider exculpatory or is that not the law? Because I'm sure that there is
36 somewhere in the jurisprudence where it says that where the Defence knows for sure what the
37 exculpatory material is and the Prosecution is saying, "We don't have that," the Defence should be

1 specific.

2 MR. JORDASH:

3 Well, I would submit that the following should actually take place: The basis upon (*inaudible*)
4 demonstrable at the status conference many months ago, at the pre-trial conference not so long ago.
5 In the latest motion we asked for -- Paragraph 16 -- "All evidence which relates to inducements made
6 to witnesses to facilitate their cooperation in giving evidence. On the face of many of the witness
7 interviews of the so-called insiders the interviewers appear to offer rewards for continued cooperation.
8 The Defence seeks all the details of offers made and rewards, including relocation packages,
9 amnesties and monies, given or due."

10
11 Each one -- on each and every occasion over the last year when the Prosecution have been asked to
12 comply with their Rule 68 obligations they have said they have done so. On the eve of the trial last
13 week, and only after the evidence had come out partly at the CDF trial, did the Prosecution turn
14 around and serve this information that they had been paying some witnesses large sums of money.
15 Had that not, on the face of it, raise a *prima facie* case and the Prosecution are in fault in complying
16 with their Rule 68 obligations. That, I would submit, has an impact because what it does is it puts the
17 burden back on the Prosecution to address their mind to the specific requests which have been
18 identified by the Defence in their motion and say what is their position in relation to it. Not to simply
19 say as they say in their reply: "The Prosecution submits that it has disclosed materials within its
20 possession to the Defence." That means nothing.

21
22 We all know, we are sitting on thousands of pages of evidence. We know they've disclosed materials
23 to the Defence; what we don't know is what is their position in relation to the specific request in the
24 motion. But what we do know now is that there is *prima facie* evidence that they have failed
25 advertently or inadvertently to comply with their Rule 68 obligations.

26
27 It is for the Prosecution now, I would submit and I would invite the Court to order them to deal with
28 these requests. It is not enough that they just served this piecemeal. It is not enough that they've just
29 pushed this trial onwards without giving the Accused the protection that they deserve and it's their
30 right under Article 17.

31 MR. PRESIDENT:

32 Yes, please.

33 MR. JORDASH:

34 Those are my submissions for the moment.

35 (*Pages 1 to 23 by Gifty C. Harding*)
36
37

1 1142H

2 MS. AKIN:

3 Your Honour, again the Defence for Kallon joins in and associates with the motion as put forward by
4 Mr. Jordash and would add, with respect, particularly to their request under Rule 66, that the
5 Prosecution supply the guideline that they have in their office that controls the standards for the
6 payments to witnesses and also provide any notes and memoranda that approve and make reference
7 to such payments. And, again, in joining with Mr. Jordash's --

8 MR. PRESIDENT:

9 But you are making -- you are taking the Prosecution aback. I mean, we don't appear to be seeing an
10 end, you know, to the arguments. You are bringing fresh applications, you know, fresh issues, you
11 know, which were not raised by Mr. Jordash and they will impact on the Prosecution's, you know,
12 rights, you know, to reply. I mean, do you think that it is proper to proceed this way?

13 MS. AKIN:

14 Your Honour, I respectfully disagree because this just expounds upon Mr. Jordash --

15 MR. PRESIDENT:6y6666666666

16 You disagree with what?

17 MS. AKIN:

18 That this is something new? It just clarifies that what Mr. Jordash and his colleagues have already
19 requested this should be included --

20 MR. PRESIDENT:

21 We know what -- we know what Mr. Clayson has asked for, we know what Mr. Jordash has asked for
22 and your enumeration does not come within that context.

23 MS. AKIN:

24 Your Honour, they have asked for an indication of all inducements that have been made for witnesses
25 to participate in this process. I am just clarifying that all inducements would include the guidelines
26 under which these inducements were made.

27 JUDGE THOMPSON:

28 May I just -- is the term "inducement" a proper term, because we heard that these were -- is that not a
29 litigious and argumentative position to take, because I am sure that the Prosecution will not accept
30 that terminology. I thought that what learned counsel for the other Accused were asking for evidence
31 of payments, allowances, something like that. I don't think the term "inducement" was used and may
32 well be too controversial at this stage --

33 MS. AKIN:

34 Your Honour, I was --

35 JUDGE THOMPSON:

36 -- because that would be a matter for cross-examination, wouldn't it, and we haven't gone there yet?

37

1 MS. AKIN:

2 It would be a matter that we would hope to cover in cross-examination.

3 JUDGE THOMPSON:

4 You see, this Chamber will not at this stage be able, if we are minded to accept what you are asking
5 for, to order the Prosecution to release evidence of inducements since we don't --

6 MS. AKIN:

7 Your Honour, whether or not it would be called an inducement --

8 JUDGE THOMPSON:

9 That's why I think we need to get that terminology straight.

10 MS. AKIN:

11 In the flea market or bazaar, that would be a place where the deals, if you will, are (*overlapping*
12 *microphones*)

13 JUDGE THOMPSON:

14 That's the point -- that's the point, you see.

15 MS. AKIN:

16 That would be brought out in cross-examination what we would label them. However, in getting the
17 list of and the payments made to the witnesses --

18 JUDGE THOMPSON:

19 Payments would be a better word than inducements because the term "inducement" is clearly
20 pregnant with a lot of meaning and it's pregnant with impropriety in the context of the law. It's -- it's --
21 it suggests something unlawful and that is what I'm saying. At this stage can you, as counsel and
22 officer of the Court, make those statements and request the Prosecution to respond and say, "Yes,
23 this was an inducement"?

24 MS. AKIN:

25 Your Honour, I would submit that, for instance, for amnesty or a plea bargain, if you will, that that
26 indeed is an inducement, but I am guided by the Court's problem with that language and would refrain
27 from using it at this juncture. However, one could --

28 JUDGE THOMPSON:

29 Yes, it's just that --

30 MS. AKIN:

31 -- fairly, even as an officer of this establishment, could conclude that --

32 JUDGE THOMPSON:

33 Of this Court, of this Court.

34 MS. AKIN:

35 Yes, as an officer of this Court one could fairly and --

36 JUDGE THOMPSON:

37 Yes. Again, you see, we must -- we must get our terminologies right. This is a court, not an

1 establishment. I am already reprimanding you in a mild way that the term "inducement" may well be
2 premature to use at this stage, because we don't know as judges at this stage whether payments
3 allegedly made were inducements or not. And if you want us to make an order, and we are so
4 minded to do that, it would be highly improper for the Bench to call a payment an inducement without
5 any evidence that it was. It is just that I want to guide you on the kind of vocabulary which we are
6 familiar with.

7 MS. AKIN:

8 I respect that, Your Honour, and will -- we will reserve for a later day the classification of such
9 payments. But, Your Honour, I would just note that under Rule 68 that the Prosecution's duty is
10 independent and continuing, and that these requests should be complied with forthwith prior to
11 proceeding with even the first witness in this matter. Thank you.

12 MR. PRESIDENT:

13 Yes, Mr. O'Shea.

14 MR. O'SHEA:

15 Yes, Your Honours, Mr. Cammegh and myself find ourselves in some difficulty. I address you as an
16 officer of the Court at this stage and not as counsel for Mr. Gbao at this stage.

17
18 The issue which is being raised here is an extremely serious issue and one which Mr. Gbao has a
19 right, in my respectful submission, to contribute to. Now, I earlier indicated to Your Honours that
20 Mr. Gbao had an issue regarding his legal representation and I would respectfully request that that
21 matter be resolved before we go any further because at the moment Mr. Cammegh and I are in limbo
22 because we cannot make any representations with regard to any legal matters until this issue is
23 resolved.

24
25 I am not aware if the Court has reservations about hearing from Mr. Gbao. If that is the case, then I
26 can address Your Honours on the matter myself. It was only --

27 MR. PRESIDENT:

28 You can address us on the matter yourself as an officer of the Court. Please, go ahead.

29 MR. O'SHEA:

30 Very well. The position is this that Mr. Gbao's position, and you have heard his position with regard to
31 recognition of the Court and I'm not going to go into that, but because of his position on that he now
32 says that he does not wish to participate in these proceedings, he does not wish to be --

33 MR. PRESIDENT:

34 Just a moment. I thought that -- maybe I misunderstood you, I thought that you were going to address
35 us as an officer of the Court --

36 MR. O'SHEA:

37 Yes.

1 MR. PRESIDENT:

2 -- on the issues that have been raised before we conclude these arguments.

3 MR. O'SHEA:

4 Oh, I see what you mean, Your Honour.

5 MR. PRESIDENT:

6 Yes.

7 MR. O'SHEA:

8 Well, Your Honour, it's difficult --

9 MR. PRESIDENT:

10 Because we have to -- we started off with a matter before we adjourned.

11 MR. O'SHEA:

12 Yes.

13 MR. PRESIDENT:

14 And we thought we should conclude it before we get back to Mr. Gbao and to --

15 MR. O'SHEA:

16 Well, I suppose in a way --

17 MR. PRESIDENT:

18 -- and to also handle this issue.

19 MR. O'SHEA:

20 -- I suppose in a way I am in Your Honours' hands. I have indicated that there is a problem over my
21 legal representation of Mr. Gbao. If Your Honour says to me that for the purpose of this particular
22 argument you would like me to present an argument as an officer of the Court, and only as an officer
23 of the Court, I will do so.

24 JUDGE THOMPSON:

25 Until such time when we -- until such time when we decide to hear your client, if we do decide to hear
26 him, it would seem that there is a presumption of regularity. You are here on his behalf.

27 MR. O'SHEA:

28 Well --

29 JUDGE THOMPSON:

30 And, therefore, as an officer of the Court you should in fact continue.

31 MR. O'SHEA:

32 Your Honour, I am here as an officer of the Court, I am not here on his behalf.

33 MR. PRESIDENT:

34 Mr. O'Shea, address the Court as an officer of the Court. Please, let's move ahead.

35 MR. O'SHEA:

36 Very well. I will do so -- I will do so in that capacity.

37

1 I did not -- I apologise to the Prosecution because I did not address this argument before the
2 Prosecution replied and so I may raise new issues and they may need to respond to them. I would
3 just like to add to the --

4 MR. PRESIDENT:

5 Please continue.

6 MR. O'SHEA:

7 Very well, Your Honour.

8
9 Just to complete the list of questions which were placed forward by Mr. Clayson on this issue,
10 Mr. Clayson asked the question, and this is the premise of his request for further information from the
11 Prosecution: who disburses this fund? Who is responsible for this fund? He also raised the question
12 of have there been claims, can we see these claims? And I would like to add to that: what are these
13 payments for? Are they for the trial period or are they for the pre-trial period? And if they are for the
14 pre-trial period, it would be my submission that they are questionable, to say the least. That is just to
15 fulfil the context.

16
17 Legally, in my submission, there are two particular problems here which are quite serious ones. The
18 most obvious problem, which has been spoken about already, is the question of cross-examination. If
19 we are going to -- if it is going to be part of the Defence case that witnesses are giving evidence for
20 the wrong motives, then that is a matter which needs to be properly prepared in cross-examination.

21
22 We have received some information with regard to payments, at least two of them, quite substantial
23 payments, and until we have all the information at our disposal we are not in a position to properly
24 cross-examine these witnesses on the question of their relationship with the Prosecution and what
25 impact that has had on them giving evidence.

26
27 Perhaps the less obvious problem here, in my submission, is the question of the power of the
28 Prosecutor. The power of the Prosecutor is set out in Article 15 of the Statute and under the Rules of
29 Procedure and Evidence a unit or section is specifically set up for dealing with questions of witnesses
30 and witness support, which is the Victims and Witnesses Unit, set up under Rule 34(A). And under
31 Rule 34(A)(iii) it is the specific duty of the Victim and Witnesses Unit to provide relevant support for
32 witnesses. Therefore, there is a question over whether this is a matter within the power of the Victims
33 and Witnesses Unit to make payments to witnesses, or whether it falls within the power of the
34 Prosecutor. And having regard to Article 15 and what the Prosecutor is directed to do with regard to
35 witnesses, there is a serious question over that. So there is a second branch of legal argument which
36 relates to capacity.

37

1 What would be the effect of a successful Defence submission that the Prosecutor has no power to
2 directly make payments to witnesses. The effect of that, in my respectful submission, is a potential
3 abuse of process argument. I say potential at this stage because we do not have all the facts, but we
4 have enough information to raise serious questions about what is going on.

5
6 Two figures that I calculated -- and they may be wrong because my maths are not good -- but in
7 relation to one witness, and to respect protective measures I will not mention the pseudonym or the
8 name, but in relation to one witness -- and the Prosecution will correct me if I am wrong -- I have
9 calculated a figure of \$5,526.60 which is extraordinary and raises very serious questions.

10
11 So it is in that legal context with those two branches, the right to properly cross-examine and the
12 question of the proper powers of the Prosecutor and whether there may have been an abuse of
13 process here, that we say that we are entitled to the full context and the full facts so that we can
14 appraise the position.

15 JUDGE THOMPSON:

16 Enlighten me a bit. Some of the submissions that you have just referred to whether -- for example,
17 whether the Prosecution has the authority to do what they are purporting to do in respect of
18 witnesses --

19 MR. O'SHEA:

20 Yes.

21 JUDGE THOMPSON:

22 -- and a possible conflict with Rule 34, would there be -- on another level, would there really be issues
23 that would fall within the scope of Rule 66? Would they have anything to do with disclosure or would
24 they be issues that could be the subject matter of some motion questioning the authority, some *ultra*
25 *vires* motion? Because I am a little confused here that you are raising issues of *intra vires* and *ultra*
26 *vires*. I don't know whether as co-issues to the question of possible cross-examination, or whether
27 you are raising them in the context of -- that the Prosecution or the Office of the Prosecutor might
28 have exceeded certain powers provided for -- as provided for under the Statute. And we are in a
29 different juridical realm here than the actual question of witnesses coming to the stand to testify on
30 what payments were made to them.

31
32 Undoubtedly, of course, if you have that material they can form some affidavit evidence for some
33 other motion on a different juridical level, because I don't know where you are taking us now.

34 MR. O'SHEA:

35 Well, Your Honours, as I indicated at the outset, there are two potential legal difficulties here, and I
36 use the word potential because we don't have all the facts yet, but they are clearly intertwined
37 because they arise out of the same source.

1 What the Defence is essentially wanting to do here is to request that the Court orders the Prosecution
2 to give the full information to the Defence, and there are two possible bases for doing that. One is
3 under Rule 68 with regard to the issue of cross-examination in the sense that what is being said by
4 the Defence is that this is exculpatory material. Why? Because it provides a possible motive for
5 providing false evidence, that is why it is exculpatory.

6 JUDGE THOMPSON:

7 Yes, okay.

8 MR. O'SHEA:

9 So that is the one branch that I think Your Honour has followed with regard to the Sesay team's
10 argument.

11 JUDGE THOMPSON:

12 Yes. Okay. And the second branch?

13 MR. O'SHEA:

14 And the second branch is the issue which I raise of potential abuse of process. And, again, I come
15 back to the Rule I came to yesterday, Rule 54, and I say that this Court, if it is apprised of
16 information from any party which raises serious questions which potentially might rise -- give rise to
17 abuse of process arguments, then, in my respectful submission, the judges have the power to order
18 disclosure of information in order to protect the integrity of the Court and ensure the credibility of the
19 proceedings and the fairness of the trial.

20 MR. PRESIDENT:

21 Can you wrap up, please, so that we can --

22 MR. O'SHEA:

23 Those are my only submissions and I reiterate to Your Honour that at this particular point in time I
24 make them within the specific framework and mandate that Your Honour has given me.

25 MR. PRESIDENT:

26 Understood, understood. We have to move --

27 MR. JORDASH:

28 Would Your Honour mind if I just raise one quick third point which is this, that at some stage --

29 MR. PRESIDENT:

30 *(microphone not activated)*

31 MR. JORDASH:

32 I beg your pardon, I beg your pardon. I am sorry, Your Honour.

33 MR. PRESIDENT:

34 You have made *(inaudible)* for me. Please, go ahead. Be short, please.

35 MR. JORDASH:

36 At some stage, this information has to come from the Prosecution for this reason, Article 17; the rights
37 of the Accused, 4, subsection (b) "To have adequate time and facilities for the preparation of his or

1 her defence and to communicate with counsel of his or her own choosing."

2
3 Now, if these payments have been made in order to encourage or the effect has been to encourage
4 witnesses to come forward because of difficulties the Prosecution have had getting witnesses, then
5 the Defence are going to suffer from the same problems and ought to have access to the same fund,
6 not the fund which the witnesses talk about through cross-examination, but the fund as revealed
7 through the Prosecution. And, it goes further than that, Article 17, Article 17 4(e) "To examine, or
8 have examined, the witnesses against him or her and to obtain the attendance and examination of
9 witnesses on his or her behalf under the same conditions as witnesses against him or her."

10
11 The point, I would submit, is obvious. The Prosecution have the fund, if they are administering it, if
12 they are doing that in order to obtain witnesses to come to Court, the Defence ought to know about it.

13 JUDGE THOMPSON:

14 Is the Defence entitled to the funds too?

15 MR. JORDASH:

16 Exactly.

17 MR. PRESIDENT:

18 Exceptionally, the Court would ask the Prosecution to make a brief reply to these arguments, anything
19 new that has been raised.

20 MS. TAYLOR:

21 Your Honour, I would like to raise a question of procedure to start with. All of my learned friends for
22 each of the Accused on the other side have addressed Your Honours in relation to this point. It is not
23 at all clear whether we are dealing with the written motion filed by the first Accused, Sesay, or whether
24 there is a new motion filed also by the second Accused, Kallon, and what consequences --

25 MR. PRESIDENT:

26 The second Accused, Kallon, is associating himself with the submissions of the first Accused.

27 MS. TAYLOR:

28 The submissions, yes, Your Honour.

29 MR. PRESIDENT:

30 That is it.

31 MS. TAYLOR:

32 But there is a written motion by the first Accused, Sesay. There is nothing in writing from either the
33 second --

34 MR. PRESIDENT:

35 I say they are associating themselves. Are you replying to that?

36 MS. TAYLOR:

37 Well, I will reply to that. I also wish to raise that, with Your Honour's leave, my learned friend

1 Mr. O'Shea addressed you as an officer of the Court and raised issues that are completely beyond the
2 scope of the other issues raised by the other Defence counsel, and it is unclear on what basis, if
3 anything, those issues are now before the Court. Are they on behalf of an accused or are they at
4 large? And the Prosecution finds itself having to reply to something that is most unclear.

5
6 In any event the issues raised, with due respect to my friends for the first Accused –

7 MR. PRESIDENT:

8 Let me ask you one question. Although you say the issues are not clear, the Defence is raising the
9 issue of payments and that they do not know who made the payments. If they say, you know, that
10 fund is available to witnesses for the Prosecution as they allege, they too are entitled to access to that
11 fund. Was that clearly stated or not?

12 MS. TAYLOR:

13 That was clearly stated, but in my submission, Your Honour, it illustrates the huge leaps in logic that
14 the Defence are making on this issue. They have assumed that there is a fund. They have put
15 forward no evidence that such a fund exists. What is this fund that they talk about, in the same way
16 that they assume that the Prosecution must have evidence that they have not disclosed? In no case
17 has the Prosecution been hiding anything. The point can be illustrated by what my learned friend,
18 Mr. Jordash, said in relation to why they cannot proceed with the first witness, that is that they have
19 information that Johnny Paul Koroma was not in a particular place at a particular time when the first
20 witness for the Prosecution says that he was. And so they have, therefore, assumed that the
21 Prosecution must be hiding information that Johnny Paul Koroma was at a place contrary to where the
22 first witness says he was. Now that is a huge leap in logic and it defies the entire point of a criminal
23 trial and it should come as no surprise that the Prosecution and the Defence witnesses will say
24 different things. Just because the Prosecution has not given material that supports a Defence theory
25 or a Defence fact does not mean that the Prosecution has ever had it. And I will not go over the
26 issues in the filed response of the motion and that goes to the point that was raised by Your Honour
27 Judge Thompson as to the Defence needing to be specific as to what they say the material that the
28 Prosecution has; the 12 categories that have been raised under Section 66, are incredibly broad.

29
30 But in relation to the issue as to the payments to witnesses, and I must say that the Prosecution
31 objects to the tag that has now become used in this Court of cash for convictions, what has been
32 disclosed to the Defence is a list of disbursements that has been made by the Office of the Prosecutor
33 to the witnesses. Now, whether these witnesses have been paid additional money from a budget
34 from the Registry is a separate issue. What has been disclosed is the full information of dates and
35 payments made to witnesses, the first 16 witnesses to be called in this Chamber. And, in my
36 submission, there is absolutely no basis upon which any delay in the calling of those witnesses now
37 arises.

1 As Your Honour pleases

2 JUDGE THOMPSON:

3 May I ask one question. Because counsel -- one of the counsel on the other side there was using the
4 term inducements, which I thought clearly was a stretch. What is your response to that?

5 MS. TAYLOR:

6 The Prosecution has held out no inducement to any witness to testify in this trial.

7 MS. AKIN:

8 Your Honour, may I respond?

9 MR. PRESIDENT:

10 No, matters are closed, sorry. I'm sorry.

11 JUDGE THOMPSON:

12 We did say that matter was argumentative.

13 MR. PRESIDENT:

14 This is not something which historically has been referred to as an ex-parliament. I don't want to
15 mention, you know, to qualify it, but we cannot encourage little springing from both sides of the aisle
16 at random and please, let us be bound by our ethics and our procedures, please.

17 MR. BROWN:

18 May I ask one question?

19 MR. PRESIDENT:

20 No.

21

22 The Court is reserving a ruling on this matter for Friday, Friday the -- what is the date of Friday? What
23 is the date of Friday? Court Management, you have the register there.

24 MR. CLAYSON:

25 The 9th.

26 MR. PRESIDENT:

27 The 9th, Friday, the 9th. Yes.

28 MR. CLAYSON:

29 Sorry, would Your Honours be assisted by seeing the documents? We have copies for you, that
30 provide the information that I was referring to. It seems to me that it may be of assistance to you.

31 MR. PRESIDENT:

32 What are these documents?

33 MR. CLAYSON:

34 Copies of the documents I have mentioned that disclose the evidence of payments. I thought it might
35 be of assistance to you to see those. Otherwise, you will be ruling in (*inaudible*).

36 MR. PRESIDENT:

37 We -- we -- we -- that application should have come earlier. We would look at the application, we

1 have got your arguments and we will determine them without the documents.

2
3 We would proceed with Mr. O'Shea, you will still have to be on your feet. You consulted -- you went
4 and consulted -- you were granted an adjournment to consult with your client.

5 MR. O'SHEA:

6 Yes.

7 MR. PRESIDENT:

8 Is there any preliminary issue you want to raise before we ask him to speak? I know you did say that
9 you wanted to address the Court.

10 MR. O'SHEA:

11 It is, of course, his fundamental right as to how to be represented and on that basis it would be my
12 submission that it would be more appropriate to hear it from his own mouth.

13 MR. PRESIDENT:

14 Right. Okay, thank you. You don't need to raise your hand, we are coming to you. You can now
15 speak. You can now speak, Mr. Gbao. Yes, please. Put on your microphone, please.

16 THE ACCUSED GBAO:

17 Thank you, Your Honour. My position in this case is very simple and since my right under Article 17
18 had been denied, I have decided not to recognise this Court. And henceforth no lawyer should
19 appear here, should represent me, should defend me in this Court until the African Union, European
20 Union and the Commonwealth of Nations interfere into this matter so as to define --

21 MR. PRESIDENT:

22 Thank you, Mr. Gbao, thank you very much.

23 THE ACCUSED GBAO:

24 -- what took place in this country.

25 MR. PRESIDENT:

26 Thank you, thank you, thank you.

27 THE ACCUSED GBAO:

28 Thank you very much, sir.

29 MR. PRESIDENT:

30 Yes, we heard you.

31
32 Mr. Gbao, can you please stand up. Stand up, please. You have made an application to this Court,
33 you say you do not recognise the Court and that you don't want any lawyer to appear for you here any
34 more. That is the application you have made.

35 THE ACCUSED GBAO:

36 Yes.

37

1 MR. PRESIDENT:

2 The Court will give you a ruling on this application this afternoon at three o'clock, this afternoon at
3 three o'clock.

4 THE ACCUSED GBAO:

5 Yes, sir, I want to make a further application.

6 MR. PRESIDENT:

7 Will you --

8 THE ACCUSED GBAO:

9 I want to make a short statement about my standing before Your Lordship.

10 MR. PRESIDENT:

11 Yes, yes, what statement? Yes, go ahead.

12 THE ACCUSED GBAO:

13 My standing before Your Lordship, together with the other Accused, does not bind me to them in any
14 way from taking any independent action deemed proper for my defence in the interests of transparent
15 justice.

16 MR. PRESIDENT:

17 I hope he is -- the records have got Mr. Gbao in what -- so you think they can defend you in a way,
18 your other colleagues in the interests of justice?

19 THE ACCUSED GBAO:

20 In the interests of justice it does not bind (*inaudible*) if they want to go their own way, let them go.

21 MR. PRESIDENT:

22 Yes.

23 THE ACCUSED GBAO:

24 I stand to defend myself, I wish to fight my -- to fight this case anyhow I see proper I will bring total
25 justice.

26 MR. PRESIDENT:

27 Okay. We will be ruling on your application this afternoon at --

28 JUDGE BOUTET:

29 You may be seated, Mr. Gbao, please.

30 MR. PRESIDENT:

31 Mr. Gbao, please, sit down.

32 THE ACCUSED GBAO:

33 Thank you, Your Honours.

34 MR. PRESIDENT:

35 Yes, I said your ruling will be ready -- would be delivered at three o'clock -- it will be delivered at four
36 o'clock.

37

1 THE ACCUSED GBAO:

2 Four o'clock.

3 MR. PRESIDENT:

4 Four o'clock, yes. So we are adjourning this session. Yes --

5 MR. CÔTE:

6 With your permission, Your Honour, I just want to understand clearly. You said you are going to rule
7 on the application of the Accused, is this an application from the Accused to replace his lawyer, to
8 have no lawyer, to represent himself? If this is such a case I would have some representation to
9 make, but I don't clearly understand what is the application as Your Honours consider it made by the
10 Accused.

11 MR. PRESIDENT:

12 He says he does not recognise this Court, and that he is asking -- he doesn't want anybody to
13 represent him here any further because he doesn't recognise the Court.

14 MR. CÔTE:

15 Yes, but, I mean --

16 JUDGE THOMPSON:

17 Can I make an intervention here? I don't consider his statement about not recognising this Court as
18 an application at all. I think that statement has to be treated with the contempt that it deserves, and I
19 do so. In terms of his decision, which I think is virtually saying that he is now deciding that he doesn't
20 any more want counsel to represent him, I think we can take a position, we can rule on that.

21 MR. CÔTE:

22 Yes, so --

23 JUDGE THOMPSON:

24 We have the power to decide in the interests of justice, you know. So that is what I understand it to
25 be. But the question of not recognising the Court I treat that with utmost contempt.

26 MR. CÔTE:

27 Well, just in that sense, Your Honour, on that second part that you talked, which is also what I
28 understood, I would just like this Court to take into account that there is provision under the Rules that
29 talk about exactly that issue.

30 JUDGE THOMPSON:

31 Quite, quite, I know.

32 MR. PRESIDENT:

33 We know, we know.

34 JUDGE THOMPSON:

35 But, Counsel, I didn't want to jump the gun, you know, but I do --

36 MR. PRESIDENT:

37 But since you want to be heard, you can be heard, Mr. Prosecutor.

1 MR. CÔTE:

2 I mean, my only point is that there is an article under the Rule that talks exactly about that which gives
3 a test that this Court will certainly consider in granting such an application.

4 MR. PRESIDENT:

5 Certainly, the Court will examine all the text available before coming up with a ruling on the matter,
6 Mr. Côte. This said – Mr. Gbao, please, sit down. This said, we shall adjourn -- we shall rise and
7 adjourn the proceedings to four o'clock, 1600 hours today. The Court will now rise.

8 *(Court recessed at 1220H)*

9 *(Pages 24 to 37 by Susan G. Humphries)*

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1 *(Court resumed at 1620H)*

2 MR. PRESIDENT:

3 We are resuming the session. We are sorry for the delay. It is all housekeeping. I hope counsel
4 would understand. We are very sorry to have kept you waiting.

5
6 This said, we did adjourn to this time in order to come out with the ruling, the decision of the Court
7 on --

8 MR. BROWN:

9 Your Honour, is your sound system working? I can hardly hear the Court. I don't know if the sound
10 system is working, but your voice is quite faint over here.

11 MR. PRESIDENT:

12 It is all back inside there.

13 THE INTERPRETER:

14 Yes, My Lord, we are getting you people and we are interpreting what is being said. Yes, My Lord, we
15 are getting it and we are interpreting what is being said.

16 MR. BROWN:

17 Mr. President, you speak my language so I don't have to worry.

18 MR. PRESIDENT:

19 I see. Are you all right now?

20 MR. BROWN:

21 Fine.

22 MR. PRESIDENT:

23 All right. I was saying we adjourned to this time in order to deliver a decision on the third Accused's
24 application to do away with his counsel. And this is the decision of the Court.

25
26 The Trial Chamber of the Special Court for Sierra Leone, composed of Judge Benjamin Mutanga Itoe,
27 the Presiding Judge, Judge Bankole Thompson and Judge Pierre Boutet, both Judges in the
28 Chamber;

29
30 Seized of the oral application made by Mr. Augustine Gbao in Court on the 6th, this day, the 6th of
31 July 2004 to withdraw his counsel since he does not want anyone to represent him before the Court
32 on the grounds that he does not recognise the legitimacy of the Special Court;

33
34 Now renders its decision on this oral application:

35
36 The background of procedure and history is that during the first day of the trial on the 5th of July 2004,
37 following the completion of the opening statement by the Prosecutor, counsel for the Accused Gbao

1 expressed the intention of the Accused to make an opening statement to the Court but not pursuant to
2 Rule 54 of the Rules.

3
4 During the first day of the trial, the 5th of July 2004, following the completion of the opening statement
5 by the Prosecutor, the first Accused, as I have said, expressed the intention to make an opening
6 statement, but not pursuant to Rule 84 of the Rules.

7
8 When told by the Chamber that the right could only be exercised pursuant to Rule 84 which entails the
9 Accused being put to his election, namely, to make an opening statement after the Prosecution's
10 opening statement and to lose his right for doing so at the beginning of the presentation of his
11 evidence, counsel indicated that the request to make an opening statement was being sought under
12 Rule 54 of the Rules.

13
14 Rule 84 of the Rules of Procedure and Evidence provides as follows: "At the opening of this case
15 each party may make an opening statement confined to the evidence he intends to present in support
16 of his case. The Trial Chamber may limit the length of those statements in the interests of justice."

17
18 The Chamber granted the application warning both counsel and the accused to confine the statement
19 to the provisions of Rule 84 and reiterated that each accused would have to elect to make an opening
20 statement either after the Prosecution's opening statement or at the opening of the Defence case.

21
22 The Court further granted an adjournment until the following morning for the accused to consult with
23 his counsel in order to ensure the Accused's desire to deliver an opening statement and that the
24 contents thereof do comply with the provisions of Rule 84.

25
26 During the hearing held this morning, the 6th of July 2004, counsel for the accused confirmed the
27 Accused's intention to personally proceed with an opening statement pursuant to Rule 44 -- to Rule
28 84 of the Rules.

29
30 The issue of -- I take that paragraph again.

31
32 During the hearing of this morning, the 6th of July 2004, counsel for the accused confirmed the
33 Accused's intention to personally proceed with the opening statement pursuant to Rule 84 of the
34 Rules. Once again the Chamber warned the accused to confine his statement within the plain scope
35 and reading of Rule 84 and allowed the Accused to proceed with his opening statement.

36
37 Despite these warnings of the Court, the Accused in his statement, persistently asserted that he

1 considered the Court to be of a political nature, thereby falling completely outside the scope of
2 Rule 84 of the Rules. Once again, the Court warned the Accused to refrain from making statements
3 with a political connotation. After several interventions and observing that the Accused resolutely
4 persisted in making a political statement which is outside this code of Rule 84, the Court decided to
5 stop him from proceeding further.

6
7 Reacting to comments from the Accused, counsel applied that the matter be stood down for five
8 minutes to permit a discussion with his client. This was granted by the Court. Upon return, counsel
9 stated that he believed the Court should hear representations from the Accused. When he was
10 provided the opportunity to address the Court, the Accused stated that he decided not to recognise
11 this Court any longer and wanted to withdraw his Defence counsel who he no longer wanted to
12 represent him.

13
14 Article 17(4)(d) of the Statute of the Special Court for Sierra Leone states that the accused have the
15 right "to have legal assistance assigned to him or her, in any case where the interests of justice so
16 require".

17
18 Rule 45(E) of the Rules of Procedure and Evidence of this Court states clearly that counsel for the
19 accused "will represent the accused and conduct the case to finality." Furthermore, this provision
20 mandates that "counsel shall only be permitted to withdraw from the case to which he has been
21 assigned in the most exceptional circumstances."

22
23 As noted, counsel for Mr. Gbao have represented him throughout the entirety of these proceedings
24 before the Special Court and even during his initial appearances. Trial has now commenced and we
25 are today on the second day of trial.

26
27 According to Rule 45(E) of the Rules, "most exceptional circumstances" would need to be established
28 in order to allow Defence counsel for Mr. Gbao to withdraw from the case at this stage of the process.
29 No such exceptional circumstances have been advanced in this case. Instead, Mr. Gbao has stated
30 only that he wants his counsel to withdraw since he does not recognise the legitimacy of the Special
31 Court. We consider this assertion is patently misconceived.

32
33 The issue of the legitimacy of the Special Court has already been litigated before the Appeals
34 Chamber of this Court where it held in the cases of *Kallon, Norman and Kamara* in its Decision on
35 Constitutionality dated the 13th of March 2004, and in its Decision on Preliminary Motion on Lack of
36 Jurisdiction: Establishment of the Special Court Violates the Constitution of Sierra Leone which was
37 issued on the 25th of May 2004, that the Special Court for Sierra Leone was competent to determine

1 its own legality. It held that the relevant constitutional requirements had been fulfilled for the domestic
2 incorporation of the Special Court Agreement, and that the Court acts only in an international sphere
3 and does not form part of the national judiciary of Sierra Leone. This finding was referred to and
4 applied in the Gbao case, Decision on Preliminary Motion on the Invalidity of the Agreement Between
5 the United Nations and the Government of Sierra Leone on the Establishment of the Special Court,
6 dated the 25th of May, 2004. These findings are binding on this Chamber and thus the legitimacy of
7 the Special Court can now be considered to be *res judicata*.

8
9 It is, therefore, our considered opinion that the ground that Mr. Gbao has advanced, that is, the
10 non-recognition of the legitimacy of the Special Court, cannot constitute exceptional circumstances
11 under Rule 45(E) that are required for allowing counsel to withdraw. Counsel has the obligation to
12 conduct this case to its finality and must continue to do so. We therefore do so hold and direct.

13
14 In making this finding the Trial Chamber would like to refer to the decision of the International Criminal
15 Tribunal for Rwanda in the case of the *Prosecutor vs. Barayagwiza* of the 2nd of November 2000. In
16 that decision the Court found that Mr. Barayagwiza's assertion that he did not want to be represented
17 since he did not believe that the ICTR was an independent and impartial tribunal, could not constitute
18 exceptional circumstances warranting the withdrawal of Defence counsel.

19
20 It is clear from examining all of the circumstances of this case that the interests of justice would not be
21 served by allowing Mr. Gbao to be unrepresented before this Court. The Trial Chamber accordingly
22 takes the position that it must safeguard the rights of the Accused and the integrity of the proceedings
23 before the Court by insisting and directing that Mr. Gbao continue to be represented by counsel that
24 have represented him throughout these proceedings.

25
26 We hold that an accused person cannot waive his right to a fair and expeditious trial whatever the
27 circumstances.

28
29 In the *Barayagwiza* decision the ICTR noted: "In the present case, Mr. Barayagwiza is actually
30 boycotting the United Nations Tribunal. He has chosen both to be absent to the trial and to give no
31 instructions as to how his legal representation should proceed in the trial or as to the specifics of his
32 strategy. In such a situation, his lawyers cannot simply abide with his instruction."

33
34 We also note that all counsel before the Special Court has an obligation to act as an officer to the
35 court, in addition to acting in the interests of the accused person.

36
37 The Court hereby finds that: The Accused Gbao has not established exceptional circumstances as

1 required by Rule 45(E) in order to withdraw his counsel, and accordingly orders that counsel currently
2 on Gbao's Defence team must continue to represent the Accused and shall, in accordance with the
3 provisions of Rule 45(E), conduct the case to the finality of the proceedings.

4
5 Done in Freetown the 6th day of July, 2004.

6
7 This decision will be formalised and circulated to the parties latest tomorrow morning so that we can
8 proceed -- now how to proceed from there.

9
10 Yes, Mr. O'Shea.

11 MR. O'SHEA:

12 Yes, Your Honours, thank you very much. I would just like to inform the Court of a little additional
13 information principally for the benefit of Mr. Gbao. Mr. Gbao requested us that if we did represent
14 him, we, in addition to himself, should not appear before this Court. And we have explained to him
15 that according to our professional duties we are not capable of following that instruction. And I believe
16 he understands that position.

17 MR. PRESIDENT:

18 Well, this is a decision of the Court and we expect that unless this decision is overruled by the
19 Appeals Chamber of this Court, it is the decision that stands to be executed and to be applied in these
20 proceedings.

21
22 Yes, Mr. Gbao.

23 THE ACCUSED GBAO:

24 Good afternoon. I just want to remind Your Honour it is not a matter that I want to evade international
25 law, defy international justice. But my greatest concern, and I am still maintaining, is that the
26 agreement that produced the Special Court --

27 MR. PRESIDENT:

28 I cannot listen to you, Mr. Gbao. The Court has ruled. You will please sit down. If you are continuing
29 to contest the Agreement and the legality of the Court -- if you continue to contest the legality of the
30 Court, you can sit down because the Court will not listen to you on that. This Court is sovereign and it
31 has delivered a decision. If you are not satisfied with the decision, you can appeal against the
32 decision to wherever. But the decision is there and we will entertain no more comment on the United
33 Nations or whatever. We don't have much time, Mr. Gbao, to lose.

34 THE ACCUSED GBAO:

35 Your Honour, I'm very much afraid because the parties that set up the Special Court by the
36 competence of the judges. So my fear is that under my application in this respect is that let this
37 matter be forwarded to the EU, the Commonwealth of Nations and ECOWAS and the African Union.

1 MR. PRESIDENT:

2 That application -- Mr. Gbao, that application is rejected.

3 THE ACCUSED GBAO:

4 I mean the Geneva Conventions.

5 MR. PRESIDENT:

6 That application is rejected.

7

8 We shall proceed with this case and I hope you understand tomorrow you will be served with a
9 decision and then you can know where to proceed from there.

10 THE ACCUSED GBAO:

11 Okay, Your Honour, then I will respond to it tomorrow, sir.

12 JUDGE BOUTET:

13 Mr. Brown, we're coming to you now that you had raised an issue about disclosure of urgent concerns
14 about statements. We had indicated this morning that we would hear you on that issue later on in the
15 day. You are aware at this time I also indicated when I mentioned that this is a matter that had been
16 dealt with on a confidential matter until now, and therefore, I mentioned that we should move into a
17 closed session to hear arguments and to hear comments that could be made in this respect. So if
18 you're prepared to proceed, I would ask that the public be excluded in the sense that we close the
19 curtains and make sure that this is not broadcast on the public speakers.

20 MR. BROWN:

21 Thank you. We are prepared to proceed and we have no objection to the Court's ruling concerning
22 the confidential nature.

23

24 My colleague, Wanda Akin, will handle this argument.

25 JUDGE BOUTET:

26 Very well.

27 MR. O'SHEA:

28 Your Honours, while the curtain is being pulled, if I could just assist the Court in relation to the
29 argument which was put this morning which Your Honours are going to rule on on Friday, I would just
30 like to draw the attention of the Court to a relevant authority that Your Honours can take into
31 consideration on deliberations.

32 MR. PRESIDENT:

33 Mr. O'Shea, can you hand it to the court manager and then he will give it to us, please. You can also
34 submit a copy to the other side, to the Prosecution.

35 MR. JORDASH:

36 That has been done, Your Honour.

37

1 MR. PRESIDENT:

2 So if the Prosecution has any comments on that case, we will just save --

3 MR. O'SHEA:

4 I'll hand it up, Your Honour. Let me just quickly indicate the relevant paragraph.

5 MR. PRESIDENT:

6 No, no, mark it please, Mr. O'Shea. Kindly mark the paragraph, please. You can take your time.

7 Mr. Walker, please when Mr. O'Shea is ready --

8 MR. WALKER:

9 Your Honour.

10 MR. PRESIDENT:

11 When he is ready, you will collect the document. That's okay. Are we ready for the closed session?

12 Are we sure there are no microphones echoing on the other side? Who is the technician here?

13 *(At this point in the proceedings a portion of the transcript [pages 45 to 60] was extracted and sealed*
14 *under a separate cover as the session was heard in camera)*

15 *(Pages 38 to 44 by Roni Kerekes)*

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CERTIFICATE

We, Gifty C. Harding, Susan G. Humphries and Roni Kerekes, Official Court Reporters for the Special Court for Sierra Leone, do hereby certify that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated; that it was taken in shorthand (*machine writer*) and thereafter transcribed by computer; that the foregoing pages contain a true and correct transcription of said proceedings to the best of our ability and understanding.

We further certify that we are not of counsel nor related to any of the parties to this cause and that we are in nowise interested in the result of said cause.

_____ Gifty C. Harding

_____ Susan G. Humphries

_____ Roni Kerekes