

THE SPECIAL COURT FOR SIERRA LEONE

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

THE PROSECUTOR
OF THE SPECIAL COURT

v.

ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

FRIDAY, 23 JULY 2004

3.03 P.M.

CONTINUED TRIAL

Before the Judges:

Benjamin Mutanga Itoe, Presiding
Bankole Thompson
Pierre Boutet

For the Registry:

Mr. Geoff Walker

For the Prosecution:

Ms. Lesley Taylor
Mr. Alain Werner
Ms. Sharan Parmar
Mr. Bobby Gboyor

For the Principal Defender:

Ms. Simone Monasebian
Ms. Haddijatou Kah-Jallow

For the Accused Issa Hassan Sesay:

Mr. Wayne Jordash
Ms. Sareta Ashraph

For the Accused Morris Kallon:

Mr. Raymond Brown
Mr. Melron Nicol-Wilson

For the Accused Augustine Gbao:

Mr. Andreas O'Shea
Mr. John Cammegh

Court Reporters:

Ms. Susan G. Humphries
Ms. Gifty C. Harding
Mr. Momodou Jallow
Ms. Roni Kerekes

I N D E X

WITNESS/ES

FOR THE COURT:

WITNESS RONALD BARRY WALLACE

Examined by the Court.....8

1 [Friday, 23 August 2004]

2 [Open Session]

3 [The Accused Sesay and Kallon enter court]

4 [The Accused Gbao not present]

5 [Upon commencing at 3.03 p.m.]

6 MR. PRESIDENT:

7 We are resuming the session.

8 MR. CAMMEGH:

9 Good afternoon, Your Honour.

10 MR. PRESIDENT:

11 Yes, Mr. Cammegh.

12 MR. CAMMEGH:

13 Good afternoon, Your Honour. We have, all of us, over the last few weeks been speculating as to
14 when one of us would get caught out and it seems today is the day. I know that Mr. O'Shea is here
15 because I have just been talking to him. Similarly, Mr. Jordash. I can only assume that they are on
16 their way in because they are all aware that we are sitting at 3.00 o'clock.

17 MR. PRESIDENT:

18 And we were told that the Court was ready, so we came in.

19 MR. CAMMEGH:

20 Well, as I say, Your Honour, all I know is that they are here and they are coming in, so I am afraid I
21 can't advise you any better than that. I saw them all just a few minutes ago.

22

23 What I can say -- what I can say, Your Honour, is that I know that Mr. O'Shea has been fine-tuning
24 various arguments which I know he wishes to present today in relation to the witness, I think, 199 we
25 heard from on the 20th of July, and, of course, contingent upon your ruling there, there will or will not
26 be cross-examination of that witness via the video link. I am afraid, as of now, that is the best I can
27 advise you.

28 MR. PRESIDENT:

29 Yes.

30 MR. JORDASH:

31 Could I apologise most profusely for keeping the Court waiting. I hadn't noticed the time and I am
32 very, very sorry for keeping the Court waiting.

33

34 Could I also say and perhaps this relates to what Mr. Cammegh has just been talking about, I just
35 walked up to the court with Mr. O'Shea, so he is in the vicinity.

36 MR. PRESIDENT:

37 Well, I think we will rise and come back when he comes, but please ensure that he is here as soon as

1 possible.

2 MR. JORDASH:

3 Certainly, Your Honour.

4 MR. PRESIDENT:

5 Thank you. We will rise, please.

6 [Break taken at 15.07 p.m.]

7 [On resuming at 15.18 p.m.]

8 MR. PRESIDENT:

9 We are resuming the session and we would be presenting the ruling on the application for the
10 exclusion of the additional statement for Witness no. TF1-060, disclosed by the Prosecution on the
11 16th of July 2004 and the unanimous ruling of the Court will be read by Honourable
12 Judge Bankole Thompson.

13 [Ruling]

14 JUDGE THOMPSON:

15 The Trial Chamber of the Special Court for Sierra Leone (Special Court) composed of Honourable
16 Judge Benjamin Mutanga Itoe, Presiding Judge, Honourable Judge Bankole Thompson and
17 Honourable Judge Pierre Boutet, seized of an oral application by the Defence counsel for Issa
18 Hassan Sesay, Morris Kallon and Augustine Gbao (the Defence) and their supporting grounds and
19 submissions during the trial proceedings on the 19th of July 2004 for the exclusion of evidentiary
20 material contained in a supplemental statement of Witness TF1-060, disclosed to the Defence by the
21 Prosecution on 16th July 2004, and the Prosecution's response to the said application.

22

23 Considering Rule 66(A)(ii) of the Rules, Article 17 of the Statute of the Special Court for Sierra Leone
24 (Special Court) and the Trial Chamber's order for disclosure, dated 1 April 2004, after deliberation,
25 hereby issues the following ruling:

26

27 This is the unanimous ruling of the Trial Chamber of the Special Court for Sierra Leone on the oral
28 application by counsel for the first accused with whom other defence counsel associated on the 19th
29 July 2004 for the exclusion of the alleged additional statement of Witness TF1-060 disclosed by the
30 Prosecution to the Defence on the 16th of July 2004.

31

32 It will be recalled that during the course of the trial of this case on the 19th July 2004, learned counsel
33 for the first accused, Issa Hassan Sesay, sought from this Court an order to exclude a supplemental
34 statement made by Witness TF1-060 on the 16th July 2004.

35

36 The Defence contended that that aforesaid statement contains evidence relating to a new count, to
37 wit, 14, charging the offence of pillaging and makes a direct reference to and specific allegations

1 against the first accused.

2 The Defence forcefully submitted that the said statement cannot in law be considered as an addition
3 to or clarification of the original statement previously disclosed by the Prosecution on the 2nd of
4 June 2003, but that it is in essence a new statement from the witness alleging entirely new facts and it
5 should be deemed to be a statement from a new witness for purposes of the interpretation and
6 application of Rule 66(A) of the Rules.

7

8 The Defence further submitted that the disclosure of the alleged additional statement is in breach of
9 Rule 66(A)(ii) of the Rules, the order for disclosure of materials issued by the Trial Chamber on
10 1st April 2004 and Article 17(4) of the Statute of the Court guaranteeing an accused person the right
11 to adequate facilities for the preparation of his defence.

12

13 The Defence also argued that Rule 66(A)(ii) should be interpreted in a purposive manner, consistent
14 with Article 31 of the Vienna Convention on the Law of Treaties so as to require the Prosecution to
15 show good cause for the admission of the additional statement akin to facts emanating from a new
16 witness. It was also submitted by the Defence that on a plain and literal interpretation of Rule 66(A)(ii)
17 the Prosecution has the burden of showing good cause whenever it wishes to disclose to the Defence
18 statements of additional witnesses rather than additional statements of the same witness. And that
19 having failed to do so in this case, it should not be allowed to adduce the evidence contained in the
20 contested supplemental statement.

21

22 The Defence firmly argued that in any event if the statement is considered to be supplemental in law,
23 the Defence would need time to investigate the new allegations for purposes of an effective cross-
24 examination.

25

26 In response, the Prosecution submitted that it did disclose the additional statement as soon as
27 possible and argued that Rule 66(A)(ii) does not apply to additional statements, but rather to
28 additional witness. The Prosecution also argued that the Defence has already been put on sufficient
29 notice as to the evidence pertaining to Witness TF1-060 from the previous disclosures and that the
30 testimony should be permitted to proceed as scheduled.

31

32 The merit or otherwise of the Defence application revolves around both the proper interpretation to be
33 given to Rule 66(A)(ii) as to the obligation of the Prosecution to disclose witness statements to the
34 Defence and its application to the statement alleged to be objectionable.

35

36 In our most recent decision entitled, and I quote: "Decision on Disclosure of Witness Statements and
37 Cross-examination," dated 16 July 2004, interpreting Rule 66, the Trial Chamber had this to say,

1 quote: "As a matter of statutory interpretation, it is the Chamber's opinion that Rule 66 requires, *inter*
2 *alia*, that the Prosecution disclose to the Defence copies of the statements of all witnesses which it
3 intends to call to testify, and all evidence to be presented pursuant to Rule 92 *bis*, within 30 days of
4 the initial appearance of the Accused. In addition, the Prosecution is required to continuously disclose
5 to the Defence, the statements of all additional Prosecution witnesses it intends to call, not later than
6 60 days before the date of trial, or otherwise ordered by the Trial Chamber, upon good cause being
7 shown by the Prosecution."

8
9 Commenting on the rationale behind the statutory framework for disclosure obligations of the Court,
10 the Chamber observed as follows, quote: "It is evident that the premise underlying the disclosure
11 obligations is that the parties should act *bona fides* at all times. There is authority from the evolving
12 jurisprudence of the International Criminal Tribunals that any allegation by the Defence as to a
13 violation of the disclosure rules by the Prosecution should be substantiated with *prima facie* proof of
14 such a violation."

15
16 We underscored the importance of these principles of law with citations from two of the Chamber's
17 recent decisions on the same subject, to wit, *Prosecutor v. Sesay* and *Prosecutor v. Kondewa*.

18
19 Taking due cognisance of Article 17(4) of the Statute in ensuring ample protection of the rights of an
20 accused to have time and adequate facilities for the preparation of his case, and also to examine or
21 have examined the witnesses against him, the Trial Chamber emphasised its role to enforce
22 disclosure obligations in the interests of a fair trial, quote, "Where evidence has not been disclosed or
23 is disclosed so late as to prejudice the fairness of the trial."

24
25 In this regard, the Chamber indicated that its judicial option in such an eventuality would be to, "Apply
26 appropriate remedies which may include the exclusion of such evidence."

27
28 Consistent with the foregoing exposition of the law, we note that in the case of *The Prosecutor v.*
29 *Théoneste Bagosora*, the Trial Chamber of the ICTR reasoned as follows:

- 30
31 1. That the issue, whether the material disclosed is new, requires a comparative assessment.
32
33 2. That such an assessment requires an examination of the allegedly new statement and the original
34 statement of the witness, including any reference of the event in question in the indictment and
35 the pre-trial brief of the Prosecution.
36
37 3. That such an examination should also include a consideration of notice to the Defence, that the

1 particular witness will testify on that event, and the extent to which the evidentiary material alters
2 the incriminating quality of the evidence of which the Defence already had notice.

3
4 The reasoning of this same chamber was similar to the above regarding the admissibility on the same
5 grounds of the evidence of another witness in the same case. On that issue, the Chamber had this to
6 say, and I quote: "These Rules and the arguments of the parties give rise to three distinct questions.
7 First, is this evidence relevant to the charges in the indictments, or do they constitute entirely new
8 charges? Second, do the will-say statements merely provide additional details of matters already
9 disclosed in Witness DBQ's original witness statement, or in other materials disclosed to the
10 Defence? Third, if this is indeed new evidence, should it be admitted and under what conditions?".

11
12 Guided by these principles and reasoning, the major question for determination by this Chamber is
13 whether the Defence has demonstrated or substantiated with *prima facie* proof that the Prosecution is
14 in breach of its disclosure obligations under Rule 66(A)(iii) and in violation of the Article 17(4), rights of
15 the accused persons, on the alleged grounds of disclosing at this stage a witness statement
16 constituting entirely new allegations from those in the indictment and one that is not at all
17 supplemental in character, vis-a-vis the original statement of the witness, but which amounts to, as it
18 were, an entirely new statement of an entirely new witness.

19
20 In order to determine if there has been such a breach, the Chamber has carefully reviewed the
21 original statement of the Witness TP1-060, alongside the purported supplemental statement, the
22 indictment, the Prosecution's pre-trial brief, and the Prosecution's compliance report of the 11th May
23 2004 and finds specifically as follows:

- 24
- 25 1. That the allegations in the second statement are germane to those charged and particularised in
26 Counts 1, 2, 3, 4, 5, 6, 8, 10, 11 and 12 of the indictment.
 - 27
28 2. That the allegations in the second statement are clearly supplemental to those specified and
29 particularised in the indictment and at page 102 of the Prosecution's pre-trial brief.
 - 30
31 3. That indeed the second statement cannot objectively be legally characterised as an entirely new
32 statement, having regard to its contents in relation to the original statement of the witness, in that
33 the second statement is congruent in material respects with matters deposed to in the entire
34 original statement dated 2nd February 2003 about the alleged combined attack on Tonga Field by
35 members of the RUF/AFRC, the armed factions to which the accused are alleged to have
36 belonged, and led by some Sam Bockarie, alias Mosquito, and more specifically with that portion
37 of the original statement which states as follows, and I quote: "Two days after our selection as I

1 stated earlier, we came to Kenema to the late Paramount Chief of Lower Bambara, Chief Farmer
2 who had persuaded us to form a caretaker committee for the sake of our people and protect them
3 from AFRC/RUF atrocities."

- 4
5 4. That by reason of our findings in (i), (ii) and (iii), the supplemental statement is not a statement of
6 an additional witness within the meaning of Rule 66(A)(ii).

7
8 As a matter of law the Chamber would like to reiterate what it emphasised in a previous ruling that
9 Rule 66 does impose upon the Prosecution the obligation to continuously disclose to the Defence
10 copies of statements of all witnesses whom they intend to call, which include new developments in the
11 investigation, whether in the form of will-say statements or interview notes or any other forms obtained
12 from a witness at any time prior to the witness giving evidence in trial.

13
14 Based on the foregoing considerations and our specific findings, the Chamber is of the opinion that
15 the Defence has not substantiated by *prima facie* showing the allegations breached by the
16 Prosecution of Rule 66(A)(ii) of the Rules, Article 17(4) of the Court Statute and the Chamber's order
17 for disclosure, dated 1 April 2004.

18
19 Accordingly, the application for exclusion or suppression of the supplemental evidence is denied on
20 the understanding, however, that the Defence reserves its right to cross-examine this witness on all
21 issues raised, including those in the supplemental statement.

22
23 Done at Freetown, this 23rd day of July 2004.

24 MR. PRESIDENT:

25 Yes, we did have on hold for today Mr. O'Shea's application, so I don't know if he -- I don't know what
26 his attitude is to the application. He said he was going to -- well, we couldn't take the arguments and
27 we decided to take them on today. I don't know what your stand is on these issues that you were to
28 raise.

29 MR. O'SHEA:

30 Well, Your Honours, I am grateful. We do wish to still put the argument. We have listened carefully to
31 Your Honours' ruling in relation to Witness TF1-060. Our view is that this is a different situation from
32 the one which has just been ruled upon. Of course, it was possible that there may have been things
33 that Your Honours might have said by the way which may have dramatically affected the way we
34 approach our argument, but I don't believe that has happened in the event. Therefore, with Your
35 Honours' leave, I can commence the argument in relation to TF1-199.

36 MR. PRESIDENT:

37 Mr. O'Shea, just a moment. Why don't you sit down?

1 [Trial Chamber confer]

2 MR. PRESIDENT:

3 Mr. O'Shea, we will rise for just a few minutes

4 MR. O'SHEA:

5 Yes.

6 MR. PRESIDENT:

7 And we shall be back very shortly.

8 MR. O'SHEA:

9 Thank you.

10 MR. PRESIDENT:

11 The Court will rise, please.

12 [Recess taken at 15.42 p.m.]

13 [Upon resuming at 15.58 p.m.]

14 MR. PRESIDENT:

15 We are resuming the session and yesterday we -- the attention of the Court was drawn to a rather
16 serious incident that was alleged to have happened in the detention facility and counsel would
17 remember that we did -- the Court did say -- did instruct that the Registrar investigates that report and
18 that he report back for us to know exactly what happened because the allegations were sufficiently
19 serious and alarming. So we have been informed that there is the head of the detention facility, who
20 is here, and who is supposed to have -- who is supposed to be directly in control of that facility. That
21 of course is under the control of the Registrar generally. It is the Registrar who is the overall boss of
22 the detention facility. And we would like to hear from him. It was in an open proceeding and I think it
23 is only fair that we hear from him in these proceedings which are also open.

24

25 So we would like, I don't know -- Court Management, please, is the head of the detention facility
26 around? Can you please call him in?

27 MR. WALKER:

28 I can.

29 [Witness enters]

30 MR. PRESIDENT:

31 I think he needs a microphone, he should go to the witness stand or so.

32 THE INTERPRETER:

33 My Lords, we wonder if there will be need for interpretation that does not go to the gallery.

34 JUDGE THOMPSON:

35 Mr. Walker, let him be sworn.

36 JUDGE BOUTET:

37 He has a Bible? You have given him a Bible?

1 JUDGE THOMPSON:

2 Let him be sworn.

3 MR. WALKER:

4 You want him sworn in?

5 JUDGE BOUTET:

6 Yes.

7 [RONALD BARRY WALLACE, sworn]

8 Questioned by the Court:

9 JUDGE THOMPSON:

10 Q. What is your name?

11 A. Donald Barry Wallace.

12 Q. Where do you live?

13 A. I live in Bangor, Northern Ireland.

14 Q. Currently a resident in Sierra Leone?

15 A. Correct.

16 Q. What is your occupation?

17 A. I am the Chief of Detention at the Detention Centre of the Special Court of Sierra Leone.

18 Q. As Chief of the Detention Centre, Sierra Leone, Special Court, what are your responsibilities?

19 A. To keep those detained in custody until they are tried by the Court, and to treat them according to the
20 Rules of Detention based on the minimum standards which would be accepted internationally.

21 Q. In your custody, do you have two detainees; one by the name of Issa Hassan Sesay?

22 A. That is correct, Your Honour.

23 Q. Do you also have another detainee by the name of Augustine Gbao?

24 A. That is correct, Your Honour.

25 Q. Could you tell the Court if there is another detainee by the name of Fofana, Moinina Fofana?

26 A. That is correct, Your Honour.

27 Q. Could you tell the Court -- just give the Court a brief idea of the visiting policies and regulations at the
28 centre in respect of detainees' relations, briefly?

29 A. Detainees are permitted visits, Wednesdays, Fridays, Saturdays and Sundays each week, morning
30 and afternoon, and their visitors make application to visit, and if that application is approved, then they
31 are permitted to visit on any of those days. We permit three adults and three children morning and
32 afternoon.

33

34 Each visitor on arrival would be searched as per the Rules of Detention and any articles that would
35 not normally be permitted in the centre, but which they would obviously have the right to have outside
36 the centre, would be removed and held in safe custody while the visit took place and returned to them
37 when they leave. We have a list, a prescribed list, of permitted articles.

1 Q. Let me go straight to what is germane for the purposes of your testimony here. It was alleged in this
2 Court yesterday that the wife of Issa Hassan Sesay, one of the detainees, did pay a visit, I think the
3 day before, to the centre and also the allegation goes on to say that she was subject to what was
4 considered or alleged to be an intrusive search or intimate search. As head of the Detention Centre
5 do you -- are you aware of that?

6 A. My Lord, I have checked our records for, I believe, Wednesday 21st and our records show --

7 MR. PRESIDENT:

8 Q. Mr. Wallace, the allegation, more precisely, is that she was subjected or (*inaudible*) suggest -- was
9 subjected to a vaginal search --

10 A. Yes, Your Honour.

11 Q. -- in your detention facility.

12 A. I understand that.

13 Q. Hence, I wanted to be very precise about the word. I understood what my learned brother was
14 saying, but I am using the words that were used by counsel.

15 JUDGE BOUTET:

16 I should add, the allegation at that time -- Mr. Jordash, we will hear you -- were that it was done
17 without your authority. It was done in what used to be the court -- the temporary courthouse, and it
18 was done by national staff without any international being present or supervising -- supervised by an
19 international staff. So these were the allegations made in the Court.

20 JUDGE THOMPSON:

21 Q. To what is your response?

22 A. The records show that Mr. Sesay did not have a visit from his wife on Wednesday, the 21st. So the
23 allegation that she was subjected to an intimate search I refute totally. Visitors on that day were
24 searched as a consequence of concerns raised with me that articles, including medication, were being
25 taken out of the detention facility by visitors. I instructed my deputy to consult with security section
26 and to put in place arrangements for an unannounced search of visitors as they left the detention
27 facility at their discretion.

28

29 The search was conducted, as Your Honour has said, in the temporary courthouse. It was supervised
30 by an international detention officer and was conducted by those staff who carry out the daily
31 searches at the entrance who have been trained and know the correct procedures. At no time was
32 any visitor asked to remove any clothing or subjected to an intimate internal search.

33

34 Articles were found on their possession in the bags that they carried, including medication, cigarettes
35 and bars of soap. Medication caused me considerable concern and it was one of the issues that
36 prompted me to introduce the search of visitors leaving. It had been noted that the supply of
37 medication to detainees was extra-ordinarily high and that having been issued should have been

1 lasting longer than they claimed . My concern was that such medication being passed and consumed
2 by others for whom it was not prescribed and may prove dangerous. I wanted to stop the practice.

3 JUDGE THOMPSON:

4 Q. Well this Court did make an order for a report to be -- for the matter to be investigated and a report
5 filed with the Court. The order was directed to the Registrar. Did you, as a result of that order, do any
6 investigation? As you have said, did you send a report to the Registrar on that?

7 A That is correct, Your Honour. I submitted a report to the Registrar yesterday and it contained
8 basically points that I have just mentioned to you. And, as I said, I refute totally any claim that any
9 visitor has in the past or on that particular day ever been subject to an internal, intimate search or on
10 that day any item of clothing was even removed from a visitor.

11 Q. Do you have a copy of your report with you here?

12 A. I have a copy of the report which Mr. Vincent -- yes. I submitted -- which is, in essence, my report.

13 Q. I see. Would you like to present it to the Court? The report will be received in evidence for
14 identification.

15

16 Finally, Mr. Wallace, do you have anything else to say about the permissibility of intimate and intrusive
17 searches?

18 A. Any search which involves the invasion of someone's intimate areas is unlawful, certainly for any of
19 my staff. That would never be condoned by me and any officer that I found actually who carried out
20 such a search would be subjected to severe disciplinary action. It is unlawful and should only be
21 carried out under medical supervision and you would need strong grounds to even consider it.

22 JUDGE THOMPSON:

23 Thank you.

24

[Pages 1 to 10 by Susan G. Humphries]

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1 [4.15 p.m.]

2 MR. PRESIDENT:

3 Well, I want to ask this -- I know you have answered this question: you were saying that there were no
4 intimate searches conducted, as has been alleged, and that such a search in any event is unlawful.

5 MR. WALLACE:

6 That is correct, Your Honour.

7 MR. PRESIDENT:

8 Mr. Walker.

9 MR. WALKER:

10 Your Honour.

11 MR. PRESIDENT:

12 Can you show the report to Mr. O'Shea, please -- I mean, to Mr. Jordash.

13

14 Yes, Mr. Jordash, do you have any -- on this report, on this report, do you have any observations?

15 MR. JORDASH:

16 Well, I have two principal observations. Firstly, I raised a complaint and not once did I complain that
17 Mr. Sesay's wife had been intimately searched. I carefully chose my words and I led --

18 MR. PRESIDENT:

19 We shall hear you, but on this report, do you have any observations?

20 MR. JORDASH:

21 Yes. The basic observation is that in my respectful submission, for a report to make findings as to this
22 allegation, the writer of the report or those who instigated the report ought to hear from those people
23 who made the allegations in the first place.

24

25 Today, and from the context of that report, it would seem that the women who made the allegations in
26 the first place have not been heard. And my respectful submission is that for an allegation to be
27 considered in a public forum such as this, then every party has a right to be heard in order for a
28 tribunal or any finder of fact to make a reasoned and balanced finding.

29

30 I raised the allegations, and they are alarming allegations. If they are to be investigated properly, in
31 my respectful submission, then not only should tribunal hear from the chief of detention, but it should
32 hear from the person who is alleged to have been supervising those searches, and moreover, and
33 importantly, those women who made the allegations.

34

35 Those are my submissions.

36 MR. PRESIDENT:

37 Can you show that report to the Prosecution, please?

1 Prosecution, what are your observations on that report, please?

2 MS. TAYLOR:

3 Your Honour, the matter that is now being discussed in this courtroom is completely outside the
4 provenance of the Prosecution and the Prosecution does not wish to be heard on these matters.

5 MR. PRESIDENT:

6 Okay, thank you.

7 MR. JORDASH:

8 May I respectfully add one further matter?

9 MR. PRESIDENT:

10 Can you just hang on a minute, please. Just hold on a minute.

11 JUDGE BOUTET:

12 I do have a few questions for Mr. Wallace. As a result of your intervention, Mr. Wallace, did you
13 speak to either the persons that were described in the report at all, either then or subsequent to that,
14 or did you speak to Mrs. -- or relatives of Mr. Sesay about these incidents?

15 MR. WALLACE:

16 The incident as reported to me was when I was meeting the detainees as a meeting to discuss
17 domestic matters. Mr. Gbao came into the room (*inaudible*) and claimed that she had been stripped
18 to her underwear and subject -- and his words -- to a "vaginal search." I told him I'd investigate it
19 immediately, and advised Mr. Gbao that his wife should, if she felt a criminal offence had taken place
20 to indeed report it to the police and have a criminal investigation instigated. I have been waiting
21 yesterday and today for Mrs. Gbao to attempt to speak to her, but up to the point I entered the court
22 this afternoon, Mrs. Gbao has not returned to visit her husband. When she does, I will speak to her
23 and ask her more details on her allegation.

24

25 Mrs. Sesay has not been to the court in the last two days, to my knowledge. I am not aware, other
26 than what was said, I understood yesterday that Mrs. Sesay had made a complaint.

27 JUDGE BOUTET:

28 Thank you, Mr. Wallace.

29 MR. PRESIDENT:

30 Well, we shall be admitting this report just for identification in the records of the Court. And -- yes, Mr.
31 Jordash, you --

32 MR. PRESIDENT:

33 I simply wanted to add this, Your Honours, that I did not allege that Mr. Sesay's wife had been
34 intimately searched. What I said was that the families of the accused had made a complaint that
35 some of the women in those families had been searched. I didn't make specific allegations against
36 any specific person or in relation to any specific woman precisely because I had only learnt of the
37 allegations a moment and precisely because I didn't have any precise details. It was never my

1 intention to convey any allegation that Mr. Sesay's wife had been intimately searched because I knew
2 that Mr. Sesay's wife had not attended the detention centre at the time these allegations arose.

3 MR. PRESIDENT:

4 And do you think it was normal, you know, as counsel, you know, appearing here to make such
5 allegations before ascertaining, you know, the truth at least and even identifying those family
6 members? You say you talked of family members, I mean, was it normal for you to make such an
7 allegation that has -- was spreading, you know, so widely? And do you think that it was normal, you
8 know, for you to make such an allegation before even verifying the truth from interviewing your client
9 and the family members who were supposed to have been subjected to the intimate search?

10 MR. JORDASH:

11 The only way I could bring this --

12 MR. PRESIDENT:

13 Because, I mean, leaving this courtroom yesterday, I mean, I was -- we were -- the Bench was with
14 you to condemn, you know, such an act. But here we are, the document we have before us does not
15 contain -- does not sustain your allegation. In fact, it only sustains allegations of some family
16 members who were caught with property which they were removing from the detention facility.

17 MR. JORDASH:

18 Well, I have made my comments about --

19 MR. PRESIDENT:

20 And, indeed, there was no intimate search at all, none.

21 MR. JORDASH:

22 Well, according to the report, that's right, there was no intimate search. However, I've made my
23 comments about that finding and I find -- and I don't wish to repeat them but to say, fairness dictates
24 that all parties to an allegation are heard.

25

26 But secondly, in relation to an allegation as serious as that, and one which was of such concern to my
27 client, the quickest and most effective way of bringing that to the attention of Your Honours is to raise
28 it in court. I could have waited until the next day.

29 MR. PRESIDENT:

30 Do you have any questions to put to the head of the detention who is sitting in front of you on this?

31 MR. JORDASH:

32 No, and precisely --

33 MR. PRESIDENT:

34 You don't have any questions?

35 MR. JORDASH:

36 At this stage, no. If I were to be able to speak to those who made the allegations so I could isolate
37 and identify precisely what they are --

1 MR. PRESIDENT:

2 You are supposed to -- Mr. Jordash, they are supposed to have spoken to you before you make such
3 an allegation, you know, in front of this Bench and to the world, to the world. I mean, the gallery is
4 there and you know what has been published in the papers about that allegation. It is Mr. Sesay, you
5 know, who is in the forefront and yet Mr. Sesay's wife is not even concerned from what the witness is
6 saying.

7 JUDGE BOUTET:

8 You are saying your words were carefully chosen, and yet if I listen to you, you are speaking on behalf
9 of your client, Mr. Sesay, not the whole family of detainees.

10 MR. JORDASH:

11 The reason I'd raised these allegations was because my client raised these allegations and because
12 he was concerned that when his wife did visit this type of conduct would take place. So I did raise
13 these allegations in relation to him.

14 JUDGE THOMPSON:

15 But, counsel, you did not rationalise it that. You didn't rationalise it that way. You left the Court with
16 the impression that something outrageous in your judgment had happened and you were inviting the
17 intervention of the Court to stop what, in your mind, in fact, and based on the information you may
18 have received, had happened and was clearly, if it did happen, outrageous. And I wasn't of the
19 opinion when you when you were speaking yesterday that you were saying, "Well, if such conduct is
20 allowed to continue my client's relations may well be subjected to that." That was not the way I
21 understood you. I understood that you were making an allegation that something -- some violation of
22 the rights of your client's visitors or even the client's wife had been infringed. It wasn't, hypothetical; it
23 wasn't if so and so, it was as if clearly that something so blatantly outrageous had taken place. And it
24 was that kind of tone of language that urged us to suggest that the best thing to do or decide was to
25 get a report from the Registrar. And I would like to ask whether if when you received that report you
26 would not have considered it prudent to direct some kind of complaint to the Registrar, rather than
27 come to the Court for some quick intervention, because what has happened now, as the Presiding
28 Judge has said, the press has picked it up and they are making quite -- spreading it as if this is a true
29 allegation.

30 MR. JORDASH:

31 And it may be a true allegation.

32 JUDGE THOMPSON:

33 It may be, yes, quite. It may be.

34 JUDGE BOUTET:

35 What investigation did you do if it is, rather than standing up on a personal feud to raise this particular
36 matter yesterday morning? My concern is you are an officer of the Court, you are here to represent
37 the rights and the interests of your client to the best of your ability, and we accept that. And we heard

1 you and we let you speak yesterday morning because you have very serious concerns and we
2 understood those concerns to be of a serious nature. And certainly if they were founded they would
3 be of a very serious nature, but we are concerned that allegations --

4 JUDGE THOMPSON:

5 Please sit down, Mr. Brown.

6 JUDGE BOUTET:

7 -- that obviously, to our knowledge and based on the information that has been provided to the Court,
8 that it is totally unfounded. I would have expected that at least as an officer of the court before you
9 raise matters of that nature, of that seriousness, that you would look into these matters over a bit to
10 see if there is any foundation. That is of concern, because now you have spoken publicly and it has
11 been reported as if it had happened and it had happened to your client's wife. This is what I heard.
12 This is what the media have reported. I don't blame the media for that because this is what I
13 understood as well. And now you are saying, "Well, this is not exactly what I've said or what I meant."
14 It may be so, but my concern is you are an experienced counsel and you know that when you
15 speaking as such we will pay attention to what you are saying, but at the same time, it would be
16 reported. Once it is launched in the public domain and there is no more foundation than what we
17 have seen up to now, we were greatly concerned.

18 MR. JORDASH:

19 Mr. Sesay would be greatly concerned if I hadn't raised it and in fact it had happened to his wife that
20 day.

21 JUDGE BOUTET:

22 Well, if you -- it had not happened to -- from what we know -- to his wife. She did not visit the
23 detention facility that day.

24

25 Your client wants to speak to you.

26 MR. JORDASH:

27 From what --

28 JUDGE BOUTET:

29 Mr. Jordash.

30 [Defence counsel and accused confer].

31 MR. CAMMEGH:

32 Your Honour, can I just --

33 MR. PRESIDENT:

34 Mr. Cammegh.

35 MR. CAMMEGH:

36 I have just heard for the first time that it was Mr. Gbao who apparently made the original allegation
37 that caused Mr. Sesay to report that to Mr. Jordash. Your Honours know that we in the Gbao Defence

1 team are hamstrung at the moment and more so this week unusual because this week Mr. Gbao has
2 decided not to speak to either Mr. O'Shea, nor myself at all. And I find myself really wondering how I
3 would have reacted if I had heard from my client that his wife had been interfered with in this way.
4 And in support of Mr. Jordash, and with full respect to Your Honours, I find myself in a position where I
5 would surely have had to have done the same thing. I don't think Mr. Jordash --

6 MR. PRESIDENT:

7 Before investigating?

8 MR. CAMMEGH:

9 Well --

10 MR. PRESIDENT:

11 As a responsible officer of the Court, Mr. Cammegh?

12 MR. CAMMEGH:

13 Your Honours, I would have brought it to your --

14 MR. PRESIDENT:

15 We all have passed through the Bar, you know, and I think we've been taught certain things, you
16 know, going through the Bar.

17 MR. CAMMEGH:

18 Your Honour, yes.

19 MR. PRESIDENT:

20 You make an allegation in front of an international tribunal --

21 MR. CAMMEGH:

22 No, no, no.

23 MR. PRESIDENT:

24 -- before investigating the facts --

25 MR. CAMMEGH:

26 Your Honour, please let me finish.

27 MR. PRESIDENT:

28 -- you have heard?

29 MR. CAMMEGH:

30 Please let me finish.

31 MR. PRESIDENT:

32 No, I have to put you on the spot on that --

33 MR. CAMMEGH:

34 Well, I --

35 MR. PRESIDENT:

36 -- Because you are taking sides with your learned brother.

37

1 MR. CAMMEGH:

2 I am, indeed, with respect. It is not an allegation I would be making; I would simply be reflecting a
3 complaint made by client and asking Your Honours to put in trend a mechanism whereby an
4 independent investigation could take place to see that fairness could be done to all parties. And it
5 would be very important, not for the satisfaction of my client, but also surely for the satisfaction of this
6 Court, if an independent inquiry into such a grave complaint could take place. And if it met with the
7 sort of result that we hear from Mr. Wallace today, so be it. But I find myself in a position where I
8 would have been in a very difficult position. Who else could I have taken the matter up with?

9 JUDGE BOUTET:

10 To the Registrar who is responsible for the detention before you go public with such an affirmative.

11 MR. PRESIDENT:

12 Because we are now public.

13 JUDGE BOUTET:

14 That's our concern.

15 JUDGE THOMPSON:

16 Yes.

17 JUDGE BOUTET:

18 I'm not saying you should have kept silent on this, what we're saying is you should have ascertained
19 or should have been ascertained a bit more about what has happened and there is a process in
20 place. The Registrar is responsible for the administration of the detention facility and it should indeed
21 have been reported to him. And if you were not satisfied of the result at that time, yes, you could have
22 come here, because you were not getting anywhere. But the timely responsibility -- and it is in the
23 Rules, in our rules, in the rules of detention, is the registrar, and then it was his duty to do the
24 investigation if you had reported that to him. To me, that's the normal and a fair way of dealing with
25 the matter, whatever it is. If you were not obtaining result, then you come to the Court and you may
26 have to go public because you are not achieving what you are trying to obtain. My concern is it is --
27 an allegation is all of a sudden launched publicly and we asked -- obviously, we took that very
28 seriously because we asked that action be taken immediately on that because, indeed, if that was
29 founded in any way, shape, or form, it was very, very serious. So that's why we asked that -- but
30 before we make allegation that have -- of that seriousness, public -- and of a public nature, what we
31 are saying, there shall be some investigation in addition to -- I'm not saying you shouldn't trust your
32 client, but there should be a little bit more than just to listen to your client at the last moment before
33 coming to court and then rushing that publicly. That's the concern.

34 MR. CAMMEGH:

35 Your Honour, I hear that completely. We all understand, and I'm sure from now on we will all
36 understand that in future should any complaint of such a nature arise that would be the mechanism.
37 But I'm sure Your Honours understand that -- and we all accept that now; we stand corrected, but I'm

1 sure Your Honours understand and particularly in our case, the Gbao team, we are under a certain
2 amount of stress. We are already at the whim of our client's temperament, if I can put it that way. I'm
3 sure Mr. Jordash was, I'm sure I would have been as well, and I hope Your Honours can accept that
4 we are simply doing our best. If it was the wrong mechanism, if I had taken it to you myself, I'd accept
5 that might have been the wrong mechanism. We stand corrected, from now on we will go to the
6 registry. But, Your Honour, I'm sure that -- well, I hope you can accept that there is no disrespect to
7 this Court meant by us wanting to take the matter up here. In future we'll do it differently.

8 JUDGE BOUTET:

9 And again, we want you to fully understand that we do appreciate the concerns and we're not taking
10 this lightly. This is -- this is, if you understand our purpose and our comments to be of that nature,
11 absolutely not. These are very, very serious allegations. If they are founded, they are, and we are
12 deeply concerned about that. But at the same time, we are very much concerned about the image of
13 the Court and the credibility of this Court and everything that is related to that. And when allegations
14 of that nature are made publicly, we have to act and we have to act quickly, and that's what we have
15 done.

16 MR. CAMMEGH:

17 Of course.

18 JUDGE BOUTET:

19 But that's why I say we expect at the same time that before a public allegation of that nature is made,
20 because of its seriousness, that there is some inquiry as to whether or not it is -- I mean, on the face
21 of it, sounded and --

22 MR. CAMMEGH:

23 Your Honour, we fully accept that, and in future, of course, even now we know the proper route to
24 take should this arise again.

25 JUDGE BOUTET:

26 Thank you. And we understand your position. I know you are in a very sensitive position, given the
27 scenario that you and Mr. O'Shea are into. We fully appreciate.

28 MR. CAMMEGH:

29 We are grateful, thank you.

30 MR. PRESIDENT:

31 It is a very serious issue when allegations like this are made. This -- the officer who is in charge of the
32 detention is -- if you look at him he is a very, very -- he trails behind him a great experience, you
33 know, in penitential administration and if he has to come here and has to live with such dirty remarks
34 in an, you know, of misconduct. That's misconduct, in an establishment which he controls, so you can
35 understand his control. I mean, he has come here on loan from the Northern Island -- Ireland and, I
36 mean, how do you expect that he would come here and you would start rubbing mud, you know, on
37 him.

1 MR. CAMMEGH:

2 Your Honour, we are sensitive to his position, of course, but it's a very fine line that we have to tread.

3 MR. PRESIDENT:

4 Yes, Mr. Brown.

5 MR. BROWN:

6 Your Honour, first of all, let me say that it would be difficult for me to stand silent and see my
7 colleague criticised for a conduct which I supported and joined in. So the record should be clear that I
8 indicated that I too sought the intervention of the Court on this matter. In retrospect -- I'm hearing a
9 strange echo that I can't explain -- but as retrospect, as probably the oldest person sitting at this table,
10 I should have thought to ask that we a closed session for that matter, and for not having thought of
11 that I should bear some responsibility.

12 MR. PRESIDENT:

13 Unfortunately it was raised in an open session --

14 MR. BROWN:

15 Absolutely.

16 MR. PRESIDENT:

17 -- so there should be no closed session about it.

18 MR. BROWN:

19 Well, the concern I have, Your Honour, is this, to begin with what was did was something quite frankly
20 that I have been trained to do as a lawyer and which I think the Court would respect, which is, when
21 there is something of concern that has the potential to affect the rights of the accused or the integrity
22 of the process surrounding it, that the matter be first and foremost brought to Your Honours. And,
23 quite frankly, what we did was, I thought, proper in its substance, which was to say, there is
24 something that disturbs us we ask your guidance, your protection and your investigation to the
25 matters.

26 MR. PRESIDENT:

27 Mr. Brown, I don't want to cut you short. Look at the time it has taken us to produce the report. It's
28 relatively short. I'm sure if you did the same thing by approaching the Registrar, you would have had
29 just the report that is taking all our time today, after all the press, nation and international, negative
30 press publicity on an organ of the Court.

31 MR. BROWN:

32 I'm sure as Mr. Cammegh pointed out we have all taken a lesson from the Court's response.
33 However, there was a judgment to be made, which involved on the one hand, the gravity of the matter
34 and that the report included the fact that Mr. Wallace, as of the time we spoke, was himself
35 undertaking to determine what was the nature of the search involved. Because as I understand it, he
36 wasn't present, and had communicated in a direct way to those at the meeting that he would do so.

37

1 It seems to me, Your Honour, that that was a nice judgment but the one involving a serious allegation
2 as evidence by the fact that the Court will immediately look into it. And while certainly the question of
3 the forum and the manner in which it was raised and the time is an issue on which there can be some
4 reason. Quite frankly I was disturbed to see Mr. Jordash the subject of the Court's eye. If there is ire
5 I should share it, but I do think it was a nice judgment. There are some complications that have
6 ensued which no one anticipated as either attacking Mr. Wallace's integrity or that of the Court.

7 MR. PRESIDENT:

8 The only comment I have to make is that we are sitting in an open session and that whatever we say
9 or do here is directly transmitted, you know, to the public, to both the national and the international
10 audience, and that I think we need to be very, very, very, very careful. We don't stand to gain, you
11 know, anything. I don't think the families, you know, the families concerned were shown this report. I
12 think this should be worried as to what should happen if the detention facility decided to take the
13 matter on. You understand? I don't want to get into the details, so --

14 JUDGE THOMPSON:

15 Mr. Jordash, your preliminary remarks after the testimony of Mr. Wallace seemed to focus on the
16 question of the short comings of the report or the insufficiency of the report, and we do not want to
17 create the impression here that we are in any way impeding what -- the achievement of any remedy
18 that you might think that your pre-emptive, if you call it that, in terms of the kind of treatment that
19 should be meted out to visitors who have relations in the detention centre. And it would be necessary
20 for this Court to know whether you intend to stand by your position that the report itself may well be
21 defective in terms of not having, as you hinted, observed the principle of natural justice in the process
22 of investigating. Because you did in your response say to me that the allegation may be true, and I
23 am myself prepared to say that it's possible the allegation is true. But if your position is that the report
24 or the inquiry or investigation has not been exhaustive, this Court does not want to stand in your way
25 in terms of what you need to do in the best interest of your client. So perhaps you need to let us know
26 how you want us to proceed, because that is very important for me. We've put somebody in the
27 witness box and who has sworn on oath that intrusive and intimate searches are not a policy of the
28 detention facility, and the Court has no alternative but to accept what he says and for -- for the time
29 being. Well if you feel that this report may well be, to use another language, skewed, why not let us
30 why know what your position is.

31 MR. JORDASH:

32 My position, as has been throughout, is that this type of search, if it happened, shouldn't happen.

33 JUDGE THOMPSON:

34 And we agree with you on that because the -- Mr. Wallace said it's unlawful, and as far as we know,
35 intrusive searches, intimate searches are generally frowned upon by the law.

36

37 So where do we go from here? You take us -- part of what you do is to propound the law, which we

1 agree with, but then we have the factual situation. We commissioned an inquiry, we now have a
2 report which is factual, and your response is that you don't accept it. So how do we proceed to be
3 able to protect the interests of your client's relations if, in fact, they do visit the facility and when they
4 do visit the facility?

5 MR. JORDASH:

6 Well --

7 JUDGE THOMPSON:

8 And that's the difficulty we find ourselves in. The head of the detention facility has told us as a
9 general rule these are impermissible searches; they are unlawful, we don't conduct them.

10 MR. PRESIDENT:

11 Mr. Jordash --

12 JUDGE THOMPSON:

13 How do we go --

14 MR. PRESIDENT:

15 -- you are an adult. You are a very experienced practitioner, and I don't think you require any advise
16 on this matter. But if I -- you wanted to do yourself and your client a service, I think the service, you
17 know, has -- the road you should -- the path you should walk on, you know, has been traced by your
18 colleagues in their interventions. We followed them, you know, very, very carefully, Mr. Cammegh
19 and Mr. Brown. I think in situations like this you are an adult you should just know how to let a matter
20 rest.

21 MR. JORDASH:

22 I know and I'm --

23 MR. PRESIDENT:

24 Yes.

25 MR. JORDASH:

26 I accept and adopt what my learned friends have said in relation to this.

27 MR. PRESIDENT:

28 Pardon me?

29 MR. JORDASH:

30 I accept and adopt what and I'm grateful to my learned friends for what they've said in Court of what I
31 did. And I do want to let the matter rest; however, my concern was at the beginning of this hearing,
32 and still is my concern, is that Your Honours do not take from this any suggestion that Mr. Sesay has
33 made false allegations because --

34 MR. PRESIDENT:

35 No, far from it.

36 MR. JORDASH:

37 -- and I reiterate my comments about the report, that a report into allegations which does not take into

1 account all parties, is only a -- an incomplete report, in my respectful submission. But I do not wish to
2 take the matter further. I've made my points and those are my submissions.

3 JUDGE BOUTET:

4 But you have the opportunity to cross-examine the witness and the author of the report was right there
5 and you have -- you have, in your own mind, decided not to do it. And if you are not satisfied with the
6 veracity of the content of that report, you have all possible opportunity to explore that now. But you
7 have decided, for your own reason, not to do it, but to complain that maybe the report is incomplete
8 because.

9 MR. JORDASH:

10 If, if, if --

11 JUDGE BOUTET:

12 But I can reassure you, Mr. Jordash, my comments have to do with what you have represented to do
13 the Court and absolutely nothing in what I've said should be interpreted to mean anything about your
14 client. Absolutely not.

15 MR. PRESIDENT:

16 Absolutely not.

17 JUDGE BOUTET:

18 And I want that to be very clear. I was commenting to you and not to your client.

19 MR. PRESIDENT:

20 In fact, he is in the headlines of the news for nothing, for nothing.

21 JUDGE THOMPSON:

22 And I'd like to adopt the position that clearly we are dealing with you in the context of your role as an
23 officer of the Court, and we are in fact calling upon you to follow certain hallowed traditions and ideals
24 of the profession and we are certainly not, I can assure you, not going to take anything that we say in
25 the context of our interaction with you to reflect adversely on your client. I mean, we are here to -- we
26 are sworn to perform our duty and it's just that in matters of this nature, if the Bench and the Bar need
27 to react or interact in a way that reflects the high traditions of the profession that serious allegations
28 before they are made must be checked out. And in this particular case, they are quite serious. We
29 were outrage by the compliant. I will tell you that I was outraged by it, because if the complaint is true,
30 then this Court has to act in a very forthright and authoritative manner to prevent that kind of thing
31 happening. And that was the mood in which we are, and when we got this report to say that, "Well, it
32 doesn't seem as if there is any factual subtract in all this", then you can understand how indignant we
33 have been.

34 JUDGE BOUTET:

35 And again, Mr. Jordash, it is not in fact -- I think it was quite proper, I would suggest, for your client to
36 raise that with you. After all, you are his counsel in court. It's more the manner in which it has been
37 dealt with rather than what -- I mean, his ways to complain are indeed through you, because you have

1 access not only to the Court, to the Registrar, to every other means as such, which he may not have
2 access to and therefore it was absolutely and completely proper for him. And I'm not disputing that at
3 all. So my comments have nothing to do with whatever may have transpired between you and your
4 client, none whatsoever. It's more my -- in the after fact, it is more with the process rather than the
5 substance of it.

6 MR. PRESIDENT:

7 Mr. Sesay, I see your hand up.

8 JUDGE BOUTET:

9 I think it's what I'm saying, so I --

10 MR. PPRESIDENT:

11 You do not need to address the Court. I don't think we need to hear from you. This matter does not
12 implicate you, it does not concern you, you know, don't you worry about that.

13

14 Now -- yes, did you want to wrap up?

15 MR. JORDASH:

16 No, I think I have said everything I wanted to say.

17 MR. PRESIDENT:

18 Right.

19

20 Well, we would let this matter rest there and to caution counsel against such conduct. We hope it
21 wouldn't have to happen again. We all learn from our experiences. I think we learn everyday. So, we
22 would let this matter rest there. The Chief of Detention, we thank you very much. We believe what
23 you have said, we believe your report and we would release you now and -- we would release you so
24 that we can continue with our proceedings.

25 MR. O'SHEA:

26 Your Honours.

27 MR. PRESIDENT:

28 Please, you can go please.

29 MR. O'SHEA:

30 Your Honours, before Mr. Wallace leaves --

31 MR. PRESIDENT:

32 You can go.

33 JUDGE BOUTET:

34 He wants to question Mr. Wallace first.

35 MR. PRESIDENT:

36 You can go. You want to question him?

37

1 MR. O'SHEA:

2 I want to -- yes, I think it's fine if Mr. Wallace stands there -- sorry, I think it's important that he hears
3 what I have to say, and I don't want to extend the patience of the Court on this matter.

4

5 Mr. Cammegh has already indicated that our client is refusing to see us. We've just heard from Mr.
6 Wallace that the allegation has come from Mr. Gbao in relation to his own wife. We've also heard that
7 -- and Mr. Wallace can stand me corrected if I'm wrong about this, but my understanding is that Mr.
8 Gbao's wife has not come back to the detention centre since the time of the specific incident.

9

10 Now, that being the case, this matter is already in the public domain. Perhaps we could have dealt
11 with it in a different way, but it's now in the public domain. I would simply request, considering the
12 handicap that we are faced with at the moment with our client, that the matter not be simply laid to
13 rest but that Mr. Wallace be asked to have a discussion with Mrs. Gbao the next time she comes to
14 the detention centre so that he can follow up on the matter. Because it appears as though it's a
15 matter which should not be closed, if I can put it that way, and I'm not in a position to take instructions
16 on this, but I'm here as an officer of the court, in the face of an order, to represent Mr. Gbao and, in
17 my submission, before this matter can be closed, Mrs. Gbao needs to be spoken to, if I can put it that
18 way.

19 MR. PRESIDENT:

20 Yes, Mr. O'Shea, when I say that we were letting the matter rest, I mean, that the person we wanted
21 to answer -- to listen to the report was Mr. Jordash, and maybe, you know, the Defence counsel. And
22 if we are letting the matter rest it's because we want to forget the allegations as far as, you know, our
23 own level is concerned but certainly the chief of the detention of the Special Court, you know, will
24 have to carry out his own administrative inquiries, you know, at his level just as they did. In fact, this
25 matter is even extraordinarily before us; it should have been before the Registrar of this -- of this
26 Court. If we took it on it's because we shared -- we, the Bench, he shared the concerns, you know, of
27 the Defence about the outrage of the allegations, you know, that were made. And we just -- because
28 of the dialogue we've had here, we want to assure the members of the Defence that we at this level
29 are at this stage letting the matter, you know, rest there, and that the proceedings -- I mean, the
30 incident will in no way affect the relationship, you know, between the Court, the Bench, and Mr. Sesay
31 because Mr. Sesay is an innocent victim of this particular incident. If the papers are flagging him all
32 over the place, it is not true; we've seen that it is not true, so I think that we should allow it rest there
33 but Mr. Wallace will continue with whatever he has to do at his administrative level in his own
34 detention centre.

35 MR. O'SHEA:

36 I understand Your Honour's point; the ball is back in the court of the registry.

37

1 MR. PRESIDENT:

2 Pardon me?

3 MR. O'SHEA:

4 The ball is back in the court of the registry.

5 JUDGE THOMPSON:

6 Mr. O'Shea, that's where it properly belongs. It would seem to me, my own understanding is that
7 when it comes to what happens in the detention facilities, there is a tradition of judicial non-
8 intervention. Unless something happens there that shocks the conscience of the Court, then the
9 Court is called upon to intervene. But we are not called upon to intervene if there's every infraction,
10 minor or major, of prison rules. The hierarchy there gives the administration supervisory jurisdiction
11 over that. And when we agreed to take on this matter it was because the issue was so serious. And
12 speaking for myself, I said if the allegation is true, then this is a matter that rises to the level of
13 shocking the conscience of the Court and requires judicial intervention. That's what we're saying. I
14 mean, you should only come to us when you've exhausted the other channels that are provided and
15 you don't have any remedy, then the Court sees its way clear to intervene. And I am pretty sure that
16 Mr. Wallace has now been sensitised to a very, very serious allegation, and that he will continue to be
17 vigilant about what he himself has said, the possibility of impermissible intrusive searches. He had
18 said from the witness box that they are unlawful; they shouldn't happen. And if he, under his watch,
19 allows such things to happen, it reflects on his own reputation as a detention chief. And, of course,
20 this Court will not condone outrages on human dignity wherever they are happening.

21 MR. PRESIDENT:

22 I hope you are all satisfied. Mr. Wallace, can you --

23 MR. O'SHEA:

24 Thank you.

25 MR. PRESIDENT:

26 Thank you very much for coming. Yes, thank you.

27 MR. O'SHEA:

28 I'm grateful to Mr. Wallace.

29 MR. PRESIDENT:

30 Yes, may we hear -- Mr. O'Shea, what do you intend to do?

31 MR. O'SHEA:

32 I'm in Your Honours' hands, Your Honour.

33 MR. PRESIDENT:

34 We are also in your hands because if we are here it's because of you.

35 MR. O'SHEA:

36 Well, well, I'm ready to give the arguments, of course, but I noticed that the time has moved on quite a
37 bit, whether Your Honours would like to take this matter on Monday morning or now, it's up to Your

1 Honours.

2 MR. PRESIDENT:

3 But how long should it take you? I mean, go to the essentials and let's finished with it. I mean, it's
4 not --

5 MR. O'SHEA:

6 Well, it's just that Your Honours indicated the last time we discussed this matter that we'd follow up
7 with cross-examination. I suppose we can address that when we reach the end, Your Honour.

8 MR. PRESIDENT:

9 Well, let's go on. Let's go on.

10 MR. O'SHEA:

11 Very well.

12 MR. PRESIDENT:

13 Yes.

14 JUDGE THOMPSON:

15 Mr. O'Shea, I have my pen in my hand.

16 MR. O'SHEA:

17 Sorry, Your Honour.

18 JUDGE THOMPSON:

19 I have my pen in my hand to start to record your arguments.

20 [Pages 11 to 26 by Gifty C. Harding]

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1 [5.00p.m.]

2 MR. O'SHEA:

3 May it please Your Honours. This is an application to exclude specific parts of the testimony of
4 witness TF1-199 and, in particular, the essence of those parts of the testimony which referred to
5 kidnapping of UNAMSIL personnel in Makeni, which is in the District of Bombali.

6
7 Your Honours, the starting point to my submission is Rule 89 of the Rules of Procedure and Evidence,
8 and in particular Rule 89(C) which reads that: "A Chamber may admit any relevant evidence." It is
9 my submission that the use of the word "may" in that Rule clearly shows that there is a judicial
10 discretion in the evidence admitted not merely because it's relevant, but it should also be probative,
11 and I think that, as suggested by Your Honours themselves, there are two ways of putting it. These
12 are, the Court can exclude evidence on the basis of their discretion, and if they feel that the fairness
13 of the trial requires it, and there may be a number of reasons for that, and then more narrowly on the
14 question of whether evidence is probative, in my respectful submission, evidence ceases to be
15 probative if it cannot be reliably tested through cross-examination.

16
17 The next principle that I would like to draw to Your Honours' attention is the principle of disclosure on
18 the part of the Prosecution, and if I may draw Your Honours' attention in particular to Rule 67(D), "If
19 either party discovers additional evidence or information or materials which should have been
20 produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial
21 Chamber of the existence of the additional evidence or information or materials."

22
23 Now -- and in my respectful submission, this is a provision which is intended to give effect to Article
24 17(4)(b) to the extent that the Defence must be given adequate time and facilities to prepare their
25 case. And obviously, the Prosecution should not deliberately violate Rule 67(D). But in my respectful
26 submission, Rule 67(D) can be violated even without deliberate conduct on the part of the
27 Prosecution, and I remind Your Honours of Your Honours' decision in the case of *Norman et al*
28 regarding the exclusion of evidence at paragraph 25 where Your Honour indicate in that paragraph,
29 "While there is a duty for the Prosecution to diligently disclose witness statements that identify matters
30 that witnesses will testify about a trial, thereby providing the Defence with essential information for the
31 preparation of its case." Your Honours then go on to indicate that it is foreseeable that other
32 evidence may come out during the course of oral testimony, and the Court has referred to what it calls
33 the principle of orality.

34
35 Now that sentence that I read out from Your Honours ruling: "The Prosecution to diligently disclose
36 witness statements," in my respectful submission, in order for the Prosecution to be diligent, they
37 must not only not deliberately lead to a situation whereby a witness comes out with surprise evidence

1 and without former notice, but also they must not do so negatively. In my respectful submission, and
2 in this particular case, even if there was not a deliberate omission to disclose this relevant material on
3 the Defence so that they would not be taken by surprise, they had all the information at their disposal
4 to be able to, number 1, adduce this information from the witness before the witness came into the
5 witness box, and number 2, have it disclosed on the Defence.

6
7 If I may refer Your Honours to a decision in the International Criminal Tribunal for Rwanda, and I will
8 hand out copies of that decision. It seems as though I only have two left, that wasn't intentional; that
9 was negligence. Well, I said a decision; it's actually a transcript. The reason why I'm handing up the
10 transcript is because the decision was an oral decision and not a written decision and that doesn't
11 detract from the usefulness of the decision. It perhaps makes it a little bit less practical. But this is
12 the case of *Keremera et al* or *Government I* and an issue arose in this case, and with regard to an
13 allegation of rape which came out for the first time during the course of the testimony of the witness.
14 And rape was a count in the indictment and joint criminal enterprise to commit rape was a count in the
15 indictment, and so it was a matter for which the accused was being charged.

16
17 However, there was no notice that this specific witness in this case who was giving evidence was
18 going to say -- was going to talk about a rape. So a specific incident of rape came out for the very first
19 time in the witness box, and there was no previous statement and no will-say statement. And the
20 relevant part, Your Honours', on page 17 and 18 of this transcript and on page 17 of the transcript,
21 there is a submission by Defence counsel Mr. Hooper where he states that, "I believe that there is
22 clear thought in the case of *Bagasora* that there should be will-say statement. If the Prosecution is
23 saying that they have notice of this, then, Madam President, my concern is that I've had no notice of
24 it, none at all," referring to the rape allegation coming from the witness.

25
26 And then further down, the President of the Court states: "Madam," referring to the Prosecution, "can
27 you confirm to us that there has been no disclosure of these facts, either in preliminary pre-trial brief
28 or in any previous statements you have from this witness?" Then prosecution counsel replies: "That
29 is correct, Your Honours." Then the President of the replies: "Very well, we therefore cannot accept
30 you divulge these facts now without having disclosed to the other party." There is one more copy of
31 this particular transcript.

32
33 So this is a -- this case --

34 MR. PRESIDENT:

35 You were on pages 17 and 18. Are you still on pages 17 and 18?.

36 MR. O'SHEA:

37 Well, it goes on to page 18 but I've only referred Your Honours to parts on page 17. It's basically just

1 a reassurance on page 18 from the Bench that they wouldn't allow further questions on that matter.
2 Now, the situation in that case and in the case before us, Your Honours, and as I assert, is that there
3 is information, significant information which has not been disclosed on the Defence before, in relation
4 to this specific incident where this witness, Witness 199 states that he saw white men in a truck and
5 later states that that refers to a kidnapping in Makeni. Now, this is a witness who, according to my
6 understanding, his evidence relates to Koinadugu District, essentially. He moved into Port Loko to
7 some extent, but he is not in Makeni.

8

9 Now, so far as the witness statements are concerned, there is reference to UN personnel, and I don't
10 know if Your Honours have copies of the witness statements of this witness, probably not. And on
11 the last page of the main witness statement of this witness, it was stated when the RUF attacked UN
12 peacekeepers, they left Lunsar and went to Freetown. "There was a heavy attack on the Gberi
13 Junction. We saw UN vehicles drive by -- with RUF soldiers as drivers; they were wearing UN caps."
14 Now, in my submission, that puts the Defence on notice of the fact that there was an attack on UN
15 peacekeepers. It also puts the Defence on notice that these rebels from somewhere got hold of UN
16 caps, but we don't know how.

17

18 The next statement is what has --

19 MR. PRESIDENT:

20 You say the Defence was put on notice of an attack on UN forces?

21 MR. O'SHEA:

22 Yes. The Defence was put on notice of an attack on UN forces and the fact that rebels were wearing
23 UN hats or caps.

24 JUDGE BOUTET:

25 Mr. O'Shea, which page are you referring to? If I -- this is page 3, there is number on top of the page
26 6, 9 something. It would be easier for me to refer to --

27 MR. O'SHEA:

28 We don't have those numbers, Your Honour.

29 JUDGE BOUTET:

30 Okay.

31 MR. O'SHEA:

32 But it's the last page of the statement; there is only one statement for this witness. As I said, there is
33 only one statement for this witness. According to Your Honours' ruling in *Norman*, there are two
34 because the will-say which I'm about to refer to, is the additional supplementary statement. And the
35 additional supplementary statement states that: "I heard about the attacks on the UN peacekeepers
36 when I was at the interim care centre. I saw rebels wearing UN caps and driving UN vehicles. We
37 knew that the rebels had attacked the UN." Again, the Defence is put on notice of the fact that there

1 has been an attack on UN peacekeepers, and that they were wearing UN caps and driving UN
2 vehicles. How they came by those UN caps and UN vehicles, we don't know.

3

4 Again, Your Honours have referred to the *Bagosora* decision where this issue has been discussed,
5 and in the *Bagosora* decision, the Court attempts to give some guidance as to what would be just
6 providing details and what would amount to new evidence. And I would refer to paragraph 18. I think
7 I have copies of this decision. Well, I have at least two copies. I apologise, Your Honours, for the
8 disorganisation and also, one of them has been stapled and ordered wrongly, and there is even a
9 page missing. So I apologise for my sloppiness on the organisation. That's at paragraph 18, and we
10 would like Your Honours to remember that this is a decision which deals with late disclosure --
11 will-say statements. It does not deal with the situation we are dealing with here which is though within
12 the other oral decision that I referred Your Honours to. So the principles are not necessarily identical,
13 but what is useful in paragraph 18 is the guidance on where the line is to be drawn. The court states
14 that: "At the other end of the spectrum are events described in witness DBQ's will-say statements
15 which are not mere details of the incident previously disclosed to the Defence, but which are
16 substantially new and seriously incriminating of the accused. This is not a case of correcting the
17 place or time of an incident; or adding an incident proximate in time and place to other substantially
18 identical incidents; or providing additional information about an incident which has already been
19 substantially indicated." Now --

20 JUDGE THOMPSON:

21 So in one sentence, what is the test in *Bagosora* --

22 MR. O'SHEA:

23 Well --

24 JUDGE THOMPSON:

25 For exclusion as suppression of the --

26 MR. O'SHEA:

27 Well, in one sentence -- well, I should add so that the court is not misled. There are two possible
28 forms of relief: One, is the exclusion of the evidence --

29 JUDGE THOMPSON:

30 Because my (*overlapping microphones*) is that the test is whether, in fact, the evidentiary material that
31 is complained of materially alters the incriminating nature of the evidence of which the Defence had
32 had notice. That would seem to be the overriding test of *Bagosora*. There must be some indication of
33 a material alteration of the incriminating nature of the evidence of which the Defence has already had
34 notice. It would seem to be the theme that runs in *Bagosora*.

35 MR. PRESIDENT:

36 *Bagosora* talks of evidence which is substantially new, substantially new on your paragraph 18.
37

1 JUDGE THOMPSON:

2 And that's the test.

3 MR. O'SHEA:

4 Well, I would invite Your Honours -- I would accept that that's a reasonable test.

5 JUDGE THOMPSON:

6 But the thing that runs throughout or the thing that -- if you are invoking the jurisdiction of the Court to
7 exclude evidence that is relevant, and that may have some little probative value in context, then you
8 must show that the new material is of such a nature that it materially alters the incriminating nature of
9 the evidence of which the Defence already has had notice.

10 MR. O'SHEA:

11 Your Honour, there is another aspect to testing my submission which is perhaps in a way more
12 important, which is the question of: have the Defence been taken by surprise? And in this particular
13 case, we're dealing with the witness who is not in Makeni. He is in other locations, and, the fact that
14 he speaks of attacks on the UN, having regard to the indictment and the pre-trial brief, we would not
15 necessarily from the bench of the Defence anticipate that the witness would start talking about
16 kidnapping. And, I think it's important to indicate that in the indictment and the pre-trial brief, with
17 regards to kidnapping incidents, and the Prosecution would correct me if I am wrong here, that
18 Koinadugu is not one of the places which is mentioned. Now, so what I am saying is that --

19 JUDGE BOUTET:

20 Mr. O'Shea, I just want to follow -- because you keep coming back to Koinadugu --

21 MR. O'SHEA:

22 Yes.

23 JUDGE BOUTET:

24 -- as not being the place, but my recollection and just looking at the statement as such, the witness
25 does not say it happened; he said, "I heard about it." Nowhere did I hear -- I may be wrong on this, I
26 will have to check my notes. But my recollection is he has not seen any of that. All he is saying is
27 that, "I have heard of when I was at the --." In the statement in question, "I heard about the attacks
28 when I was at the interim care centre." And as such, he doesn't know about the attack other than
29 somebody told him about that and from that he says, he has seen rebels wearing UN caps. That's
30 what he is reporting; that's what is in the interview notes.

31 MR. O'SHEA:

32 Yes. That's quite right, Your Honour, but I should qualify that in the sense the evidence -- his
33 evidence was also that: "I saw a truck coming with white men in the truck who did not have clothes
34 on."

35 JUDGE BOUTET:

36 Can you find this in his evidence in court?

37

1 MR. O'SHEA:

2 In chief, yes.

3 JUDGE BOUTET:

4 Okay.

5 MR. O'SHEA:

6 Yes. Indeed, he has said, insofar as the kidnapping in Makeni is concerned, but coupled with a
7 degree of direct evidence on his part with regard to unclothed white men in the truck. Now what I say
8 is that we have not in the -- while in the indictment we have notice of kidnapping as a count, we do not
9 have notice that testimony was going to come out of this witness or, indeed, in this trial session. The
10 Prosecution served upon us a witness list fairly recently, and in that witness list it has TF1-199. The
11 counts of kidnapping of UN personnel is counts 14 to 17, but the counts which are brought to the
12 attention of the Defence in this document are 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 13. If we were to
13 expect kidnapping of UN personnel would come out of this witness, we would have expected Counts
14 14 to 17 to be explicitly mentioned in this document.

15 JUDGE BOUTET:

16 How does that defer from the decision we've just rendered?

17 MR. O'SHEA:

18 Well, the decision Your Honours have just rendered, I say, respectfully, deals with a slightly different
19 scenario because it's a question of will-say statement having been given. So it's not a case where
20 there is absolutely no notice on the Defence whatsoever.

21

22 And secondly -- when you say the decision you've just rendered, I'm assuming you are talking about
23 this morning's decision.

24 JUDGE BOUTET:

25 This afternoon, yes.

26 MR. O'SHEA:

27 This afternoon's decision, yes.

28 JUDGE BOUTET:

29 Yes.

30 MR. O'SHEA:

31 So that's one important distinction is that that ruling relates to a situation where information is in a
32 will-say statement, whereas this situation is where -- yes, there is a will-say statement, but the
33 information we are complaining about -- we have no notice of it, we are saying. And the other
34 important distinction, in my respectful submission, is that in this particular case, in my submission, the
35 Prosecution have been insufficiently diligent, and I say this for the following reasons:

36

37 First of all, the Prosecution know of the existence of counts 14 to 17 of the indictment.

1 MR. PRESIDENT:

2 Mr. O'Shea, you have just ten more minutes to address us, please.

3 MR. O'SHEA:

4 That's very generous.

5 MR. PRESIDENT:

6 Just ten, more minutes, please.

7 MR. O'SHEA:

8 That's very generous.

9 JUDGE BOUTET:

10 May be, you will conclude before that.

11 MR. PRESIDENT:

12 I intended to be very generous.

13 MR. O'SHEA:

14 So, the Prosecution know that it is an important issue for them, this issue of kidnapping. When they
15 were going to see their witnesses and they were talking about UN personnel, if they interview their
16 witnesses properly, as the questions were put very ably by my learned friend to the witness in the
17 witness box, one can reasonably assume that the detail in relation to these UN personnel should have
18 come out. So I say that the Prosecution has not been diligent in this affair because they have not --
19 they are on notice of the fact that this witness is talking about UN personnel. If questions had been
20 put to this witness in the same way they were put in open court, the full facts, one assumes would or
21 should have come out or at least, the essentials of those facts. And clearly, the kidnapping is a very
22 important part of this witness's story. If one looks at the transcripts -- and I've got to be careful with
23 my ten minutes, I won't go through the transcript, but if one looks at the transcripts, one can see that
24 there are two or three pages of questions in relation to the trucks, the white men and ultimately, the
25 question of kidnapping in Makeni.

26

27 So the questions were led, and I don't say that the Prosecution knew that this was going to come out
28 of the witness, and the Prosecution have to answer that for themselves, but what I do say is that they
29 ought to have known and, the way in which the questions were deliberately, slowly, progressively
30 through this question of the truck, the white men in the truck, the kidnapping, certainly is a *prima facie*
31 indication -- I'm not saying that they did know, but it's *prima facie* indication that the counsel who was
32 leading had some idea of what the witness was coming out with. And I just leave it to Your Honours
33 and the Prosecution's submission on this to clear up that particular issue. But what I do say at a
34 minimum is that if the Prosecution are going to be diligent in matters of disclosure, if they do not
35 question their witnesses in a diligent manner, and what I say is, if they hear from the witness UN
36 vehicles and rebels with UN caps, they know their case, we don't, but they must say to the witness:
37 "Well, tell us about these UN vehicles. Who was in the vehicles? What did they look like? Where

1 was the vehicle coming from? What do you think was happening; what was your perception?" These
2 are the kinds of questions which come out in court and had they come out through the investigators or
3 counsel out of court, then they would know this information.

4 JUDGE THOMPSON:

5 Probably they were afraid of coaching their witnesses.

6 MR. O'SHEA:

7 Well, I entirely accept that there is a line to be drawn between conducting a competent interview and
8 coaching a witness. However, if the Prosecution have, as an important part of their indictment, UN
9 personnel and the major complaint that they have is kidnapping, then, what I say is that a diligent or
10 competent interview ought to have brought that out. If you take that, coupled together with the fact
11 that we were taken completely by surprise, my submission is that it would not be fair for this evidence
12 to be admitted because the examination-in-chief has taken place, two counsels have cross-examined.
13 We are now called upon to cross-examine on a matter which has taken us by surprise. We should, at
14 least, have been given the opportunity to, at least, be able to make an assessment as to whether we
15 had to conduct investigations on this particular incident; this truck coming down the road with the
16 white men in it. Perhaps we could have conducted investigations. I entirely accept that we are in a
17 complete bind because of the position of our client at the moment, but that's a separate matter.
18 Maybe we could have conducted independent investigations on that incident at that time, coming
19 down the road from Makeni, etc. We could have conducted investigations.

20

21 And then there is the question of cross-examination. We need to be able to think very carefully about
22 this because our client is accused by the Prosecution of being very central in these questions of
23 kidnapping in Makeni. That is the allegation, if one reads the supplementary pre-trial brief. So we
24 are, in my submission, prejudiced by all this and it is not a mere matter of just setting out a few mere
25 details which add to the story. This is a new crime which is effectually capable of being quite
26 separated from an attack. The fact that there were hats on their heads doesn't say anything either
27 way because they could have been picked up, they could have stolen, pillaged or anything, we just
28 don't know.

29

30 On the question of the diligence of the Prosecution also needs to be pointed out that we've got two
31 interviews. We've got the first interview: UN vehicles comes out, caps on their heads comes out.
32 Then we have a second interview very shortly before we come into court, again the same information
33 comes out. So these witnesses had two bites of the cherry of coming out with this issue of the white
34 men in a truck, and in my respectful submission, on the face of the document, on the face of the
35 transcript, this is information that ought to have come with diligent inquires or investigations from the
36 Prosecution, and ought to have been brought to our attention. And the mere fact that we have no
37 notice of it whatsoever, is enough, in my respectful submission, to make it unfair for it to be admitted.

1 Those are my submissions.

2 MR. PRESIDENT:

3 Thank you, Mr. O'Shea. Learned counsel for the Prosecution, your reply please.

4 MS. TAYLOR:

5 Thank you, Your Honours.

6 MR. PRESIDENT:

7 You can, please, oblige us with some element of brevity.

8 MS. TAYLOR:

9 I would do my best.

10 MR. PRESIDENT:

11 Thank you.

12 MS. TAYLOR:

13 Your Honours, my starting point would be paragraph 83 of the amended consolidated indictment.

14 Paragraph 83 appears immediately below the heading: "Counts 15 to 18, attacks on UNAMSIL
15 personnel." And that paragraph reads: "Between about 15th April 2000 and about 15th September
16 2000, AFRC/RUF engaged in widespread attacks against UNAMSIL peacekeepers and humanitarian
17 assistance workers within the Republic of Sierra Leone including, but not limited to locations within
18 Bombali, Kailahun, Kambia, Port Loko and Kono Districts. These attacks included unlawful killing of
19 UNAMSIL peacekeepers and abducting hundreds of peacekeepers and humanitarian assistance
20 workers who were then held hostage." If I can just pause on that last sentence: "These attacks
21 included --" the word is, "included." And it then goes on to talk about the abduction of peacekeepers
22 and workers who were then held hostage. And in my respectful submission, at its most basic, there
23 can be no kidnapping or no hostage taking without there first being an attack.

24

25 My learned friend talked that this witness gave evidence about Koinadugu District and whilst it is true
26 that the bulk of his evidence which is in relation to the Northern Jungle, he did say that he was taken
27 into the care of Caritas and that he was in Lunsar with Caritas. Lunsar is in the District of Port Loko
28 and Port Loko is one of the districts that is specifically pleaded in the indictment relating to the attacks
29 on UNAMSIL personnel, those attacks including the abduction of peacekeepers and humanitarian
30 assistance workers. The fact that he was in Lunsar is in the first statement, the fact that he was in
31 Lunsar is in the second statement, and the fact that he was in Lunsar at the time that he talks about
32 this was given in his oral evidence.

33

34 For my learned friend to submit that there is some kind of artificial distinction between the
35 Prosecution's case relating to the attacks on UNAMSIL personnel and the abduction of UNAMSIL is
36 completely and utterly artificial.

37

1 The indictment goes on to deal with counts 15 to 18, not 15 to 17 as my learned friend said. Count
2 15 is intentionally directing attacks against personnel involving -- involved in humanitarian assistance
3 or peacekeeping mission, and Count 18 is the abductions and taking hostage -- and taking as
4 hostage, I beg your pardon. And as explained on the face of the indictment, those counts are
5 grouped together as one, in the same way that the counts relating to sexual violence are grouped
6 together as one, the way that the counts relating to physical assault are grouped together as one; the
7 counts that relate to murder and loss of life are grouped together as one. They are part of the same
8 package.

9
10 Your Honours, my learned friend referred you to your own decision dated 16 July 2004, the decision
11 on disclosure of witness statements and cross-examination, and he referred you to part of paragraph
12 25. It is my respectful submission, it is the entire of paragraph 25 that deals with this issue, and if
13 Your Honours would permit me, Your Honours said: "The contention that witness TF2-198 testified at
14 trial about matters not included in his witness statement does not find support from the evolving
15 jurisprudence as invalidating his oral testimony. The Defence argument is that the witness testified
16 about burning plastic being placed on his back and to suffering serious burns, evidence which was not
17 part of his witness statement disclosed prior to trial. The fact that burns to the witness's shoulders
18 were not in the brief interview notes, does not amount to a breach by the Prosecution of its Rule 66
19 disclosure obligations. The Trial Chamber considers that it may not be possible to include every
20 matter that the witness will testify about at trial in a witness statement. The Special Court adheres to
21 the principle of orality, whereby witnesses shall, in principle, be heard directly by the Court. While
22 there is a duty for the Prosecution to diligently disclose witness statements that identify matters that
23 the witnesses will testify about at trial, thereby providing the Defence with essential information for the
24 preparation of its case, it is foreseeable that witnesses, by the very nature of oral testimony, will
25 expand on matters mentioned in their witness statements, and respond more comprehensively to
26 questions asked at trial. The Trial Chamber notes that where a witness has testified to matters not
27 expressly contained in his or her witness statement, the cross-examining party may wish to highlight
28 this discrepancy and further examine on this point."

29
30 Your Honours, you have accepted that with all due diligence, witnesses often say something for the
31 first time at trial. My learned friend has raised really quite a serious allegation against the
32 Prosecution, that we have been insufficiently diligent in the preparation of witnesses. That allegation,
33 in my respectful submission, is completely without foundation and is utterly rejected by the
34 Prosecution. I would doubt that my learned friend, in his legal career has never had the experience,
35 whether he's been appearing for the Prosecution or the Defence, of calling a witness who, for the first
36 time comes out with something that he has never heard before, no matter how many times he has
37 spoken to that witness, no matter how diligent his preparation of that witness is. And I might point

1 out, Your Honours, that it seems to be that the Prosecution is criticised depending upon which way
2 the wind is blowing for the Defence on a particular day. A lot of the cross-examination of the
3 witnesses so far, has been to the effect of, "How many times has the Prosecution spoken to you?
4 What have they said to you? What kind of questions have you been asked?" And whether there is
5 going to be some allegation of the Prosecution has been coaching witnesses or not, it seems to be a
6 matter that the Defence are very interested in, in terms of how many times the witnesses have been
7 spoken to by the Prosecution. The Prosecution speaks to witnesses only sufficiently, to prepare
8 them to give evidence, and not in any way to coach them. The language that is used by witnesses in
9 this Court is their own, and the Prosecution cannot be responsible for the particular words that come
10 out of a witness's mouth once they have been sworn.

11
12 Your Honours, my friend -- my learned friend referred you to two decisions: One, which he gave me a
13 copy of just prior to his submission. The first being in the matter of *Keremera*, and I have only looked
14 at part to which he has referred Your Honours. But his explanation was that, in that matter, although
15 there was an allegation of rape on the indictment, there was no notice that that particular witness
16 would say anything about the sexual violence. Then that is completely distinguishable from the
17 present case where the Defence is being on notice from the two statements that the witness was
18 going to talk about the attacks on the UN personnel.

19
20 And in relation to the decision of *Bagosora*, again one has to be careful simply calling a principle that
21 deals with an issue of disclosure of statements to what Your Honours have termed the "principle of
22 orality." They are not necessarily something that can be directly correlated. But even assuming for
23 the sake of argument that it can, the paragraph to which my learned friend referred you said that the
24 events -- one end of the spectrum relates to events which is substantially new and seriously
25 incriminating the accused, and not simply of correcting the place or time of an incident, or adding an
26 incident proximate in time and place to other substantially identical incidents. And in my respectful
27 submission, the phrase: "Adding an incident proximate in time and place to other substantially
28 identical incidents," is exactly what this witness did.

29
30 This witness, for the first time in the witness box spoke about white men in trucks. The Defence were
31 on notice that the witness would say that whilst he was in Port Loko, he heard about the attacks on
32 Makeni, and he saw in Port Loko rebels wearing UN caps driving UN trucks. Now, to say that there
33 were white men in those trucks is simply adding an incident proximate in time and place to other
34 substantially identical incidents particularly because of the way that the indictment is framed and that
35 the Prosecution case is, as pleaded, that the attacks include hostage taking and the abduction of the
36 UNAMSIL personnel.

37

1 My learned friend also criticised the Prosecution in terms of its preparation of this witness, but -- and
2 with diligent preparation, we would have elicited this information because the statement was shortly
3 before the date of testimony. Your Honours, I would invite you to look at the date of the
4 supplemental statement. (*Microphones not activated*) the supplemental statement being served
5 within the 42-day period that Your Honours have mandated in terms of unredacted disclosure of
6 witnesses. This material has all been in the possession of the Defence outside the 42 days that Your
7 Honours had mandated.

8
9 So, in my respectful submission, there has been no surprise. My learned friend raised the issue that
10 these allegations or that his client is said to have played a central role in these allegations. That fact
11 has been clear to the Defence for quite some time, and to suggest that because this evidence which
12 apart from adding: "I saw white men in the trucks. I saw trucks driving past," is hearsay. "I heard
13 about the attacks in Makeni." To suggest that the Defence is somehow prejudiced or haven't begun
14 any kind of investigation into the attacks on the UNAMSIL peacekeepers when it's been clear to them
15 for quite some time that the Prosecution alleged that the third Accused played a very central role in
16 those events is quite possible.

17 [Pages 27 to 38 by Momodou Jallow]

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1 [5.45 p.m.]

2 MS. TAYLOR:

3 So in my respectful submission, there has been no surprise, there has been no prejudice that cannot
4 be cured by cross-examination. And, as Your Honours pointed out in the decision in the CDF trial to
5 which I have referred, Your Honours say that if my learned friend wishes to put that, this evidence has
6 less weight because it was not put in the original statement, he is at perfect liberty to do so.

7

8 Your Honours, I note your injunction to me to be brief. I don't wish to go into too much more except
9 perhaps just to respond to something that my learned friend said at the very beginning of his
10 submissions when he was talking about Rule 89(C) and Your Honour's discretion to admit relevant
11 evidence. He said that in his submission, for evidence to be probative, it must be able to be reliably
12 tested through cross-examination. Now, I don't, with the greatest respect to him, agree with that. I
13 would submit that evidence is probative if it can materially affect an issue that is, in fact, before the
14 Tribunal. And, of course, it is up to my learned friend to cross-examine on this issue, being the issue
15 which Your Honours have given him leave to cross-examine at a later stage on. There is no prejudice
16 that arrives from that.

17

18 And I also respond to the idea that there can be some kind of negligent breach of the Prosecution's
19 obligation in relation to Rule 67(D). The Prosecution has disclosed everything that it had in relation to
20 this witness. The Prosecution will not coach witnesses, the Prosecution will not sit with witnesses so
21 many times so that we know in advance the particular language that a witness will use about events
22 to which we are aware that the witness will testify. And in my submission, there is absolutely no
23 foundation for assuming that the Prosecution can be negligently, recklessly or indifferently in breach
24 of an obligation.

25

26 If Your Honours please.

27 MR. PRESIDENT:

28 Thank you. Are you through?

29 MS. TAYLOR:

30 Yes, Your Honour.

31 MR. PRESIDENT:

32 Thank you. Yes, Mr. O'Shea, a short reply. Five minutes, please.

33 MR. O'SHEA:

34 Yes, Your Honour.

35 Yes, the indictment does, of course, put us on notice of the issue of kidnapping and that, in my
36 respectful submission, is the problem because the areas where this witness was did not include
37 Makeni where he says this kidnapping took place, albeit hearsay.

1 Also, when we receive documents from the Prosecution with regard to notice to us, we look all at the
2 documents we receive from the Prosecution and the significant document, the witness list, which
3 deals not with the very general allegations against our client, but deals specifically with what this
4 witness is going deal with, specifically excludes the counts on the indictment which deal with the
5 question of kidnapping of UN personnel. Those counts are 14 to 17. And while a number of other
6 counts are mentioned next to TF1-199, 14 to 17 is not. That is in the witness list provided by the
7 Prosecution so, if anything, it leads us down the wrong path.

8

9 And also the witness's reference to dates does not concord with the indictment because the witness
10 talks about December 1999, then three months elapse and then we hear about the truck and then --
11 so in my respectful submission, the indictment and the documents which we have received from the
12 Prosecution don't help. I know that in the jurisprudence that is a relative factor, but in this case they
13 don't help. In fact, they mislead us, us being the Defence.

14

15 Secondly, Your Honours' decision in *Norman* and the question of providing extra details, it is still my
16 submission that these are not extra details. This is a separate allegation which is quite separable
17 from the question of an attack.

18

19 And to deal with the question of investigation, my learned friend says we should have investigated this
20 anyway. Well, the fact of the matter is that if one looks at the indictment and the pre-trial brief in the
21 supplementary pre-trial brief, we're supposed to go to Makeni and other places, but to Makeni to
22 investigate these matters. We're not supposed to be on that road where this witness is, where he
23 sees the truck coming form the direction of the Makeni. So it is in terms of investigating that particular
24 sighting, we haven't had the notice to be able to do it. So farcical is putting it a bit high.

25

26 Lastly, with regards to my submission on Rule 89(C), again I refer to the decision of *Bagosora* in the
27 case testimony of DBQ. I should have specified that the first time because there are several
28 *Bagosora* decisions and it does get confusing. Paragraph 24 states as follows, and in my respectful
29 submission, supports the proposition that I was putting to Your Honours.

30

31 "The power to preclude admission of late disclosed testimony flows from the language of Rule 89(C)
32 which gives the Chamber discretion to admit relevant evidence which it deems to have probative
33 value, and conversely, a power to refuse evidence which is irrelevant or does not have probative
34 value. As previously mentioned, evidence whose reliability cannot be adequately tested by the
35 Defence cannot have probative value."

36

37 So there is jurisprudential support for the proposition that I was putting to Your Honours about how the

1 expression "probative value" should be interpreted.

2

3 Lastly, Your Honours, the question of diligence. I emphasise -- I'm not saying deliberate -- it is for the
4 Prosecution to tell Your Honours, if they wish, whether they knew about this evidence or not, but
5 diligence is not just about deliberate behaviour or omissions or misconduct. It is also about the
6 manner in which interviews were taken, and in my respectful submission, it is clear on the documents,
7 not from any other evidence, but it is clear on the documents that a properly conducted interview
8 ought, I don't say will, ought to have brought out that information. And the Defence surely cannot be
9 in the position where they have to prove diligence in these kind of matters because the whole issue is
10 one of surprise. I'm not trying to throw arrows at the Prosecution. The question here is: Have we
11 been prejudiced? Have we been taken by surprise? And the test with regard to diligence of the
12 Prosecution has to, in my respectful submission, be a constructive one for that very reason. And even
13 in the absence of lack of diligence on the part of the Prosecution, I say that it would not be fair to
14 admit this evidence because we have been taken by surprise.

15 JUDGE THOMPSON:

16 Learned Counsel O'Shea, your learned colleague for the Prosecution did say that the distinction
17 which you seek to draw in this context between an attack and kidnapping for the purposes of the
18 indictment, if I am correct, is a distinction without difference. What is your short response?

19 MR. O'SHEA:

20 An attack can take place without a kidnapping.

21 JUDGE BOUTET:

22 But the question was not that. It is exactly the opposite. Can a kidnapping take place without an
23 attack? Yes, obviously an attack does not always include a kidnapping, obviously.

24 MR. O'SHEA:

25 A kidnapping does not always include an attack, no.

26 JUDGE THOMPSON:

27 But an attack certainly pending the -- [Microphone not switched on]

28 MR. O'SHEA:

29 I mean, obviously it must involve an assault in the common law sense, but when we see the words
30 "attack on UN personnel" in the context of an armed conflict, we assume or we reasonably anticipate
31 that what we're talking about here is men going forward with guns or knives and attacking other
32 armed men. In no sense -- or they could be unarmed, but in these particular circumstances it is
33 unlikely because we all know that UN personnel do carry arms.

34 JUDGE THOMPSON:

35 There is no authority for limiting the word "attacked" to that situation.

36 MR. PRESIDENT:

37 Mr. O'Shea, what analogy would you draw between rebels or so driving UN trucks and wearing

1 uniforms, and then on the other side you see some UN staff white or so, you know, naked or bare
2 bodied, well what sense would you make about that?

3 MR. O'SHEA:

4 Well, let's be clear about this, Your Honour. In the statement, in the two statements that I have
5 referred to, there is no mention of white men without their clothes in a truck. That comes out in the
6 oral statement.

7 MR. PRESIDENT:

8 I'm putting your question, you know, to you.

9 MR. O'SHEA:

10 Yes. But it is important to have that clear, Your Honour, because if one puts a UN cap on a rebel and
11 UN clothes on a rebel and a white man sitting next to him with no clothes on, one can perhaps draw
12 the inference that there might be a kidnapping. Had we had notice of the fact that there were naked
13 white men in a truck, the position would be different, but we didn't. The fact that a man has a UN
14 helmet on means nothing. He may have found it in the bush. It may be a result of looting. Looting is
15 another allegation on the indictment.

16 MR. PRESIDENT:

17 Looting from a UN --

18 MR. O'SHEA:

19 Facility.

20 MR. PRESIDENT:

21 -- facility in that area?

22 MR. O'SHEA:

23 Or simply sneaking up behind a UN soldier and taking it off his head.

24 JUDGE BOUTET:

25 But the statement goes a little bit further. "I saw rebels wearing UN caps and driving UN vehicles."
26 I'm just quoting from the statement. "We knew that the rebels had attacked the UN. At this time the
27 rebels were still mixed with." So this is the statement you're talking about. In that statement, I'm not
28 saying it is true or not, but I'm just saying "in the statement." If the witness says, "I saw individuals
29 with UN caps driving UN vehicles," and in his view they were rebels.

30 MR. O'SHEA:

31 Well, it is certainly enough for -- to raise a suspicion in the Prosecution's mind --

32 JUDGE BOUTET:

33 But why not in a Defence mind when you are doing an investigation?

34 MR. O'SHEA:

35 [Overlapping microphones]

36 JUDGE BOUTET:

37 I have the difficulty to follow that, on the one hand it should have raised a suspicion on the

1 Prosecution, but it does not raise suspicion in your mind as a Defence conducting investigation. Why
2 would it on the one hand and not to you?

3 MR. O'SHEA:

4 Well, Your Honours, it would be terribly unfair on the Defence if it were the requirement that the
5 Defence has to play a guessing game and has to say, "Well let's look at these facts and analyse them
6 and think what possible suspicions might arise or what possible nuggets of gold for the Prosecution
7 might arise out of these sentences or those sentences." The whole point about the rules of disclosure
8 is that we have a clear picture of the essential elements of what the Prosecution is alleging. And this
9 witness does not, in any sense in those two statements, allege kidnapping. It might be possible to
10 argue that we could have a suspicion that the witness might go on to talk about kidnapping. But when
11 we have a witness list from the Prosecution which specifically excludes the count on the indictment
12 that deals with kidnapping of UN personnel, I think we're entitled to place a degree of trust in the
13 Prosecution, in my respectful submission.

14 MR. PRESIDENT:

15 Okay, thank you.

16 [Trial Chamber confer]

17 MR. PRESIDENT:

18 Yes. Thank you for your arguments. We would reserve -- we would put the matter under advisement
19 and advise ourselves properly on the ruling for Monday. We'll give the ruling on Monday because we
20 need to consult on it. The arguments are very interesting, indeed, and I think we -- is there any other
21 matter which the Defence would like to mention?

22 JUDGE BOUTET:

23 If I may?

24 [Trial Chamber confer]

25 MR. PRESIDENT:

26 I wanted to know from learned counsel whether the new scheduling order has been distributed to all
27 of you, the scheduling order for the RUF and the CDF cases. It was distributed to you?

28 MR. BROWN:

29 Yes, Your Honour. I think we saw it this afternoon.

30 MR. PRESIDENT:

31 So you're fully --

32 MR. O'SHEA:

33 I haven't opened all my e-mails.

34 MR. PRESIDENT:

35 Well, you'll receive it, I'm sure, any time from now.

36 MR. BROWN:

37 But we just did receive it, Your Honour, so I would not be in a position to respond or give any further --

1 MR. PRESIDENT:

2 That's all right. Okay. Well, I suppose that solves the problems, you know, the questions you were
3 raising. Mr. Cammegh, I'm referring to you in particular because I know you raised this issue.

4 MR. CAMMEGH:

5 Yes, Your Honour. I wonder if Your Honour would be kind enough to put me out of my misery and tell
6 me now?

7 JUDGE BOUTET:

8 RUF will not be in December. The timings are there, but that was essentially your question.

9 MR. CAMMEGH:

10 Yes. Well, that is very helpful. Yes, it was. Thank you, thank you very much.

11 MR. PRESIDENT:

12 And your interests were particularly considered because we want you to have a good Christmas.

13 MR. CAMMEGH:

14 I wasn't intending to take the whole of December off, if that's what Your Honour is wondering. There
15 is a professional matter that I have in the diary which would be very difficult for me to give up and I'm
16 very grateful. Do I take it from Your Honours that we sit in October and then in January?

17 MR. PRESIDENT:

18 Anyway you lay hands on the order and you will see the details there. You would be advised to get
19 the two, so that you know how the two trials --

20 MR. CAMMEGH:

21 Yes, thank you.

22 MR. PRESIDENT:

23 Yes, Mr. Jordash.

24 MR. JORDASH:

25 I know it is late in the day, but it is a matter which concerns Monday. I know my learned friend is
26 considering or is going to call the evidence of TF1-060, the witness which was the subject of Your
27 Honour's order. I'm seeking clarification of the order because whilst Your Honours have said that it
28 cannot -- the additional statement -- I beg your pardon, the supplemental statement be categorised as
29 additional, Your Honours, have, unless I misunderstood it, been silent as to whether the Defence
30 ought to be given additional time to investigate the additional allegation contained in the supplemental
31 statement.

32

33 Your Honours will appreciate that it was served well within the 42-day period. And, in fact, as I recall,
34 only served last week and it does, notwithstanding Your Honour's order -- well, it is certainly the
35 submission of the Defence that notwithstanding Your Honour's order that -- or finding that it is a
36 supplemental statement rather than an additional statement, it does nevertheless contain a fresh
37 allegation which the Defence would submit and did submit ought to lead to fresh time for the Defence

1 to investigate. Your Honours' order appears to be silent on that issue.

2 MR. PRESIDENT:

3 Well, we have no comments to make on the decision. It is there. We won't go interpreting our own
4 decisions. It is very clear. If counsel -- it is for counsel to organise himself and put in place a strategy
5 on what you would do if that witness were called on Monday to testify.

6 MR. JORDASH:

7 Perhaps I could put Your Honours on notice that I will apply to have that witness adjourned in order to
8 investigate that fresh allegation.

9 MR. PRESIDENT:

10 It's premature for us to receive such an application because the witness is not yet called.

11 JUDGE BOUTET:

12 Will you be requesting an adjournment of the evidence as a whole or the cross-examination? Can I --

13 MR. JORDASH:

14 I --

15 MR. PRESIDENT:

16 Maybe you need the weekend to think about it.

17 JUDGE THOMPSON:

18 I would say that there is nothing in our ruling that limits your options as counsel with respect to what
19 you need to do, and perhaps deliberately, we could not, in our ruling, deal with every hypothetical
20 situation.

21 MR. JORDASH:

22 Certainly. In answer to Your Honour -- in answer to Your Honour, I can see no reason why the
23 Prosecution couldn't call the evidence in chief, but certainly I wouldn't be in a position to
24 cross-examine without investigation on the new allegation.

25 JUDGE BOUTET:

26 Thank you.

27 MR. PRESIDENT:

28 There certainly you have a strategy advantage over the Prosecution because you have all the time to
29 analyse the evidence before you. In any event, let's leave it for Monday. We would see how the
30 Prosecution moves on Monday and then you may raise any questions should necessity arise.
31 The Court will rise and we'll resume on Monday at 10.00, please. At 10.00, please.

32 [Whereupon the hearing adjourned at 6.06 p.m., to be reconvened
33 on Monday, the 26th day of July 2004, at 10.00 a.m.]

34 [Pages 39 to 45 by Roni Kerekes]

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CERTIFICATE

We Susan G. Humphries, Gifty C. Harding, Momodou Jallow 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.

Susan G. Humphries

Gifty C. Harding

Momodou Jallow

Roni Kerekes