

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL-2004-14-T  
TRIAL CHAMBER I

THE PROSECUTOR  
OF THE SPECIAL COURT  
V.  
SAM HINGA NORMAN  
MOININA FOFANA  
ALLIEU KONDEWA

FRIDAY, 1 OCTOBER 2004  
2.15 p.m.  
RULINGS

Before the Judges:

Benjamin Mutanga Itoe, Presiding  
Bankole Thompson  
Pierre Boutet

For Chambers:

Ms Sharelle Aitchison

For the Registry:

Mr Geoff Walker

For the Prosecution:

Mr Luc Cote  
Mr Kevin Tavener  
Ms Leslie Murray (intern)

For the Principal Defender:

Mr Ibrahim Yillah

For the Accused Sam Hinga Norman:

Dr Bu-Buakei Jabbi

For the Accused Moinina Fofana:

Mr Arrow Bockarie.

For the Accused Allieu Kondewa:

Mr Yada Williams  
Mr Ansu Lansana

1 Friday, 1 October 2004  
2 [Open session]  
3 [Ruling]  
4 PRESIDING JUDGE: Good afternoon, learned counsel. We  
14:15:42 5 announced yesterday that we are sitting today just to  
6 deliver two decisions on motions that were presented by  
7 the parties. We would first proceed with delivering our  
8 ruling on the issue of the non-appearance of the first  
9 accused Samuel Hinga Norman, the second accused Moinina  
14:16:17 10 Fofana, and the third accused Allieu Kondewa in the trial  
11 proceedings. This, as you very well know, was realised  
12 successively, one after the other, in the course of these  
13 proceedings. It is a consolidated decision of the  
14 Chamber to clarify the situation and for this, our  
14:16:45 15 learned brother, Honourable Judge Boutet, will read the  
16 ruling of the Court.  
17 JUDGE BOUTET: Thank you, Mr Presiding Judge. The Trial  
18 Chamber of the Special Court for Sierra Leone composed of  
19 the Honourable Benjamin Mutanga Itoe, Presiding Judge  
14:17:11 20 Honourable Judge Bankole Thompson, and Honourable Judge  
21 Pierre Boutet;having noted the absence of the first  
22 accused Sam Hinga Norman, the second accused Moinina  
23 Fofana and the third accused during the trial  
24 proceedings; mindful of the provisions of Rule 60 of the  
14:17:28 25 Rules of Procedure and Evidence of the Special Court;  
26 mindful of the decision on the application of Samuel  
27 Hinga Norman for self-representation under Article  
28 17(4)(d) of the Statute of the Special Court delivered by

1 the Trial Chamber on 8 June 2004; mindful of the  
2 consequential order on assignment and role of stand-by  
3 counsel delivered by the Trial Chamber on the 14th of  
4 June 2004; mindful of the order for assignment of  
14:18:03 5 stand-by counsel for Samuel Hinga Norman issued by the  
6 Registrar on the 15th of June 2004; issues the following  
7 ruling.

8 BACKGROUND

9 1. At the end of the morning session of trial on the  
14:18:18 10 20th of September 2004, the first accused informed the  
11 Court that he would not attend trial in the future until  
12 the Trial Chamber made a determination on the issue he  
13 had raised, namely, that protective measures for witness  
14 TF2-033 should be lifted given the witness's response to  
14:18:41 15 him during cross-examination that he did not fear his  
16 identity being known to the public.

17 2. When the Court resumed sitting on the 20th of  
18 September 2004 at 3.30 p.m. to continue the trial of the  
19 CDF case, none of the accused were present in court.  
14:18:57 20 Defence Counsel expressed their ignorance of the facts  
21 leading to the absence of the accused and asked the Trial  
22 Chamber for an adjournment to confer with their clients.  
23 The Prosecution, quoting Rule 60 of the Rules that deals  
24 with trial in the absence of the accused, did, however,  
14:19:15 25 not oppose an adjournment for a clarification of the  
26 reasons for the absence of the accused. Consequently,  
27 the Trial Chamber ordered an adjournment for counsel to  
28 liaise with their clients.

1 3. The trial session resumed at 5.10 p.m. on the 20th of  
2 September 2004. The first and second accused were still  
3 absent from Court, the third accused appeared before the  
4 Court and explained his absence due to health problems,  
14:19:45 5 and asked the Court's indulgence to be allowed to leave  
6 the court to go and rest. This request was granted.  
7 4. The Head of the Detention Facility, Mr Barry Wallace,  
8 appeared in court and testified that the first and second  
9 accused were physically able to attend. However,  
14:20:02 10 pursuant to his testimony, the first accused decided not  
11 to attend, because the witness did not testify in public  
12 and the second accused agrees with this position.  
13 5. During the trial session resuming at 5.10 p.m. on the  
14 20th of September 2004, one of the stand-by counsel for  
14:20:24 15 the first accused, Mr John Wesley Hall Junior, presented  
16 a letter to the Court in which the first accused  
17 expressed his decision not to appear for his trial until  
18 certain conditions he outlined were fulfilled. These  
19 conditions included the following:  
14:20:41 20 (a) the joinder indictment served on the accused  
21 pursuant to Rule 52 of the Rules;  
22 (b) arraigned the accused to enter a plea, pursuant  
23 to Rule 61(3) of the Rules of Procedure;  
24 (c) remove the protective order so that witnesses  
14:20:59 25 who were not sexually assaulted could testify in full  
26 view of the public in order to discourage the giving of  
27 lie testimonies that the Prosecution has been paying  
28 Prosecution witnesses to give under hidden identity; and

1 (d) that the single indictment against me alone,  
2 dated the 7th of March 2003, be quashed, so that it could  
3 not be used as a fall-back tactic in an eventuality by  
4 the Prosecutor.

14:21:32 5 This letter was admitted in evidence and marked as  
6 Exhibit 12. In Exhibit 12, the first accused also  
7 instructed his stand-by counsel not to appear in court on  
8 his behalf in his absence and stated that counsel do not  
9 have his authority to participate in any ongoing  
14:21:51 10 proceedings in his absence until the legal preconditions  
11 he had stipulated are fully met.

12 6. On the 20th September 2004, Mr Arrow Bockarie, one of  
13 the counsel for the second accused Moinina Fofana,  
14 informed the Court that his client was apprehensive about  
14:22:16 15 witnesses testifying with their identity not disclosed to  
16 the public and about the fact that considerable sums of  
17 moneys were paid to them. He stated that the second  
18 accused would not appear until these issues were  
19 addressed. The second accused failed to attend court in  
14:22:32 20 the afternoon of 20th of September 2004.

21 7. On the 21st of September 2004, Mr Arrow Bockarie  
22 informed the Court that the second accused had  
23 reconsidered his position and stated that he was willing  
24 to attend court, but that due to health reasons he could  
14:22:51 25 not attend court that day. This information was  
26 supported by a report from Dr Harding, who examined the  
27 accused's health.

28 8. On the 21st of September 2004, the Trial Chamber

1 ruled that stand-by counsel for the first accused would  
2 represent him as Court-appointed counsel. The Trial  
3 Chamber further appointed Court-appointed counsel for the  
4 second accused.

14:23:17 5 9. On the 22nd of September 2004, the second accused  
6 again appeared in Court and indicated that it was his  
7 intention to attend court in the future and to be  
8 represented by his assigned counsel. The Trial Chamber  
9 then ruled that counsel for the second accused would  
14:23:35 10 represent him as his selected counsel. On the 23rd of  
11 September 2004, the second accused failed to attend  
12 court. Mr Arrow Bockarie informed the Court that he had  
13 spoken to the accused and he had expressed his intention  
14 not to attend court. Dr Harding appeared before the  
14:23:56 15 Court and stated that he had examined the accused that  
16 morning and that he was physically and mentally healthy  
17 and could attend trial. Mr Wallace, the Chief of  
18 Detention, also appeared before the Court and stated that  
19 the accused had expressed his wish not to attend court.  
14:24:17 20 The Court then ruled that counsel for the second accused  
21 would be Court-appointed counsel.

22 10. The Trial Chamber consequently orally ordered the  
23 proceedings to resume and to proceed under Rule 60 of the  
24 Rules and stated that a detailed decision would follow in  
14:24:35 25 writing.

26 11. On 27th September 2004, the third accused failed to  
27 attend court without a reason, and the Trial Chamber  
28 ruled that assigned counsel for the third accused would

1 act as Court-appointed counsel.

2 THE APPLICABLE LAW

3 Article 17(4)(d) of the Statute provides that:

4 "In the determination of any charge against  
14:25:02 5 the accused pursuant to the present  
6 Statute, he or she shall be entitled to  
7 the following minimum guarantees, in  
8 full equality:  
9 (d) to be tried in his or her presence,  
14:25:15 10 and to defend himself or herself in  
11 person or through legal assistance of  
12 his or her own choosing; to be informed,  
13 if he or she does not have legal  
14 assistance, of this right; and to have  
14:25:29 15 legal assistance assigned to him or her in  
16 any case where the interests of  
17 justice so require, and without payment by  
18 him or her in any such case if he or she  
19 does not have sufficient means to pay  
14:25:43 20 for it."

21 13. Rule 60 of the Rules, however, provides that a trial  
22 may be conducted in the absence of the accused. In this  
23 event, counsel appointed to represent him or her in two  
24 circumstances, namely, where after having made his or her  
14:26:02 25 initial appearance and being afforded the right to appear  
26 at his or her own trial, he or she refuses to do so, or  
27 where he or she is at large and refuses to appear in  
28 court, Rule 60 states.

1           "(A) An accused may not be tried in his  
2           absence, unless:  
3           (i) the accused has made his initial  
4           appearance, has been afforded the right to appear at  
14:26:24 5           his own trial, but refuses to do so; or  
6           (ii) the accused, having made his initial  
7           appearance, is at large and refuses to appear in  
8           court.

9           (B) In either case the accused may be represented by  
14:26:39 10          counsel of his choice, or as directed by a Judge or  
11          Trial Chamber. The matter may be permitted to  
12          proceed if the Judge or Trial Chamber is satisfied  
13          that the accused has, expressly or impliedly, waived  
14          his right to be present."

14:26:56 15          In its recent ruling on the issue of the refusal of  
16          the third accused Augustine Gbao, to attend a hearing of  
17          the Special Court for Sierra Leone on 7 July 2004 and  
18          succeeding days, rendered on 13 July 2004, the Trial  
19          Chamber held that a trial may proceed in the absence of  
14:27:16 20          the accused person in certain circumstances and, in this  
21          regard, had this to say, and I quote:

22                 "The Chamber therefore finds that though in  
23                 essence trial in the absence of an  
24                 accused        person is an extraordinary  
14:27:32 25                 mode of trial, yet     it is clearly  
26                 permissible and lawful in very limited  
27                 circumstances. The Chamber opines     that  
28                 it is a clear indication that it is not

1 the policy of the criminal law to allow  
2 the absence of an accused person or his  
3 disruptive conduct to impede the  
4 administration of justice or frustrate the  
14:27:53 5 ends of justice. To allow such an  
6 eventuality to prevail is tantamount to  
7 judicial abdication of the principle of  
8 legality and a capitulation to a  
9 frustration of the ends of justice without  
14:28:10 10 justification."

11 15. Reviewing the principles adopted in national law  
12 systems on this issue, the Chamber further stated and  
13 I quote:  
14 "Consistent with this reasoning, the  
14:28:19 15 Chamber  
16 also notes that in most national law systems, and  
17 especially in the common law jurisdiction, the  
18 general rule is that an accused person should be  
19 tried in his or her presence, but that  
14:28:35 20 exceptionally, courts of justice can have recourse  
21 to trial of an accused person in his absence where  
22 such an option becomes imperative but in limited  
23 circumstances. For example, in Canada it is open to  
24 a Court to continue to try an accused person in his  
14:28:52 25 or her absence where he or she was present at the  
26 start of the trial, a situation that is on all fours  
27 with the instant situation with which this Chamber  
28 is confronted as a result of the third accused's

1 refusal to appear for his trial.  
2 The Chamber further notes that in civil law systems,  
3 the practice is widespread for accused persons to be  
4 tried in their absence subject to certain  
14:29:17 5 procedural and due process safeguards."  
6 16. Explaining the international approach to trial in  
7 absentia, the Trial Chamber had this to say:  
8 "From the Chamber's perspective, it is particularly  
9 noteworthy that the international law practice is on  
14:29:36 10 two levels:  
11 1. The practice at the European Court of Human  
12 Rights (ECHR) level; and.  
13 2. The practice at the International Criminal  
14 Tribunal for the Former Yugoslavia (ICTY) and the  
14:29:48 15 International Criminal Tribunal for Rwanda (ICTR)  
16 level.  
17 At the ECHR level there is nothing in the  
18 jurisprudence of that court to indicate that  
19 Articles 6(1) and 6(3)(c) of the European Convention  
14:30:07 20 on Human Rights providing basic legal guarantees  
21 for a person charged with crime have been  
22 construed in a manner which is suggesting the  
23 impermissibility of trial in absentia.  
24 At the level of the ICTY and ICTR, the Chamber  
14:30:24 25 finds that the statutory provisions of these  
26 Tribunals on the subject are akin to those of this  
27 Court and that, insofar as ICTY is concerned, to  
28 date no trial in the absence of an accused has been

1 conducted. However, the ICTR has conducted one  
2 trial in the absence of an accused in the case of  
3 Prosecutor v Jean Bosco Barayagwiza. In that case,  
4 the accused boycotted his trial on the grounds that  
14:30:57 5 he 'challenged the ability of the ICTR to render an  
6 independent and impartial justice due, notably, to  
7 the fact that it is so dependent on the dictatorial  
8 anti-Hutu regime in Kigali.

9 It is abundantly clear to the Chamber that the  
14:31:17 10 jurisprudence evolving or past points to the legal  
11 sustainability of trial in absentia in certain  
12 circumstances."

13 17. The Chamber, accordingly, emphasises that it is  
14 settled law, nationally and internationally, that while  
14:31:40 15 an accused person has the right to be tried in his  
16 presence, there are circumstances under which a trial, in  
17 the absence of the accused, can be permitted. While due  
18 consideration must be given to ensure that all rights to  
19 a fair trial are respected, an accused person charged  
14:31:59 20 with serious crimes who refuses to appear in court should  
21 not be permitted to obstruct the judicial machinery by  
22 preventing the commencement or the continuation of trials  
23 by deliberately being absent after his initial  
24 appearance, or refusing to appear in court after he has  
14:32:20 25 been afforded the right to do so, and particularly in  
26 circumstances, as in this case, where no just cause, such  
27 as illness, has been advanced to justify the absence.

28 MERITS OF THE APPLICATION

1 18. In the light of this background and the evidence  
2 presented, the Trial Chamber concludes that the first  
3 accused has exhibited disruptive behaviour in court  
4 proceedings on a number of occasions, as can be inferred  
14:32:55 5 from his submission of a letter to the Trial Chamber on  
6 7 September 2004 where he threatened to be absent from  
7 court until a conclusion was reached on the arguments he  
8 raised in this letter.

9 Further, in Court on 20th of September 2004, he  
14:33:13 10 submitted a letter addressed to the Principal Defender  
11 and copied to the Trial Chamber judges where he affirmed  
12 that, until his listed conditions were met, he would not  
13 appear before the Trial Chamber. The first accused, in  
14 the execution of his threat, failed to appear in court in  
14:33:31 15 the afternoon of 20 September 2004, and has not attended  
16 court since then.

17 19. Having received the first accused's letter dated  
18 7th September 2004, the Trial Chamber, on 10 September  
19 2004, informed the accused that the established practice  
14:33:49 20 in this Court and in international law in respect of the  
21 issues raised by him is for arguments to be submitted by  
22 parties, by oral or written motion to the Trial Chamber,  
23 after which the Trial Chamber will consider such  
24 submissions and issue a ruling thereafter. The accused  
14:34:09 25 agreed to file the submissions contained in his letter of  
26 7 September 2004 in the form of a motion before the Trial  
27 Chamber. On 20th of September 2004 no such filing had  
28 been made. Instead, the accused on this day in court

1 presented another letter of "judicial protest". The  
2 Trial Chamber notes that on the 21st of September 2004 a  
3 motion for service and arraignment on second indictment  
4 was filed by the accused and Ms Quincy Whitaker his  
14:34:49 5 stand-by counsel.

6 20. The Trial Chamber wishes to emphasise that in the  
7 interests of justice trial proceedings will not be  
8 interrupted by accused persons who refuse to attend court  
9 while submissions are being duly considered by the Trial  
14:35:04 10 Chamber in accordance with legal procedures and due  
11 process. There is no authority for the position taken by  
12 the accused, and no lawful excuse for his deliberate  
13 absence from court.

14 21. The Trial Chamber has granted the accused a  
14:35:21 15 qualified right to self-representation. In its decision  
16 of 8th of June 2004 it accorded the accused the right of  
17 self-representation, with the additional assistance of  
18 stand-by counsel. Several adjournments were taken during  
19 the first session of the CDF trial to allow for the

14:35:41 20 accused to participate in the selection of such stand-by  
21 counsel to assist him in his self-representation. Four  
22 stand-by counsel were duly assigned to him by the  
23 Registrar and have assisted him so far in the  
24 proceedings. Additional resources and facilities have  
14:36:04 25 also been provided to him to further assist him in  
26 conducting his defence.

27 22. It is our considered judgment, therefore, that in  
28 the absence of any lawful excuse - and we find that there

1 exists no such excuse - it would not be in the interests  
2 of justice to allow the accused's deliberate absence from  
3 the courtroom to interrupt the trial. The Trial Chamber  
4 considers that any deliberate absence from the trial  
14:36:35 5 proceedings will certainly undermine the integrity of the  
6 trial and will not be in the interests of justice.

7 23. The Trial Chamber considers that the exercise of the  
8 right to self-representation should not become an  
9 obstacle to the achievement of a fair trial. As stated  
14:36:54 10 by the Trial Chamber of the ICTY in the Milosevic case:  
11 "The right to represent oneself must therefore yield when  
12 it is necessary to ensure that the trial is fair."

13 The Trial Chamber therefore concludes that, on  
14 account of the accused's deliberate absence from court,  
14:37:15 15 his right to self-representation is revoked and, in  
16 accordance with Rule 60 of the Rules, the CDF trial will  
17 be continued in the absence of the first accused and that  
18 he will be represented by Court-appointed counsel.

19 24. The Trial Chamber also holds that the second accused  
14:37:37 20 has failed to attend court for no lawful reason, and on  
21 the basis of Rule 60 of the Rules and in the interests of  
22 justice, the trial will proceed in his absence while  
23 ensuring that his interests are properly represented in  
24 Court by Court-appointed counsel.

14:37:58 25 For the above reasons the Trial Chamber orders as  
26 follows for the first accused: revokes the first  
27 accused's right to self-representation and orders that  
28 the trial proceed in the absence of the first accused

1 pursuant to Rule 60(A)(i) of the Rules, and appoints the  
2 first accused's stand-by counsel, namely Dr Bu-Buakei  
3 Jabbi, Mr John Wesley Hall Junior, Mr Tim Owen QC, and  
4 Ms Quincy Whitaker as Court-appointed counsel to  
14:38:35 5 represent him in his trial proceedings and orders that  
6 the duty of Court-appointed counsel will be as set forth  
7 in the consequential order of the Trial Chamber delivered  
8 on 1 October 2004, and orders that the requirement for  
9 the resources granted by the Trial Chamber in its  
14:38:53 10 decision, on request by Sam Hinga Norman, for additional  
11 resources to prepare his defence delivered on 23 June  
12 2004 for the purpose of assisting the first accused to  
13 represent his case that include a desktop computer and a  
14 printer, and a stationary phone, be reviewed by the  
14:39:20 15 Registrar, who shall provide a report to the Chamber with  
16 a view to assist the Chamber in determining whether these  
17 measures should be maintained and that the further  
18 requests for additional resources made by the accused at  
19 the status conference on 7 September 2004 are thereby  
14:39:37 20 dismissed on the basis that the accused no longer  
21 represents himself, which is the basis upon which the  
22 resources were ordered.

23 Orders as follows for the second accused: appoints  
24 the assigned counsel for the second accused to represent  
14:39:55 25 him in the capacity of Court-appointed counsel and orders  
26 that the duty of Court-appointed counsel will be as set  
27 forth in the consequential order of the Trial Chamber  
28 delivered on 1 October 2004.

1 Orders as follows for the third accused: appoints  
2 the assigned counsel for the third accused to represent  
3 him in the capacity of Court-appointed counsel and orders  
4 that the duty of Court-appointed counsel will be as set  
14:40:25 5 forth in the consequential order of the Trial Chamber  
6 delivered on 1 October 2004.

7 And orders the Chief of the Detention Facility of  
8 the Special Court to maintain, on a daily basis, the  
9 record of the waiver of the accused Sam Hinga Norman,  
14:40:41 10 Moinina Fofana and Allieu Kondewa to appear in court  
11 during each trial session of the CDF trial.  
12 Done in Freetown, Sierra Leone, this 1st day of October  
13 2004.

14 PRESIDING JUDGE: Thank you, learned brother. We had a motion  
14:41:11 15 on the disclosure of witness statements -- originals of  
16 witness statements which the Defence was seeking to be  
17 disclosed to them by the Prosecution and in this regard  
18 our ruling on the disclosure of witness statements will  
19 be presented by my learned brother, Honourable Judge  
14:41:45 20 Bankole Thompson.

21 JUDGE THOMPSON: This is the ruling of the Trial Chamber on  
22 disclosure of witness statements. The Trial Chamber of  
23 the Special Court for Sierra Leone, Special Court,  
24 composed of Honourable Judge Benjamin Mutanga Itoe,  
14:42:15 25 Presiding Judge, Honourable Judge Bankole Thompson, and  
26 Honourable Judge Pierre Boutet; seized of a request by  
27 stand-by counsel for the first accused during the  
28 testimony of witness TF2-162 at trial on the 8th of

1 September 2004 for the Prosecution to disclose  
2 handwritten interview notes taken by the Prosecution for  
3 this witness; mindful that the witness stated in his  
4 testimony that there were handwritten interview notes or  
14:42:53 5 statements taken by the Prosecution during at least two  
6 interviews the investigators had with him; mindful of the  
7 letter from Defence Counsel for the second accused to the  
8 Prosecution, and copied to the Trial Chamber, dated the  
9 8th of September 2004 where the Defence sought an  
14:43:15 10 explanation from the Prosecution as to why it had failed  
11 to fully comply with its disclosure obligations; mindful  
12 of the request by the Defence that the interview notes  
13 prepared by investigators or prosecutors for witness  
14 TF2-162 be made available to them; considering the  
14:43:42 15 submissions made during trial on the 10th of September  
16 2004 by the Defence Counsel for the first, second and  
17 third accused, that included inter alia that:  
18 (1) The handwritten interview notes taken for  
19 witness TF2-162 are subject to disclosure within the  
14:44:09 20 meaning of Rule 66(A)(i), or alternatively, under  
21 Rule 66(A)(ii), Rule 66(A)(iii) or Rule 68 of the  
22 Rules;  
23 2. The handwritten interview notes taken for  
24 witness TF2-162 do not fall within the meaning of  
14:44:34 25 Rule 70(A) of the Rules, as this Rule applies to  
26 privileged material that includes notes of the  
27 Prosecution on how to progress investigations and  
28 does not apply to interview notes; noting that the

1 Defence also observed that witnesses in the prior  
2 court session also gave similar evidence to witness  
3 TF2-162, namely, that handwritten interview notes  
4 were taken by investigators or prosecutors when  
14:45:09 5 taking their statements and that these notes are  
6 also subject to disclosure pursuant to the Rules  
7 stated in point (1); considering the response of the  
8 Prosecution to the Defence request made during trial  
9 on the 10th of September 2004 where the Prosecution  
14:45:33 10 submitted that:

11 (1) if the Prosecution were only in possession of  
12 handwritten interview notes taken from a statement  
13 given by a witness, it would disclose these  
14 handwritten interview notes and that it would  
14:45:47 15 disclose the statement of the witness in whichever  
16 form it had in its possession.

17 (2) that it is not the policy of the Prosecution to  
18 keep handwritten notes and that the practice is to  
19 transcribe such notes into a statement on the  
14:46:07 20 computer, and once the function of these notes no  
21 longer exists, the interview notes are destroyed;  
22 (3) that no handwritten interview notes exist for  
23 witness TF2-162, nor does the Prosecution know if  
24 they ever existed;

14:46:26 25 Mindful of the Prosecution authorities filed in support  
26 of its position, filed by the Prosecution on the 14th of  
27 September 2004; mindful of Rule 66 of the Rules of  
28 Procedure and Evidence of the Special Court Rules and

1 Article 17 of the Statute of the Special Court for Sierra  
2 Leone (Special Court) hereby issues the following ruling.

3 THE APPLICABLE LAW.

4 (A) Disclosure obligations.

14:46:58 5 Rule 66 of the Rules provides as follows:

6 "Rule 66: disclosure of materials by the  
7 Prosecutor.

8 (A) subject to the provisions of Rules 50, 53, 69  
9 and 75, the Prosecutor shall:

14:47:18 10 (i) within 30 days of the initial appearance of an  
11 accused, disclose to the Defence copies of the  
12 statements of all witnesses whom the Prosecutor  
13 intends to call to testify and all evidence to be  
14 presented pursuant to Rule 92 bis at trial.

14:47:38 15 (ii) continuously disclose to the defence copies of  
16 the statements of all additional Prosecution  
17 witnesses whom the Prosecutor intends to call to  
18 testify, but not later than 60 days before the date  
19 for trial, or as otherwise ordered by a judge of the  
14:47:58 20 Trial Chamber either before or after the

21 commencement of the trial, upon good cause being  
22 shown by the Prosecution. Upon good cause being  
23 shown by the Defence, a judge of the Trial Chamber  
24 may order that copies of the statements of  
14:48:16 25 additional Prosecution witnesses that the Prosecutor  
26 does not intend to call be made available to the  
27 Defence within a prescribed time.

28 (iii) at the request of the Defence, subject to

1 sub-rule (B), permit the Defence to inspect any  
2 books, documents, photographs and tangible objects  
3 in his custody or control, which are material to the  
4 preparation of the Defence, upon a showing by the  
14:48:48 5 Defence of categories of, or specific, books,  
6 documents, photographs and tangible objects which  
7 the Defence considers to be material to the  
8 preparation of a defence, or to inspect any books,  
9 documents, photographs and tangible objects in his  
14:49:07 10 custody or control which are intended for use by the  
11 Prosecutor as evidence at trial, or were obtained  
12 from or belonged to the accused.

13 (B) where information or materials are in the  
14 possession of the Prosecutor, the disclosure of  
14:49:26 15 which may prejudice further ongoing investigations,  
16 or for any other reason may be contrary to the  
17 public interest or affect the security interests of  
18 any state, the Prosecutor may apply to a judge  
19 designated by the president sitting ex parte and in  
14:49:44 20 camera, but with notice to the Defence, to be  
21 relieved from the obligation to disclose pursuant to  
22 sub-rule (A). When making such an application, the  
23 Prosecutor shall provide, only to such judge, the  
24 information or materials that are sought to be kept  
14:50:04 25 confidential."

26 THE MERITS OF THE APPLICATION

27 APPLICABLE JURISPRUDENCE.

28 The jurisprudence of the Court so far makes it

1 abundantly clear that Rule 66(i) of the Rules requires  
2 the Prosecution to disclose to the Defence copies of the  
3 statements of all witnesses it intends to call to testify  
4 within 30 days of the initial appearance of the accused;  
14:50:34 5 that Rule 66(ii) of the Rules imposes an obligation of  
6 continuous disclosure on the Prosecution to the Defence,  
7 and that the statements of all additional Prosecution  
8 witnesses that it intends to call, should be disclosed no  
9 later than 60 days before the date of trial, or otherwise  
14:50:55 10 ordered by the Trial Chamber, upon good cause being shown  
11 by the Prosecution.

12 The jurisprudence also reveals that reciprocal  
13 disclosure is mandated by Rule 67 of the Rules, while  
14 Rule 68 requires the disclosure of exculpatory evidence  
14:51:18 15 within 30 days of the initial appearance of the accused,  
16 and thereafter to be under a continuing obligation to  
17 disclose exculpatory material.

18 The overriding principle is that the parties must  
19 act bona fides at all times when exercising disclosure  
14:51:38 20 obligations under the Rules. The Trial Chamber has, in  
21 this regard, held in a previous decision on disclosure of  
22 witness statements and cross-examination, issued on the  
23 16th of July 2004, that any allegation by the Defence as  
24 to a violation of disclosure by the Prosecution must be  
14:52:00 25 substantiated with prima facie proof of such a violation.

26 In that decision the Trial Chamber stated and I quote:  
27 "It is evident that the premise underlying the  
28 disclosure obligations is that the parties should

1 act bona fides at all times. There is authority  
2 from the evolving jurisprudence of the international  
3 criminal tribunals that any allegation by the  
4 Defence as to a violation of the disclosure rules by  
14:52:30 5 the Prosecution should be substantiated with prima  
6 facie proof of such a violation. This Chamber, in  
7 recent decisions, has indeed ruled that the Defence  
8 must 'make a prima facie showing of materiality and  
9 that the requested evidence is in the custody or  
14:52:50 10 control of the Prosecution.'

11 It is of course the role of the Trial Chamber to  
12 enforce disclosure obligations in the interests of a  
13 fair trial, and to ensure that the rights of the  
14 accused, as provided in Article 17(4)(e) of the  
14:53:09 15 Statute, to examine or have examined, the witnesses  
16 against him or her, are respected and where evidence  
17 has not been disclosed or is disclosed so late as to  
18 prejudice the fairness of the trial, the Trial  
19 Chamber will apply appropriate remedies which may  
14:53:30 20 include the exclusion of such evidence."

21 Guided by these principles, we will now proceed to  
22 consider the issue in question, which is whether the  
23 Defence has made out a prima facie showing with respect  
24 to the alleged breach of disclosure rules by the  
14:53:45 25 Prosecution on the grounds of failure to produce  
26 handwritten interview notes of witness TF2-162 in its  
27 custody and control which it should have disclosed or  
28 ought to disclose under the provisions of Rule 66 of the

1 Rules of Procedure and Evidence.

2 In addressing this matter the Chamber needs to be  
3 satisfied that the Defence has, on the basis of the  
4 evidence so far adduced, proved that the handwritten  
14:54:16 5 notes were taken by investigators and/or counsel or  
6 officials of the Prosecution in the course of their  
7 interviews with this witness.

8 In this regard the records show that in his  
9 testimony on the 8th of September 2004 this witness  
14:54:35 10 TF2-162 affirmed that the Prosecution took handwritten  
11 notes of interviews they conducted with him. In their  
12 response the Prosecution averred that it is not its  
13 policy to keep handwritten notes. Furthermore, the  
14 Prosecution has stated that no handwritten interview  
14:54:55 15 notes exist for witness TF2-162, nor does it know if they  
16 ever existed.

17 Based on the foregoing, the Trial Chamber finds on a  
18 prima facie showing by the Defence that handwritten  
19 interview notes were taken by the investigators and/or  
14:55:12 20 the Prosecution for witness TF2-162.

21 In the absence of any further clarification or proof  
22 by the Prosecution as to the chain of custody of the  
23 interview notes taken by the Prosecution for this  
24 witness, and the witness's clear statement that  
14:55:30 25 handwritten notes were taken in the course of interviews  
26 with him conducted by the Prosecution, the Trial Chamber  
27 concludes that the Defence have established that the  
28 handwritten notes in question are within the custody and

1 control of the Prosecution and, further, that such notes  
2 are not only material to their case but also constitute  
3 witness statements within the meaning of Rule 66(A)(i) of  
4 the Rules.

14:56:00 5 In a recent decision on this subject, the Trial  
6 Chamber noted that handwritten interview notes do  
7 constitute witness statements within the meaning of Rule  
8 66(A)(i) of the Rules and had this to say:

9 "In the light of the foregoing analysis, the Trial  
14:56:17 10 Chamber finds no merit in the Defence contention  
11 that the Prosecution interview notes, prepared from  
12 oral statements of witnesses, do not in law  
13 constitute witness statements. The fact that a  
14 witness statement is not, grammatically or, from the  
14:56:33 15 point of view of syntax, is not in the 'first  
16 person', but in the 'third person', goes more to  
17 form than to substance, and does not deprive the  
18 materials in question of the core quality of a  
19 statement. The Trial Chamber agrees with the  
14:56:50 20 assertion given by the Prosecution at 1st of June  
21 2004 status conference that a statement can  
22 be 'anything that comes from the mouth of the  
23 witness' regardless of the format. By parity of  
24 reasoning, the fact that a statement does not  
14:57:07 25 contain a signature or is not witnessed does not  
26 detract from its substantive validity."

27 The Chamber further emphasised:

28 "In this regard, we are of the opinion and

1 we so hold, that any statement or  
2 declaration made by a witness in relation  
3 to an event he witnessed and recorded in  
4 any form by an official in the course of  
14:57:30 5 an investigation falls within the meaning  
6 of a 'witness statement' under  
7 Rule 66(A)(1) of the Rules. When  
8 confronted with matters of legal  
9 characterisation, this Chamber must also  
14:57:45 10 take cognisance of the socio-cultural  
11 dynamics at work in the context of the  
12 legal culture in which it functions, for  
13 example, the limited language abilities  
14 and capabilities of potential  
14:57:58 15 Prosecution witnesses and their level of  
16 educational literacy. In addition, and in  
17 the particular circumstances of this case,  
18 the witness who we have on record as an  
19 illiterate, certainly depended largely  
14:58:14 20 on the investigator to record all the  
21 information that he disclosed to him  
22 during his interrogation."  
23 We find no reason to depart from the above  
24 ruling and, accordingly, consider it  
14:58:28 25 unnecessary to further examine the  
26 arguments of the Defence in respect of Rule  
27 66(A)(ii) and (iii) and Rule 68.  
28 In another argument and submission the

1 Prosecution contends that handwritten notes  
2 taken from witness TF2-162 fall within the  
3 meaning of Rule 70(A) of the Rules and  
4 that, therefore, notwithstanding the  
14:58:52 5 provisions of Rules 66 and 67, not subject  
6 to disclosure.  
7 Rule 70(A) of the Rules provides as  
8 follows:  
9 "Notwithstanding the provisions of Rules 66 and 67,  
14:59:08 10 reports, memoranda, or other internal documents  
11 prepared by a party, its assistant or  
12 representatives in connection with the investigation  
13 or preparation of the case, are not subject to  
14 disclosure or notification under the aforementioned  
14:59:26 15 provisions."  
16 While there is no doubt that the Prosecutor under  
17 whose control investigations are undertaken is a party to  
18 the proceedings within the meaning of Article 15 of the  
19 Statute and of Rule 70(A) of the Rules of Procedure and  
14:59:44 20 Evidence, the Prosecution, in making this submission,  
21 seeks to further establish that interview notes recorded  
22 by an investigator in the course of an interview with a  
23 witness or in preparation for the case, is either a  
24 report, a memorandum, or an internal document prepared by  
15:00:05 25 a party in preparation for the case and, therefore, not  
26 susceptible to disclosure under Rule 66.  
27 In responding to this submission put forward by the  
28 Prosecution, the Chamber observes that the preservation

1 of confidentiality of some internal memoranda, notes, and  
2 other sensitive information is predicated upon the notion  
3 of functional effectiveness, which is a vital element of  
4 the very existence of modern institutions.

15:00:37 5 The Chamber is, however, of the opinion that for  
6 such information to be protected, as contended by the  
7 Prosecution, it must constitute part of the mechanism for  
8 the internal strategic planning and functioning of the  
9 Office of the Prosecutor, and that its disclosure could  
15:00:56 10 threaten or disrupt the very foundation on which it  
11 functions. This information would include an internal  
12 report or exchange on how the interview notes have to be  
13 used and any other internal documents prepared by a party  
14 in connection with the investigation or the preparation  
15:01:14 15 of the case.

16 By parity of reasoning, it is the view of the Trial  
17 Chamber that the handwritten interview notes taken for  
18 witness TF2-162 logically do not fall within the meaning  
19 and contemplation of Rule 70(A) of the Rules. We are of  
15:01:34 20 the view that the aforesaid Rule is restrictive in scope  
21 and, therefore, applies only to internal documents  
22 prepared by a party in connection with an investigation  
23 or the preparation of a case. We draw support for this  
24 reasoning from the decision of the Trial Chamber of the  
15:01:55 25 ICTR in the case of Niyitegeka where it was held as  
26 follows:

27 "Questions that were put to a witness - thus being  
28 part of the witness statement - have to be

1 distinguished from 'internal documents prepared by a  
2 party', which are not subject to disclosure under  
3 Rule 70(A) of the Rules, as an exception to the  
4 general disclosure obligation pursuant to Rule  
15:02:23 5 66(A)(ii) of the Rules. A question once put to a  
6 witness is not an internal note anymore; it does not  
7 fall within the ambit and thereby under the  
8 protection of Rule 70(A) of the Rules. If, however,  
9 counsel or another staff member of the Prosecution  
15:02:42 10 notes down a question prior to the interrogation,  
11 without putting this question to the witness, such a  
12 question is not subject to disclosure. Similarly,  
13 one note made by counsel or another staff member of  
14 the Prosecution in relation to the question of the  
15:03:02 15 witness is not subject to disclosure, unless it has  
16 been put to the witness.  
17 The fact that a particular witness statement does  
18 not correspond to the standards set out above does  
19 not free a party from its obligation to disclose it  
15:03:19 20 to the other party pursuant to Rule 66(A)(ii) of the  
21 Rules. Furthermore, a witness statement which does  
22 not correspond to the standards set out above does  
23 not necessarily render the proceedings unfair.  
24 The Prosecution is obliged to make the witness  
15:03:37 25 statement available to the Defence in the form in  
26 which it has been recorded. However, something  
27 which is not in the possession of, or accessible, to  
28 the Prosecution, cannot be subject to disclosure:

1 nemo tenetur ad impossibile (no-one is bound to an  
2 impossibility)."

3 The Trial Chamber would like to underscore here, the  
4 fact that the interview notes were recorded by the  
15:04:07 5 Prosecution from a potential Prosecution witness, who was  
6 to be called to testify against an accused in what should  
7 be, and is indeed, a fair and public hearing as provided  
8 for in Article 17(2) of the Statute and that in the  
9 circumstances, a factual confrontation on all issues is a  
15:04:29 10 major and an essential element of such a process. We  
11 also reiterate that the contents of the interview notes  
12 in whatever form are the witness's statements by witness  
13 TF2-162, even if the investigator is their custodian. It  
14 is therefore our opinion, in the light of the above, and  
15:04:51 15 we so hold, that those notes neither form part of the  
16 reports, memoranda, or other document of an investigator,  
17 nor do they, by any stretch of the imagination, come  
18 within the purview and contemplation of Rule 70(A) of the  
19 Rules of Procedure and Evidence.

15:05:12 20 It is therefore the considered view of the Trial  
21 Chamber that the Prosecution has failed in fulfilling its  
22 disclosure obligations under Rule 66(A)(i) of the Rules.

23 Furthermore, the Trial Chamber finds that there is  
24 no prima facie showing by the Defence that the  
15:05:31 25 Prosecution has failed to comply with Rule 66(A)(i) as  
26 regards the disclosure of witness statements for all  
27 other witnesses who have testified, as submitted by the  
28 Defence.

1 For all the above stated reasons, the Trial Chamber  
2 finds as follows:

3 1. That the Prosecution has in its control and  
4 custody the handwritten interview notes for witness  
15:05:59 5 TF2-162.

6 2. That these notes constitute witness statements  
7 pursuant to Rule 66(A)(i) of the Rules; and

8 3. That the Prosecution has failed to disclose  
9 these notes pursuant to its disclosure obligations.

15:06:19 10 Orders the Prosecution to provide copies of all  
11 handwritten interview notes taken for or from witness  
12 TF2-162 by 15 October 2004.

13 Done in Freetown, Sierra Leone, this 1st day of October  
14 2004."

15:06:48 15 PRESIDING JUDGE: Thank you very much, learned counsel.

16 I think there are other interlocutory orders which will  
17 be issued on the CDF trial. This might be signed today  
18 and they will be made available to you, including those  
19 we read in open court, which we thought should be  
15:07:16 20 delivered in open court. We are rising and this is after  
21 we have spent quite some time -- at times difficult, at  
22 times pleasant, at times unpleasant -- in the conduct of  
23 these proceedings.

24 The essential thing is that we have done what  
15:07:40 25 I would consider to be the essence of the job which we  
26 have been asked to do, and at this stage I would like to  
27 very sincerely thank learned counsel on both sides for  
28 the collaboration that they gave to the Bench in the

1 course of these proceedings. We have always said that  
2 counsel on both sides are an integral part of the  
3 judicial proceedings and, if we have to succeed, much  
4 depends on what they do and how they assist us in  
15:08:18 5 carrying along the difficult mission that has been  
6 conferred on us.

7 May I thank you very sincerely for all what you have  
8 done, for the very pleasant and provoking legal arguments  
9 which have been put by both sides and which we have tried  
15:08:35 10 in our own way to disentangle and to try to do all in our  
11 power to satisfy not the parties but the cause of  
12 justice -- not the parties but the cause of justice.

13 I would like to thank our staff who have been very,  
14 very devoted. I would like to thank the interpreters,  
15:08:58 15 the technical staff who have managed images all along,  
16 and I wish all of you good luck and look forward to  
17 meeting you here in the month of November to start the  
18 process of the CDF once more. Today will mark the start  
19 of the RUF trials, which we start on Monday, and I think  
15:09:31 20 after this we have a status conference.

21 So learned counsel, ladies and gentlemen --  
22 I include in this our charming gallery who have been  
23 very, very faithful in their attendance -- I hope that  
24 our proceedings have meant a lot to them and that they  
15:09:54 25 would at least carry the sincere message of what this  
26 Tribunal is all about to other parts of organisations in  
27 the world which they represent. I thank you very much  
28 indeed. The Court will rise, please.

1 [Whereupon the hearing adjourned at 3.10 p.m., to be  
2 followed by a Status Conference]

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

C E R T I F I C A T E

I, Maureen P Dunn, Official Court Reporter 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 my ability and understanding.

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

Maureen P Dunn