

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

7 JULY 2004
1108H
CONTINUED TRIAL

Before the Judges:

Mutanga Itoe, Presiding
Bankole Thompson
Pierre Boutet

For the Registry:

Ms. Maureen Edmonds
Mr. Geoff Walker

For the Prosecution:

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

For the Accused Issa Sesay:

Mr. Timothy Clayson
Mr. Wayne Jordash
Mr. A.F. Serry-Kamal
Ms. Sareta Ashraph

For the Accused Morris Kallon:

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

For the Accused Augustine Gbao:

Mr. Andreas O'Shea
Mr. John Cammegh
Mr. Ben Holden

Court Reporters:

Ms. Roni Kerekes
Ms. Gifty C. Harding

1 *(At this point in the proceedings a portion of the transcript [pages 1 to 3] was extracted and sealed*
2 *under a separate cover as the session was heard in camera)*

3 MR. PRESIDENT:

4 Resuming in open session.

5 MR. PRESIDENT:

6 Yes, I see you're on your feet.

7 MR. CAMMEGH:

8 Yes, Your Honour. Your Honour will notice --

9 MR. PRESIDENT:

10 Can you, for the record, announce your name, please.

11 MR. CAMMEGH:

12 Again, it is Mr. John Cammegh for Mr. Gbao.

13
14 Your Honour, noticed that Mr. Gbao has not attended court this morning. I should tell Your Honours
15 that during a lengthy conference with Mr. Gbao yesterday evening at which all members of the his
16 legal representatives were present, he made it clear to us that he wished to take no further part in
17 these proceedings.

18
19 Now pursuant to that, we have drafted a declaration which set out the gist of what Mr. Gbao had to
20 say last night in paraphrase form, and that declaration I served on the Court this morning. Your
21 Honour will see that the copy has been signed and dated today by Mr. Gbao. I've also been able to
22 now serve copies of that same document on other parties in this case.

23
24 As Your Honours know --

25 MR. PRESIDENT:

26 Can you please read the document.

27 MR. CAMMEGH:

28 I certainly will. Does Your Honour wish me to read it in its entirety?

29 MR. PRESIDENT:

30 Yes, read it. Not in its entirety, you know the paragraphs which, you know --

31 MR. CAMMEGH:

32 It reads as follows:

33

34 I, Augustine Gbao, wish to state the following:

35

36 1. I do not recognise the Special Court of Sierra Leone as a properly constituted court of law.

37

1 2. As such, I'm resolved to take no part in the proceedings of the Special Court since to do so would
2 indicate recognition of the Special Court's legitimacy as a properly constituted court of law.

3
4 3. Further, and to protect the integrity of my position, I wish to dispense with the services of my legal
5 representatives forthwith.

6
7 4. Given that the Trial Chamber of the Special Court has ordered that I should retain their services, I
8 will hence forward refuse to furnish my former legal representatives with any further instructions
9 whatsoever.

10 5. Further, I shall demand they take no active part in the proceedings before the Special Court
11 whatsoever on my behalf.

12
13 As I just --

14 MR. PRESIDENT:

15 May we have a copy of the document, please. Has a copy been served on the prosecution?

16 MR. CAMMEGH:

17 Your Honour, copies have been served on all parties.

18 MR. PRESIDENT:

19 Do you want this document to be admitted in evidence? What are the Prosecution's comments on
20 this?

21 MS. TAYLOR:

22 I'm sorry, Your Honour, I didn't actually hear what you said. I'm sorry, could you repeat --

23 MR. PRESIDENT:

24 We want the document, you know, to go into court records as an exhibit.

25 MS. TAYLOR:

26 Yes, I think it should go in as a an exhibit.

27 MR. PRESIDENT:

28 What are your remarks to this?

29 MS. TAYLOR:

30 I think this document should be tendered as a Defence exhibit.

31 MR. PRESIDENT:

32 You have no objection to it being admitted in evidence?

33 MS. TAYLOR:

34 No, I do not.

35 MR. PRESIDENT:

36 All right. Well, the Court takes note of this document and admits it in evidence as Exhibit 1 for
37 purposes of this trial.

1 MS. TAYLOR:

2 Your Honour, might I just at this point ask that we have some system for the way that exhibits are
3 tendered in this Court. If they're simply tendered as one and sequential numbers, there may well, at
4 the end of the case, be some confusion as to the source of exhibits. And I would submit to the Court
5 that there be a system adopted so that if it is a Prosecution exhibit, it becomes P-1 if it's an exhibit
6 tendered by the Prosecution.

7 MR. PRESIDENT:

8 No, no, no. We have adopted all exhibits will be numbered numerically. It's not be P-1 or D-1 and so
9 on. They will all be numbered numerically. It will be the duty of the Court to know where to situate --
10 the Court Management, of course, as to where they will be situated as time goes on.

11 MS. TAYLOR:

12 If Your Honour please.

13 MR. PRESIDENT:

14 Yes, please.

15 MR. CAMMEGH:

16 Your Honour, we feel it is in the interests of justice that the Court is made aware of our position, that
17 is, we who represent Mr. Gbao, given that he has of course now decided to -- I forget the word I'm
18 looking for, but clearly he wishes to terminate our services as his legal team. Now clearly this opens
19 fundamental questions or raises fundamental questions so far as the progress of this trial is
20 concerned -- as far as we are concerned, that is. Perhaps it is best now if I turn to Mr. O'Shea to give
21 some indication as how to proceed.

22 MR. PRESIDENT:

23 Yes, Mr. O'Shea.

24 MR. O'SHEA:

25 Good morning, Your Honours.

26 MR. PRESIDENT:

27 Good morning.

28 MR. O'SHEA:

29 I would just like to draw the Court's attention to our national ethical position, because obviously we are
30 obviously subject to a national code of conduct. Both Mr. Cammegh and myself are members of the
31 English bar and the other members of our team are either members of the British Sierra Leonean bar
32 or associated with the Law Society in England.

33

34 Our researchers indicate that in principle there is no necessary or fundamental problem with the
35 Court's order and our national ethical position. We will continue to look into this question, but having
36 reviewed the code of conduct in England, it would appear that we can justify our position consistently
37 with this Court's order. I thought it would be useful for the Court to be aware of that. But we will

1 continue to look into that matter.

2
3 If I could also indicate that I fully understand that this Court was yesterday faced with an awkward
4 situation with no easy solution and I understand that the decision of this Court was a well-meaning
5 decision in those circumstances. I would, however, indicate that because of the fundamental nature
6 of the point in question, it is our intention to seek leave to appeal that decision. I am in Your Honours'
7 hands as to when that application is made. I'm happy, given the indications from this Court, to make
8 that application on Friday. My understanding is that within the Rules since the decision was rendered
9 orally yesterday in Court, the last day for filing such an application for leave to appeal would be
10 Friday. But I would be grateful for guidance from the Court if I'm correct in that position, because the
11 Rule states that an application for leave to appeal must be filed within three days of the delivery of the
12 decision.

13 MR. PRESIDENT:

14 Mr. O'Shea, you remember before we separated yesterday I did give the assurance that by this
15 morning you would be in possession of that decision. Are you in possession of the decision now?

16 MR. O'SHEA:

17 I am Your Honour.

18 MR. PRESIDENT:

19 You are?

20 MR. O'SHEA:

21 Yes.

22 MR. PRESIDENT:

23 When do you think the time within which you should appeal should start running?

24 MR. O'SHEA:

25 Well, my understanding of the law --

26 MR. PRESIDENT:

27 You had it at one time this morning? I imagine it was only this morning any way.

28 MR. O'SHEA:

29 Well, I received it, I think, at about 11.00, but whatever time I received it at, if the time began to run
30 from the moment that one received the written decision, then Friday would be fine. But my
31 understanding is that time begins from the moment that the party receives notice of the decision and if
32 it is delivered orally, that would be yesterday, in which case I believe that Friday is still fine. Because
33 one counts from the next day after the decision is delivered, if I'm correct.

34 JUDGE THOMPSON:

35 Isn't it the rule, the practice that the time begins to run with the notice when the appeal -- when the
36 decision is served on counsel?

37 MR. O'SHEA:

1 Well –

2 MR. PRESIDENT:

3 That's the practice that seems to --

4 MR. O'SHEA:

5 It is quite possible that I'm getting mixed up with another international tribunal.

6 JUDGE THOMPSON:

7 We did have a problem with this Rule some time ago and I think we issued a practice direction
8 indicating the time begins to run when counsel receives notice of the decision or when counsel is
9 served the decision because of also the complications imposed by the technology of electronic
10 service, and all that.

11 MR. O'SHEA:

12 Yes.

13 JUDGE THOMPSON:

14 I would have thought that would be the case, yes.

15 MR. O'SHEA:

16 I'm grateful --

17 JUDGE THOMPSON:

18 Of course there's also the provision to seek leave to appeal out of time if you're out of time.

19 MR. O'SHEA:

20 If Your Honours' indication --

21 MR. PRESIDENT:

22 But you've appealed within time, Mr. O'Shea.

23 MR. O'SHEA:

24 Thank you very much, Your Honour. Is Your Honour happy with me raising this issue on Friday or
25 would Your Honours prefers it be dealt with earlier?

26 JUDGE BOUTET:

27 What do you mean raising it Friday? Do you mean orally?

28 MR. O'SHEA:

29 Well, my suggestion would be that I put in a written application but supplement it with oral argument, if
30 Your Honours are happy with that course.

31 MR. PRESIDENT:

32 With what, Mr. O'Shea?

33 MR. O'SHEA:

34 This would be an application for leave to appeal. Your Honour asked me whether I would be putting it
35 in writing or making it orally and my suggestion is that I put it in writing and supplement it with --

36 MR. PRESIDENT:

37 Are you making the application now?

1 MR. O'SHEA:

2 We can make the application today or tomorrow and give oral argument on Friday.

3 MR. PRESIDENT:

4 Those are not complicated matters, Mr. O'Shea. We don't want to take too much time. I do not think
5 that this Chamber is against the principle of your appealing and I don't see why we should --

6 MR. O'SHEA:

7 Would Your Honours like to deal with it now?

8 JUDGE THOMPSON:

9 If this would be of help. If you look at Rule 7(A) you can see that clearly that the time shall run from
10 the day after the notice of the occurrence of the event has been received in the normal course of
11 transmission by the Registry, Counsel for the Accused or the Prosecutor, as the case may be. So
12 that should provide some help to you.

13 MR. O'SHEA:

14 Yes, thank you. I think at the moment I would just like an indication from the Court from the point of
15 view of the Court's time whether the Court would like to deal with this issue now or on Friday.

16 JUDGE BOUTET:

17 Well, I don't see why we should hear oral submissions. The practice has been that you file written
18 submissions and we deal with it in oral submissions. I don't see why we should have an exception
19 today for that.

20 MR. O'SHEA:

21 Well, if that's the preference of the Bench, that's the course I will follow.

22 JUDGE BOUTET:

23 That's the decision the Bench. Yes, you should file your documents in writing as you normally do and
24 the Prosecution will have the time to respond and we'll deal with it in the usual manner.

25 MR. O'SHEA:

26 Very well, thank you.

27

28 Your Honours, if I could just --

29 MR. PRESIDENT:

30 Yes, Mr. O'Shea.

31 MR. O'SHEA:

32 If I could just add as a thought in this that is, of course, a matter of utmost urgency. One good reason
33 for dealing with the application orally would be to expedite it. Of course, if it is Your Honours'
34 preference.

35 MR. PRESIDENT:

36 Mr. O'Shea, we have said that you should do it in writing. We've said so. Please, when we take a
37 decision, it is not good to re-open the debate on that.

1 MR. O'SHEA:

2 I meant no disrespect.

3 JUDGE THOMPSON:

4 And I wanted to support that clearly our decision has been taken. It is subject to appeal and would
5 clearly mean *functus officio*. We cannot in fact open a post mortem on our own decision.

6 MR. PRESIDENT:

7 Whilst we're on the topic, this topic, Mr. O'Shea, we would like to draw your attention to the fact that
8 our decision rendered yesterday stands. The measures or the orders made therein will be executed
9 notwithstanding the appeal which you are filing against that decision.

10 MR. O'SHEA:

11 Yes.

12 MR. PRESIDENT:

13 I hope that that is clearly understood.

14 MR. O'SHEA:

15 Yes. Well, it is our intention to make that assumption as well.

16 MR. PRESIDENT:

17 Right.

18 JUDGE THOMPSON:

19 Learned counsel on both sides, based on what counsel for the third accused have stated, it would
20 seem that we are confronted with a situation where this Court may well have to invoke an
21 extraordinary procedure. As a matter of law, Article 17(4)(d) of our Statute imposes upon the Court a
22 mandatory requirement to try accused persons in their presence.

23

24 Rule 60 of the Special Court Rules makes provision for trial in absentia by way of an exception to
25 Article 17(4)(d) of the Statute, because also Rule 80 of the Special Court Rules provides for trial in an
26 accuser's absence if he is removed from the Court due to disruptive conduct.

27

28 These are the statutory provisions or authorities governing the situation with which we are presented
29 at this point in time. I'm sure that learned counsel on both sides do appreciate that in common law
30 jurisdictions the general rule is that an accused person is to be tried in his presence. Exceptionally in,
31 for example, Canada the Courts may continue to try an accused person in absentia where he was
32 present at the start of the trial. The Chamber's usage has also disclosed that in civil law jurisdiction
33 the practice is widespread for accused persons to be tried in absentia, subject to certain procedural
34 due process safeguards; for example, proof of service of actual notice to attend.

35

36 The international situation can be summarised in this way. The European Court of Human Rights has
37 interpreted Article 6.1 and 6.3 of the European Convention on Human Rights as not excluding the

1 possibility of trial in absentia.

2
3 The position in ICTY and ICTR are also akin to that of this Court. The ICTY has not to date tried any
4 accused in absentia. On the other hand, at the level of the ICTR, one accused by the name of
5 *Barayagwiza*, who boycotted his trial, was tried in absentia.

6
7 This Court is about to embark upon an adoption of Rule 60 of our Rules, and to this end, it would be
8 necessary, in addition to the exhibit that has been tendered in respect of the non-attendance of the
9 third accused, to hear sworn testimony in order to satisfy the provisions and prescriptions of Rule 60.
10 So we'll now call the head of the Detention Unit to come to the witness stand and take the oath.

11 [The witness entered court]

12 MS. EDMONDS:

13 Please hold the book in your right hand and repeat the oath.

14 THE WITNESS:

15 I solemnly swear on the Bible that I will speak the truth, the whole truth and nothing but the truth, so
16 help me God.

17 JOHANNES WAGENAAR,

18 first having been duly sworn,

19 testified as follows:

20 QUESTIONED BY THE COURT:

21 MR. PRESIDENT:

22 What is your position?

23 THE WITNESS:

24 Sir, I'm an international supervisor at the Detention Centre.

25 MR. PRESIDENT:

26 And your name?

27 THE WITNESS:

28 My name is Johannes Wagenaar.

29 JUDGE THOMPSON:

30 You are in custody of persons who are indicted before the Special Court?

31 THE WITNESS:

32 That's true, Your Honour.

33 JUDGE THOMPSON:

34 Are you in custody of one Augustine Gbao?

35 THE WITNESS:

36 That is true, yes.

37

1 JUDGE THOMPSON:

2 Who is in fact indicted before this Court?

3 THE WITNESS:

4 That is true, yes, sir.

5 JUDGE THOMPSON:

6 Do you see him in Court today?

7 THE WITNESS:

8 No, he is absent, sir.

9 JUDGE THOMPSON:

10 Could you tell the court the circumstances for his non-attendance.

11 THE WITNESS:

12 I was informed this morning by one of the national staff members that Mr. Gbao said that he will not
13 attend court this morning. I then went into the Detention Centre to see Mr. Gbao. He was busy
14 playing a board game with one of his co-inmates there and I asked him --

15 JUDGE THOMPSON:

16 Slowly, slowly. Go ahead

17 THE WITNESS:

18 I asked him if the information that I received this morning was true, and he said yes, he will not come
19 to court this morning. I then said to him: My instructions to you is that you must go to court. And he
20 just repeated: I will not go to court. I was about to then turn around to walk away when he said: Tell
21 them - whoever he meant - that he will only come back to this court after he received a decision on his
22 statement that he do not -- I can't exactly remember his words.

23 JUDGE THOMPSON:

24 Paraphrase his words.

25 THE WITNESS:

26 He said in court the previous day he doesn't --

27 JUDGE THOMPSON:

28 Paraphrase it.

29 THE WITNESS:

30 Notify. Not notify. I can't get the English word now. Sorry for that.

31 JUDGE THOMPSON:

32 Anything else you want to tell the Court?

33 THE WITNESS:

34 That's all really. I turned and walked away.

35 JUDGE THOMPSON:

36 Where is he now?

37

1 THE WITNESS:

2 He is still there, sir.

3 JUDGE THOMPSON:

4 Can you comment on his condition?

5 THE WITNESS:

6 He was laughing at a joke, I don't know what kind of joke, and he looked perfectly healthy for me at
7 that point in time.

8 JUDGE THOMPSON:

9 Did he look well to you?

10 THE WITNESS:

11 He did look well, yeah.

12 JUDGE THOMPSON:

13 Counsel, on that side do you want to ask the witness any questions?

14 MR. O'SHEA:

15 Your Honour, no. I could perhaps assist in the recollection of what Mr. Gbao said because I know
16 what he said, but I won't do that because it won't assist the Court.

17 JUDGE THOMPSON:

18 Thank you. Prosecution any questions for the witness?

19 MS. TAYLOR:

20 No, Your Honour.

21 JUDGE THOMPSON:

22 Thank you, very much. You're released.

23 THE WITNESS:

24 You thank you.

25 [Witness withdrew]

26 JUDGE THOMPSON:

27 Call the Registrar or his delegate of the Special Court.

28 MR. PRESIDENT:

29 Learned counsel, the Chamber will rise to advise itself on the facts that have been brought before it
30 this morning and we will resume to give a decision on this situation at 1:00. At 1:00. So the Court will
31 rise.

32 *(Court recessed at 1208H)*

33 *(Pages 4 to 13 by Roni Kerekes)*

34

35

1 (*Court resumed at 1327H*)

2 MR. PRESIDENT:

3 Learned Counsel, we are resuming the session and we have a brief ruling on the absence of the third
4 Accused, and the decision that the Chamber has arrived at after an examination of the evidence that
5 was presented to us this morning, the evidence in terms of Exhibit 1 and the oral testimony of
6 Mr. Wagenwaar. The opinion will be read by our learned brother, Honourable Judge Bankole
7 Thompson.

8 JUDGE THOMPSON:

9 This is the unanimous ruling of the Chamber on the issue of the non-attendance in court of the third
10 Accused.

11
12 Based on the evidence before this Court on the issue of the non-attendance of the third Accused, this
13 Chamber finds as follows:

14
15 1. That the third Accused made his initial appearance on the indictment upon which he is charged
16 before this Court pursuant to Rule 61 of the Rules on the 16th of April 2003;

17
18 2. That the third Accused has been afforded the right to appear at his trial;

19
20 3. That the third Accused did appear for his trial on the 5th and 6th days of July 2004;

21
22 4. That the third Accused was present in court on 6th July 2004 when the matter was adjourned to
23 today, 7th July 2004;

24
25 5. That the third Accused was fully notified this morning by Mr. Wagenwaar that he should attend
26 court for the purpose of his trial, but that he refused to do so;

27
28 6. That the third Accused, according to Mr. Wagenwaar, appeared to be in good health.

29
30 In the light of the foregoing evidence and findings, this Court is satisfied that the third Accused has
31 waived his right to be present at this trial and has -- the Court has no other option but to permit the
32 joint trial of all the three Accused persons to proceed in the absence of the third Accused pursuant to
33 Rule 60(A)(1) of the Rules,. And it is so ordered.

34
35 Pursuant to Rule 60(B) of the Rules, the Chamber also directs that Professor O'Shea and other
36 members of his team continue to represent the third Accused in accordance with the provision of the
37 decision on application to withdraw counsel on 6th July 2004.

1 The chief of the detention facility of the Special Court shall maintain on a daily basis a record of the
2 waiver of the third Accused to appear in court. A reasoned decision will be filed accordingly.

3 MR. PRESIDENT:

4 Can the Court Management -- we'll now be moving to a closed session. Can the Court Management
5 please take -- and we are not rising, we'll wait for the disposition to be put in place for a closed
6 session. And after that, of course, we shall resume with the open session and the public, if it is
7 interested, could -- could come and attend the open session that will follow.

8 *(At this point in the proceeding a portion of the transcript [pages 16 to 18] was extracted and sealed*
9 *under separate cover as the session was heard in camera)*

10 *(Pages 14 to 15 by Gifty C. Harding)*

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1 MR. PRESIDENT:

2 The Chamber would like to announce that -- to learned counsel that this matter is adjourned to
3 Monday, the -- I think it's Monday the 10th of July -- the 12 July, I'm sorry, Monday the 12th of July
4 2004 at ten o'clock and the Chamber wants to give an indication that it will proceed with hearing the
5 evidence of the witnesses for the Prosecution from that date.

6
7 We, of course, had made an earlier ruling that we were going to deliver decisions on pending motions
8 on Friday at 11 o'clock, not ten o'clock. At 11 o'clock we shall be delivering decisions on pending
9 motions which -- and applications which have been made by learned counsel for the Defence, and if I
10 have announced the date, you know, of Monday it is to put the parties on guard that we shall move
11 forward by taking the evidence of some Prosecution witnesses as from Monday.

12
13 We are adjourning today to Friday at 11 o'clock in order to deliver the rulings on outstanding matters.

14 JUDGE THOMPSON:

15 Yes, Mr. O'Shea.

16 MR. O'SHEA:

17 Yes, Your Honour. Your Honour was fair enough to indicate to the parties the Bench's intention in
18 relation to proceeding with the evidence on Monday and it's only fair that I should indicate that we also
19 have a matter to raise in relation to the witnesses which we can raise on Monday or we can raise on
20 Friday, if it's convenient.

21 MR. PRESIDENT:

22 You can raise -- yes, what do you want to raise? We can hear you now.

23 MR. O'SHEA:

24 Yes, very well.

25
26 Your Honours, this -- I have an application to make in relation to one of the witnesses, Witness
27 TF1-151. During the course of this application I would like to also make reference to the following
28 witnesses but I will not be seeking any specific relief in relation to these witnesses, but I will -- I deem
29 it important to mention them: TF1-074, TF --

30 MR. PRESIDENT:

31 You were at TF1-151.

32 MR. O'SHEA:

33 Yes, TF1-151 I have an application to make for which I'll be seeking specific relief and the following
34 witnesses I will be mentioning but not seeking specific relief: TF1-074, TF1-060, TF1-217, TF1-077,
35 TF1-199 and TF1-253.

36
37 Now, in relation to the Witness TF1-151, the Prosecution will no doubt acknowledge that this is an

1 important witness from their point of view. It is a witness involving a fairly substantial amount of
2 material, comparatively speaking, 754 pages of statement and a number of interviews, and we would
3 anticipate -- and this is only a very rough estimate which Prosecution may or may not have a different
4 view upon -- but we anticipate that this is a witness which is likely to last at least a week in terms of
5 the giving of evidence.

6
7 Now, the complaint essentially is this that by -- pursuant to the orders on protective measures which
8 have been delivered by this Court, the Prosecution is under an obligation to serve unredacted material
9 on the Defence 42 days before a witness gives testimony.

10
11 During the pleadings preceding these orders on protective measures, arguments were put forward
12 from the Prosecution and the Defence on a very delicate issue. It is my submission that the issue of
13 protective measures is a very delicate and difficult issue because it attempts to balance the rights of
14 the Accused and the protection of witnesses before this Court. Because it in some way limits
15 necessarily the full application of the rights of the Accused in terms of preparation, it is, in my
16 submission, absolutely essential that Your Honours' rulings with respect to the time periods within
17 which materials are served are respected absolutely.

18
19 Now, in the case of Witness TF1-151, I do not assert that there was any deliberate violation of Your
20 Honours' protective measures orders, it may very well --

21 MR. PRESIDENT:

22 But you are saying that in TF1-151 there was a violation.

23 MR. O'SHEA:

24 I'm saying there was a violation. We received an unredacted interview on the 2nd of July 2004 in
25 relation to this witness and that interview was 42 pages long. Further, we received another interview
26 on the 25th of June 2004, a little earlier, in relation to the same witness which was 19 pages long. So
27 there has been a technical violation of the protective measures order of this Court. Again, I am not
28 asserting it was deliberate, and I'm prepared to accept until proved otherwise that it was an oversight
29 of the part of the Prosecution.

30
31 However, it does, in my submission, cause us a degree of prejudice because of the significance of
32 this witness and the amount of materials which exist in relation to this witness in total. And the relief
33 that I am seeking is this: We have the three joint -- Co-accused have jointly written a letter to the
34 Prosecution on the 2nd of July, which we have not yet received a response for. I appreciate that that
35 was not long ago therefore, again, I don't assert great blame on the Prosecution for that; however, it is
36 a matter of urgency and we would have hoped for a prompter response so that -- so that we would
37 know the position of the Prosecution before making this application. But the relief that we seek is that

1 -- and this is a relief that we indicated in that letter of the 2nd of July to the Prosecution -- is that this
2 Witness TF1-151 be put back to the next trial session so that we are not prejudiced of this violation of
3 Your Honours' own order.

4 MR. PRESIDENT:

5 This is precisely what we were thinking of, you know. That witness is listed the 16th and we -- it might
6 well be a long way getting to that witness, you know, certainly not on Monday, Mr. O'Shea.

7 MR. O'SHEA:

8 Well, I'm --

9 MR. PRESIDENT:

10 Certainly not on Tuesday, not even for the whole of next week. I have my doubts. From the
11 experiences we've had with the witnesses, don't you think that --

12 MR. O'SHEA:

13 Well, Your Honour, no. With all due respect, when Your Honours considered the question of
14 protective measures and created this balance, Your Honours chose 42 days.

15 MR. PRESIDENT:

16 From the date when the witness is supposed to testify.

17 MR. O'SHEA:

18 Yes.

19 MR. PRESIDENT:

20 Yes.

21 MR. O'SHEA:

22 But 42 days before the 16th of July will take us to somewhere around 6th of June. I may be wrong
23 about that but anyway --

24 JUDGE BOUTET:

25 Early June.

26 MR. O'SHEA:

27 Sorry?

28 JUDGE BOUTET:

29 Early June.

30 MR. O'SHEA:

31 Early June, thank you. But the -- when Your Honours made these orders, in my submission Your
32 Honours made these orders in full recognition of the fact that there was a minimum fair period of time
33 in which an accused person needed not only to read documents, but also to carry out any necessary
34 investigations which might be necessary for the purpose of cross-examination.

35
36 So, in other words, the 42 days has deep meaning for the Court and for us. So, we do say that there
37 is prejudice. I accept that we can do something in the time we have.

1 MR. PRESIDENT:

2 Do you think there is prejudice already? Do you think there is a prejudice already? Because on
3 Monday – if, for instance, the Prosecution wanted to call this witness on Monday, I'm sure you would
4 be -- there would be a definite, you know, prejudice. Would you think in your objective judgment, you
5 know, that there is a prejudice already at this point in time when you are addressing the Court?

6 MR. O'SHEA:

7 Well, there is a prejudice in that according to the Prosecution's plan, this witness will be called on the
8 16th of July and the prejudice is that --

9 JUDGE BOUTET:

10 Not 16th of July, 16th witness.

11 MR. PRESIDENT:

12 Sixteenth, yes.

13 MR. O'SHEA:

14 Ah, yes, I'm sorry 16th witness, and given the --

15 MR. PRESIDENT:

16 And, in any event, it's not for the Prosecution to determine the schedule, you know, the timing of when
17 the witness is going to be called. I mean, it depends on the due process that we have -- we are
18 applying in court here. Nobody -- we can't even be sure. You were talking of a witness who is going
19 to testify for at least one week, well, that is your speculation it could be more than one week, it could
20 be less.

21 MR. O'SHEA:

22 But, Your Honour, I would invite -- I would respectfully invite the Court to consider it appropriate for
23 matters such as this to be raised as early as possible so as to assist the Court in the smooth running
24 of these proceedings. If I were to wait until I saw the prejudice it might --

25 MR. PRESIDENT:

26 So your application is pre-emptive in a sense?

27 MR. O'SHEA:

28 Pre-emptive but not unjustified in my respectful submission.

29 MR. PRESIDENT:

30 Right.

31 MR. O'SHEA:

32 Some applications ought to be made pre-emptively simply in order to assist the Court with its
33 timetable and to prevent prejudice before it happens would be my submission. So that's my
34 application.

35

36 Apart from the specific relief I seek in relation to that witness -- sorry, excuse me one moment.

37

1 MR. PRESIDENT:

2 Yes.

3 MR. O'SHEA:

4 Well, Ms. Ashraph reminds me, and it's a good point, that the prejudice begins now in the sense that
5 we have to organise our investigations and begin conducting our investigations and if we have to
6 focus on a very large witness such as this now, something has to be compromised. But anyway, that
7 aside, there is another aspect of this that I would like to raise with the Court. In one sense I'm making
8 an application under Rule 5 for relief by virtue of the violation of the Court's order, but in another
9 sense, quite apart from that relief and whether the Court is minded to grant that relief or not, I am
10 deeply concerned that a pattern does not develop during the course of this trial with regard to this -- I
11 would describe the sacrosanct period of 42 days, and I would request the Court -- there would be a
12 number of things I could request the Court to do but I won't. I will request the Court that the mildest
13 form of -- form of not relief, but assistance in simply asking the Court to indicate to the Prosecution
14 that the Court takes it order in relation to the 40-day period (*sic*) very seriously and will not
15 countenance situations where unredacted material is served on a slate.

16
17 The reason why I say that is because I have observed in other international trials how these patterns
18 can develop. Because of course Rule 5 only allows for relief if there is prejudice and if we can't prove
19 prejudice, then the Prosecution, if they were so minded -- and I'm not suggesting that they are -- if
20 they were so minded they could effectively violate this Court's orders with impunity provided they
21 could avoid the prejudice issue. And, therefore, I'm inviting the Court simply to address the
22 Prosecution on that so that the conduct of this trial is done in an efficient manner and we don't move
23 slowly into a pattern of untidiness, if I can put it that way. And I say all this with the greatest of respect
24 to the Prosecution as well.

25
26 Those other witnesses that I mentioned to Your Honours earlier are witnesses for all of which we have
27 been served with further unredacted material, admittedly small in the sense that each of them involves
28 a statement of one page, but statements which were all served on the 30th of June 2004. So here we
29 have an example of a violation for which I could not properly seek relief.

30

31 Those are my submissions Your Honour.

32 JUDGE BOUTET:

33 These last documents that you are talking about, what are the dates of these documents? You say
34 they've been served on that date but what are they referring to?

35 MR. O'SHEA:

36 Yes. Could I have one moment?

37

1 JUDGE BOUTET:

2 Yes.

3 MR. O'SHEA:

4 I see one document is dated the 20th of January. The nature of the documents are interview notes.
5 As I indicated earlier, Your Honour, we do not assert in relation to those documents that there has
6 been prejudice or will be prejudiced, but we cite these as examples of technical violations simply with
7 a view to trying to move into a situation where rule -- the 42-day rule does in fact become sacrosanct.
8 Because this is clearly -- these are clearly places where there is no prejudice, but there will also be
9 borderline cases in the future.

10 MR. PRESIDENT:

11 Are you through?

12 MR. O'SHEA:

13 Yes.

14 MR. PRESIDENT:

15 Thank you.

16

17 The Prosecution.

18 MS. TAYLOR:

19 Thank you, Your Honours. If I may deal with the last issue first, and that is the materials in relation to
20 the Witnesses TF1-074, 060, 217, 077, 199 and 253 that is being referred to by my learned friend.
21 The materials that were disclosed on the 30th of June were unredacted supplemental notes of
22 interviews in relation to those witnesses that had previously been disclosed in a redacted form much
23 earlier to my friends. The only material redacted at the time that those documents were served was
24 the name of the witness. There was absolutely nothing in the substance of those documents that was
25 redacted. The reason that those materials were disclosed last week was as a result of some
26 correspondence between the legal team for the first Accused and the Prosecution asking whether
27 those had been disclosed in an unredacted form of 42 days. It was discovered that they had been.
28 That was immediately rectified not only in relation to the first Accused but in relation to the second and
29 the third. The Prosecution accepts that was a technical breach but as my friend has rightly
30 considered, no prejudice arises therefrom. Those documents were -- except I think in one case, not
31 one page long, and even then not -- not a full page. And, as I said, nothing in that material had ever
32 been redacted other than the names of the witness and of course at the time when the primary
33 statements for those witnesses were redacted, the Defence teams had access to the names of those
34 witnesses and they could therefore make whatever preparations and whatever investigations they
35 deemed appropriate.

36

37 Turning then to the issue of Witness TF1-151, the Prosecution does accept that there was a technical

1 breach in relation to the service of two interview transcripts of that witness and the Prosecution has
2 already in writing apologised to my learned friends for all of the Accused and this Chamber for that
3 technical breach.

4
5 In relation to the submissions put forward by my learned friend this morning, I should point out that the
6 bulk of that material in relation to that witness which does amount to in excess of 800 pages was
7 served unredacted on the 26th April this year. The Defence has been in receipt of that material
8 except for the 61 pages that were served late since the 26th of April this year. And, in my respectful
9 submission, the Defence teams have been put on notice of the overwhelming majority of evidence
10 that that witness will give and had been in a position to prepare for the cross-examination of that
11 witness and take whatever investigative steps they deem necessary in relation to that witness since
12 the 26th of April of this year.

13
14 The -- the other point that was raised by Your Honour, the Presiding Judge, is that this witness is
15 listed 16th in the order of the witnesses. The Prosecution was always doubtful whether that witness
16 would be reached during this first session of trial. Obviously, no one can predict these things and the
17 Prosecution has done its best to ensure that there are adequate witnesses to be heard during the first
18 month of trial. Given that evidence will not commence to be heard until Monday of next week, it is the
19 view of the Prosecution that it's extremely unlikely that we will get to this witness during this first
20 period of trial and therefore any order that might be made about whether the witness can be called or
21 not is rather premature, given that the Prosecution submits that very little prejudice, if any, has arisen
22 for the Defence in preparing to cross-examine this witness, given that they have been in receipt of
23 both the identity and the overwhelming majority of the evidence of this witness since the 26th of April
24 of this year.

25
26 If Your Honours please.

27 MR. PRESIDENT:

28 Mr. O'Shea, the Prosecution is through, do you have any brief reply to --

29 MR. O'SHEA:

30 Yes, perhaps a slight correction needs to be made in relation to the 26th of April in that not everything
31 was disclosed on the 26th of April. Some aspects of it was -- were disclosed on the -- in early June.
32 Your Honours have reference to correspondence in relation to these matters attached to a motion by
33 the Defence team for Issa Sesay, a motion for disclosure.

34
35 The question of these interviews when they were originally disclosed, the original substance of the
36 interviews were disclosed, to some extent it was difficult to analyse them because of some incomplete
37 material and some mis-heading, and the interviews were sequential or supposed to be sequential and

1 because of the missing parts they were not. So this did create practical difficulties, but I would
2 reiterate that, you know, I'm not asserting any prejudice in relation to those other witnesses and I'm
3 not -- I'm not challenging the *bona fides* of the Prosecution.

4 MR. CLAYSON:

5 Could I briefly indicate our observations to the Court on this matter by way of a single sentence,
6 saying that we would support Mr. O'Shea's submissions about --

7 MR. PRESIDENT:

8 You should ask for leave, you know, to address the Court.

9 MR. CLAYSON:

10 Forgive me, I --

11 MR. PRESIDENT:

12 You see, let's do things, you know, the right way.

13 MR. CLAYSON:

14 Well, forgive me. I ask for your leave, if I may.

15 MR. PRESIDENT:

16 Yes, go ahead.

17 MR. CLAYSON:

18 Thank you.

19

20 On behalf of the first Accused, and we would wish to associate ourselves with the observations of Mr.
21 O'Shea. There is an important of principle here which we would seek your ruling upon, which he has
22 fully identified.

23 MR. PRESIDENT:

24 Thank you.

25

26 We shall address -- we'll adjourn to Friday and we shall address this issue when we resume sitting on
27 Friday. The Court will adjourn to Friday at 11 o'clock, 11:00. The Court will rise.

28 *(Court adjourned at 1418H)*

29 *(Pages 19 to 26 by Gifty C. Harding)*

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CERTIFICATE

We, Roni Kerekes and Gifty C. Harding, 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.

_____ Roni Kerekes

_____ Gifty C. Harding