



## SPECIAL COURT FOR SIERRA LEONE

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## TRIAL CHAMBER II

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

Registrar: Robin Vincent

Date: 5 August 2005

PROSECUTOR	Against	Alex Tamba Brima Brima Bazzy Kamara Santigie Borbor Kanu (Case No.SCSL-04-16-T)
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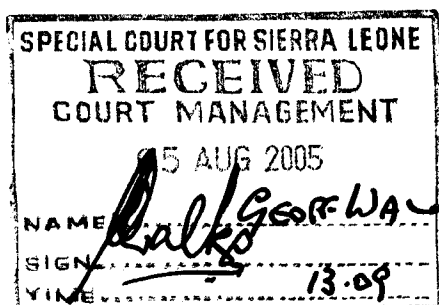
DECISION ON PROSECUTION REQUEST FOR LEAVE TO CALL AN ADDITIONAL WITNESS (ZAINAB HAWA BANGURA) PURSUANT TO RULE 73 *bis* (E), AND ON JOINT DEFENCE NOTICE TO INFORM THE TRIAL CHAMBER OF ITS POSITION VIS-À-VIS THE PROPOSED EXPERT WITNESS (MRS. BANGURA) PURSUANT TO RULE 94 *bis*.

Office of the Prosecutor:

Luc Côté  
Lesley Taylor  
James Hodes

Defence Counsel for Alex Tamba Brima:

Kojo Graham  
Glenna Thompson

Defence Counsel for Brima Bazzy Kamara:

Andrew Daniels  
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:

Geert-Jan Alexander Knoops  
Carry Knoops  
Abibola E. Manly-Spain

**TRIAL CHAMBER II** ("the Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Teresa Doherty, presiding, Hon. Justice Richard Lussick and Hon. Justice Julia Sebutinde;

**SEIZED** of the Prosecution Request For Leave To Call An Additional Witness Pursuant To Rule 73 *bis* (E), filed on the 4 May 2005 ("the Motion")<sup>1</sup>;

**NOTING** the Joint Defence Response To Prosecution Request For Leave To Call An Additional Witness Pursuant To Rule 73 *bis* (E), filed on behalf of the accused Alex Tamba Brima, Santigie Borbor Kanu and Brima Bazzy Kamara on the 13 May 2005 ("the Response")<sup>2</sup>;

**NOTING** the Joint Defence Notice To Inform The Trial Chamber Of Its Position Vis-à-vis The Proposed Expert Witness Mrs. Bangura Pursuant To Rule 94 *bis*, filed on behalf of the accused Santigie Borbor Kanu and Brima Bazzy Kamara on the 13 May 2005 ("the Defence Notice")<sup>3</sup>;

**NOTING** the Prosecution's Combined Reply To The Joint Defence Response To Prosecution Request For Leave To Call An Additional Witness Pursuant To Rule 73 *bis* (E) And The Joint Defence Notice To Inform The Trial Chamber Of Its Position Vis-à-vis The Proposed Expert Witness Mrs. Bangura Pursuant To Rule 94 *bis*, filed on 18 May 2005 ("the Combined Reply")<sup>4</sup>;

**NOTING** also the Joint Defence Reply To The Prosecution's Combined Reply To The Joint Defence Response To Prosecution Request For Leave To Call An Additional Witness Pursuant To Rule 73 *bis* (E) And The Joint Defence Notice To Inform The Trial Chamber Of Its Position Vis-à-vis The Proposed Expert Witness Mrs. Bangura Pursuant To Rule 94 *bis*, filed on 19 May 2005 ("the Defence Reply to Combined Reply")<sup>5</sup>

**MINDFUL** of the Order of Trial Chamber I To The Prosecution To File Disclosure Materials And Other Materials In Preparation For Commencement of Trial dated 1 April 2004 ("the original Order")<sup>6</sup> and the Trial Chamber's Order To Prosecution To Provide Order Of Witnesses And Witness Statements dated 9 February 2005 ("the subsequent Order");

**MINDFUL** of the Prosecution's Witness List filed on 26 April 2004; Revised Witness List filed on 9 February 2005 and Updated Witness List filed on 28 April 2005;

**PURSUANT** to the provisions of Article 17 of the Statute of the Special Court ("the Statute") Rule 7 (C), Rule 66 (A) (ii), Rule 73, Rule 73 *bis* and Rule 94 *bis* of the Rules of Evidence and Procedure of the Special Court ("the Rules");

**HEREBY** issues the following Decision based solely on the written submissions of the parties.

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<sup>1</sup> Document No. SCSL-2004-16-T 245

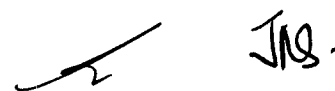
<sup>2</sup> Document No. SCSL-2004-16-T 270

<sup>3</sup> Document No. SCSL-2004-16-T 269

<sup>4</sup> Document No. SCSL-2004-16-T 276

<sup>5</sup> Document No. SCSL-2004-16-T 277

<sup>6</sup> *Prosecutor v. Alex Tamba Brima, et al*, Case No.SCSL-2004-16-T, Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for Commencement of Trial of 1 April 2004



## INTRODUCTION:

1. On April 2004, Trial Chamber I issued the original Order directing the Prosecution in the case of *The Prosecutor v. Alex Tamba Brima, et al*<sup>7</sup> to file disclosure materials and other materials in preparation for the commencement of the trial. Pursuant to the original Order the Prosecution filed a Witness List including a summary of the expected testimony of each witness on 26 April 2004. On this list the Prosecution included one Ms. Beth Vann, a Technical Advisor to the Reproductive Health Response in Conflict Consortium to testify on the broad subject of all sexual violence during the conflict in Sierra Leone as Witness TF1-332. The Prosecution avers that upon receiving Ms. Vann's final report on 5 October 2004 the Prosecution came to the conclusion that most aspects of sexual violence in the indictment could be proved solely by the testimony of first-hand witnesses and that Ms. Vann's expert testimony in that regard was no longer necessary save for one aspect, namely, the inhumane act of forced marriage as charged in Counts 6- 9 of the Further Amended Consolidated Indictment. The Prosecution avers that given the distinct social and cultural consequences of forced marriage and its uniqueness to the Sierra Leone conflict, the best evidence in that regard would come from a Sierra Leonean expert, rather than from Ms. Vann.
2. On 9 February 2005 the Trial Chamber issued the subsequent Order directing the Prosecution to provide its order of witnesses and witness statements. Pursuant to the subsequent Order the Prosecution filed a Revised Witness List on 9 February 2005 and an Updated Witness List on 28 April 2005. (Ms. Vann's name does not appear on either of these Witness Lists.
3. Subsequently in February 2005 the Prosecution identified Mrs Zainab Hawa Bangura a national of Sierra Leone and commissioned her to carry out research on the aspect of forced marriages during the Sierra Leone conflict. Having received a report of her findings the Prosecution now seek leave of court to call Mrs. Bangura as an expert to testify on the subject and to formally disclose a report of her findings to the Defence. The Prosecution filed this application seeking leave of court to vary their Updated Witness List by including Mrs. Zainab Hawa Bangura as an expert witness, pursuant to Rule 73 bis (E) of the Rules and to disclose her report to the Defence pursuant to Rule 66 (A) (ii) of the Rules.

## II-SUBMISSIONS:

### The Motion:

4. The Prosecution seeks leave of court pursuant to Rule 73 bis (E) of the Rules to vary its Updated Witness List filed on 28 April 2005 by adding the name of Mrs. Zainab Hawa Bangura to that list as a proposed expert witness for the Prosecution. The Prosecution submits that the strong relevance and materiality of Mrs. Bangura's evidence to the Prosecution case demonstrates "good cause" and that her addition to the Prosecution's list of witnesses is "in the interests of justice". The Prosecution further seeks leave of court to call Mrs. Zainab Hawa Bangura as an expert witness to testify on the issue of forced marriage and to formally disclose to the Defence her expert report and curriculum vitae pursuant to Rule 66 (A) (ii) and Rule 94 bis (A) of the Rules. The proposed report is appended to the Motion as Annex B, while her full curriculum vitae is Annex A.

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<sup>7</sup> Case No. SCSL-2004-16-T




5. The Prosecution submits that it had originally intended to call one Ms. Beth Vann, a Technical Advisor to the Reproductive Health Response in Conflict Consortium, to testify on the broad subject of all sexual violence during the conflict in Sierra Leone and had included her name on their Witness List filed on 26 April 2004 as "Witness TF1-332". However, upon receiving Ms. Vann's final report on 5 October 2004 the Prosecution came to the conclusion that most aspects of sexual violence in the indictment could be proved by the direct testimony of first-hand witnesses and that Ms. Vann's expert evidence in that regard was no longer necessary, except for the aspect of forced marriages which in the Prosecution's view would best be proved by the evidence of a Sierra Leonean expert, given its distinct social and cultural consequences and uniqueness to the Sierra Leone conflict. According to the Prosecution, the Sierra Leonean expert would be able to inform the Trial Chamber of the long-term social, cultural, physical and psychological meanings and consequences of forced marriage within the Sierra Leonean context.

6. Between October and November 2004 the Prosecution set about looking for a suitable Sierra Leonean expert on the subject of forced marriages and ultimately identified Mrs. Zainab Hawa Bangura, the Executive Director of the National Accountability Group (NAG)-Sierra Leone. On 14 February the Prosecution commissioned Mrs. Bangura to conduct research on the subject compile a report of her findings and to testify on behalf of the Prosecution in the AFRC case. The Prosecution submits that between 14 February 2005 and 4 May 2005 (date of filing Motion), Mrs. Bangura carried out her research and drafted the report (Annex B). Mrs Bangura's evidence is intended to include (a) the context within which forced marriage occurred during the conflict; (b) the socio-cultural meaning of forced marriage during the conflict; and (c) the long-term social, cultural, physical and psychological consequences of forced marriage during the conflict for its victims.

7. The Prosecution submits that the addition of Mrs Bangura as an expert witness will cause minimal prejudice to the Defence as the Prosecution will disclose her report (Annex B) to the Defence in compliance with the provisions of Rules 66 (A) (ii) and 94 *bis* of the Rules, thus giving the Defence sufficient time within which to investigate and prepare rebuttal evidence. The Prosecution further submits that Mrs Bangura is not expected to testify until a later stage of the proceedings, once key evidence is presented before the court, thereby giving the Defence adequate time to prepare.

#### The Response and Notice:

8. In their Response the Defence for the accused Alex Tamba Brima, Santigie Borbor Kanu and Brima Bazzy Kamara oppose the Motion and request the Trial Chamber (a) to exclude Mrs. Bangura from the Prosecution's witness list and (b) not to admit the proposed report (Annex B) into evidence, on the grounds that the Prosecution has failed to establish the requirement of "good cause" in breach of Rule 73 *bis* of the Rules. Furthermore, the Defence wishes to notify the Trial Chamber that it does not accept the proposed expert witness statement and indicates in the alternative, that it wishes pursuant to the provisions of Rule 94 *bis* (B) to cross-examine both Mrs. Bangura and her co-author, Ms. Christina Solomon.

9. The Defence submits that the Prosecution has failed (a) to indicate that the reasons why it is bringing forward this witness at so late a stage in the proceedings, are directly related and material to the facts in issue; (b) to explain why Mrs. Bangura's evidence is relevant and material to the Prosecution case; (c) to demonstrate that the addition of Mrs. Bangura's evidence to the Prosecution case at this late stage will not unfairly prejudice the Defence case, and (d) to demonstrate due diligence in that the Prosecution failed to inform the Defence at the earliest opportunity (i.e. shortly after 14 February 2005) of their intention to call Mrs. Bangura and instead waited to do so until May 2005, upon receiving her report.

10. The Defence further indicated in the Defence Notice that the Trial Chamber should not permit Mrs. Bangura to give evidence as an expert witness because in their opinion, she lacks the necessary qualifications to be able authoritatively to give expert opinion on the subject of forced marriages during the Sierra Leonean conflict. The Defence observe that since Mrs. Bangura's educational background is not in sociology, anthropology, psychology, medicine or other related field but rather is in insurance, she is not qualified to give expert opinion on the subject. The Defence also object to the admission in evidence of Mrs. Bangura's report (Annex B) as expert opinion on the subject of forced marriages on the grounds that (a) the title of the report seems to suggest that Mrs. Bangura has particular knowledge of the RUF and AFRC organisations, which fact is not elaborated upon by the Prosecution in their Motion nor in Mrs. Bangura's curriculum vitae, to the prejudice of the Defence; (b) the report is not relevant to the AFRC case as it is mainly confined to research conducted in the province of Kailahun which Mrs. Bangura alleges "was the only district that the RUF had control of during the entire period of the war"; (c) the report is inaccurate and incomplete as it omits to refer to relevant sources and data for the assertions contained therein; (d) the conclusion on page 10 of the report to the effect that "early or arranged marriages are no longer common in Sierra Leone" is grossly incorrect and is unsubstantiated; (e) the list of references used by the authors of the report is inadequate and insufficient to provide a proper basis for their research; and (f) the report contains numerous and unfounded statements, conclusions and generalisations that disqualify it from the status of expert opinion.

11. In the alternative the Defence notifies the Trial Chamber pursuant to the provisions of Rule 94 bis (B) (ii) of the Rules, of their intention to cross-examine Mrs. Bangura as well as her co-author Ms. Christina Solomon as expert witnesses. The Defence argue that in the event that Mrs. Bangura is unable to answer any questions regarding the report or the underlying research, then the Defence should be able to cross-examine Ms. Solomon as well.

#### The Combined Reply:

12. In reply to the Defence Response the Prosecution maintains that the issue of forced marriage in the context of the conflict in Sierra Leone warrants the calling of expert opinion. Forced marriage as an inhumane act under Article 2 (i) of the Statute is a novel legal charge. The complexity and sensitivity of the issue renders an expert opinion both material and relevant. The Prosecution was only able to make the assessment that a replacement expert witness was required to testify specifically on the issue of forced marriage after reviewing the report of Ms. Vann which report did not include an analysis or opinion on the issue. The Prosecution acted diligently and expeditiously in identifying Mrs. Bangura as a replacement for Ms. Vann and in disclosing her report to the Defence pursuant to Rule 94 bis (A) of the Rules as soon as they had received it in May 2005.

13. The Prosecution submits that notwithstanding her educational background in insurance, Mrs. Bangura qualifies as an expert in the area of forced marriage in the cultural context of Sierra Leone as she possesses relevant experience. The Prosecution expects that her evidence will assist the court in understanding the context and consequences of forced marriages in the conflict in Sierra Leone and is accordingly relevant and material.

14. The Prosecution submits that it is not sufficient for the Defence to allege prejudice without identifying the specific prejudice or infringement of Statutory right that the accused persons are likely to suffer as a result of the Prosecution calling Mrs. Bangura's evidence at this stage of the trial. The Prosecution further observes that the Defence will not suffer prejudice as they have the option to adduce their own expert evidence in rebuttal. The Prosecution submits that contrary to the Defence submissions, they could not have disclosed Mrs. Bangura's report in February 2005 as it had not yet been compiled. Mrs. Bangura submitted her report to the Prosecution on 4 May 2005 whereupon the Prosecution immediately disclosed the report to the Defence and filed this Motion. Citing the ICTY



Decision in *The Prosecutor v. Zejnil Delalic et al*<sup>8</sup> the Prosecution submits that “the Trial Chamber is enjoined to utilise all its powers to facilitate the truth finding process in the impartial adjudication of the matter between the parties. It is thus important to adopt a flexible approach when considering the management of witnesses. Where the testimony of a witness is important to the Prosecution or the Defence, the Trial Chamber will ensure that such witness is heard, subject, naturally, to the limits prescribed in the Statute and the Rules. In the present case the witnesses are deemed material to the Prosecution and it would be contrary to the interests of justice to exclude their testimony. The rights of the accused are in no sense affected by the adoption of such a flexible approach.”

15. In response to the Defence Notice pursuant to Rule 94 bis (B) of the Rules the Prosecution submits that Mrs. Bangura’s experience and exposure to the issues surrounding forced marriage and sexual violence generally are clearly evident from her curriculum vitae and professional biography appended to her report. Citing the ICTR Decision in *The Prosecutor v. Bizimungu et al*<sup>9</sup>, the Prosecution submits that “The role of an expert is to assist the Chamber in understanding the context in which the events took place. The expert must possess a relevant specialised knowledge acquired through education, experience or training in the proposed field of expertise.” The Prosecution further submits that despite Mrs. Bangura’s educational background being in the field of insurance, her extensive experience is a material factor that qualifies her as an expert with relevant specialised knowledge on the issue of forced marriage during the Sierra Leone conflict. The Prosecution further maintains that the rationale behind their disclosure obligations under Rule 94 bis (A) of the Rules is solely to ascertain whether the Defence accepts the statement of an expert filed pursuant to the Rule and if not, whether the Defence intends to cross-examine the proposed expert witness. It is not appropriate at this stage of the proceedings for the Defence to challenge the content of Mrs. Bangura’s report or the methodology used in compiling it.

16. Regarding the Defence request to cross-examine Ms. Christina Solomon, the Prosecution submits that Ms. Solomon did not co-author the report of Mrs. Bangura as alleged but merely provided support in the compilation of the said report. The Prosecution further submits that Rule 94 bis makes provision for the Defence to cross-examine the expert witness and not provide for the cross-examination to any other person. The Prosecution accordingly request the Trial Chamber not to grant the Defence request to cross-examine Ms. Solomon.

#### **The Defence Reply to Combined Reply:**

17. The Defence submits by way of preliminary objection that by filing a combined Prosecution Reply to the Defence Response pursuant to Rule 73 bis of the Rules and Prosecution Response to the Defence Request and Notice pursuant to Rule 94 bis of the Rules, the Prosecution’s Combined Reply violated the provisions of Rule 7 (C) of the Rules. The Defence submit further that the Rules do not permit a party to address two separate legal issues comprised in separate documents, in a single combined response and reply. The Defence accordingly request the Trial Chamber to disregard the second part of the Prosecution’s Combined Reply as it was not filed in proper form.

18. The Defence reiterate their earlier argument that Mrs. Bangura is not qualified to give expert opinion on the issue of forced marriage, and that the burden of proof remains on the Prosecution

<sup>8</sup> *Prosecutor v. Zejnil Delalic Zdravko Micic alias “Pavo” Hazim Delic Esad Landzo alias “Zenga”*, Decision on Confidential Motion to seek Leave To Call Additional Witness, 4 September 1997.

<sup>9</sup> *Prosecutor v. Bizimungu et al*, Case No. ICTR-99-50-T, Oral Decision on Qualification of Prosecution Expert Sebahire Deo Mbonyikebe, 2 May 2005.

and not the Defence, to adduce expert evidence that meets the proper standards of international criminal justice. The Defence reiterate their prayer that the Trial Chamber should not admit in evidence Mrs. Bangura's report (Annex B).

### III- THE APPLICABLE LAW:

19. The provisions of Rule 73 *bis* (B) of the Rules requiring the Prosecution to file before the commencement of the trial certain documents (specified in Rule 73 *bis* (B)) including a list of witnesses that the Prosecution intends to call in order to prove its case, are amongst others intended to put the Defence and the Trial Chamber on notice as to the number of witnesses the Prosecution intends to call and the substance of their evidence in relation to the indictment. This is in addition to the Prosecution's disclosure obligations pursuant to Rules 66, 67 and 68 of the Rules. The overall rationale for such early disclosure is to afford the Defence sufficient time to prepare their defence as well as to ensure an orderly and expeditious trial<sup>10</sup>. Accordingly, once the trial has commenced the Prosecution is obligated to abide by their witness list and statements as filed and may only vary the witness list in accordance with the provisions of Rule 73 *bis* (E) of the Rules which provides as follows:

"73 (E) After the commencement of the trial, the Prosecutor may, if he considers it to be in the interest of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called."

20. In addition, Rule 66 (A) (ii) of the Rules, on the disclosure of witness statements provides that the Prosecution shall:

"(ii) Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 42 days before the trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the Defence within a prescribed time."

21. Although Rule 66 (A) (ii) does not stipulate what amounts to "good cause" and 73 *bis* (E) does not stipulate what amounts to "the interests of justice" international tribunals have had occasion to interpret and apply similar provisions, thereby expanding the jurisprudence in this area. Trial Chamber I of the Special Court has observed in its own Decisions of *The Prosecutor v. Sam Hinga Norman et al*<sup>11</sup>, and *The Prosecutor vs. Issa Hassan Sesay et al*<sup>12</sup>, that when interpreting the provisions of Rule 66 (A) (ii) together with Rule 73 *bis* (E) of the Rules and articulating the circumstances that give rise to a showing of 'good cause' and 'the interests of justice', certain factors should be taken into consideration. Applying the principles laid down in the ICTR case of *The Prosecutor v. Nahimana*, Trial Chamber I has noted that:

<sup>10</sup> Under Article 17 (4) of the Statute of the Special Court, an accused person is entitled inter alia, to adequate time to prepare as well as to be tried without undue delay.

<sup>11</sup> *The Prosecutor v. Sam Hinga Norman et al*, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 2004, para. 15-18.

<sup>12</sup> *The Prosecutor vs. Issa Hassan Sesay et al*, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005, para. 25-27



"In assessing the 'interests of justice' and 'good cause' Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the Defence including elements of surprise, on-going investigations, replacements and corroboration of evidence. The Prosecution's duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his defence and his right to be tried without undue delay."<sup>13</sup>

22. Trial Chamber I continued to observe that additional factors include "the sufficiency and time of disclosure of the witness information to the Defence and the probative value of the proposed testimony". Applying the principles laid down in the ICTR case of *The Prosecutor v. Basogora*, Trial Chamber I has noted that:

"These considerations (under Rule 73 bis (E)) require a close analysis of each witness, including the sufficiency and time of disclosure of witness information to the Defence; the probative value of the proposed testimony in relation to the existing witnesses and allegations in the indictments; the ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty or other factors; and the justification offered by the Prosecution for the addition of the witness."<sup>14</sup>

23. On the issue of Mrs. Bangura's qualification as an expert on the subject of forced marriage during the Sierra Leonean conflict, neither the Statute of the Special Court nor the Rules contain a definition of the term "expert". However, Article 1 (f) of the Headquarters Agreement Between the Republic of Sierra Leone and the Special Court for Sierra Leone contains the following definition:

"(f) "Expert" means a person referred to as such in Article 15 of the Agreement establishing the Special Court and appearing at the instance of the Special Court, a suspect or an accused to present testimony based on special knowledge, skills, experience or training."

24. Rule 94 bis of the Rules specifically provides for the disclosure of statements of expert witnesses by either party to a trial and admission by the trial Chamber of statements of expert witnesses that are not contested. The Rule also provides for the cross-examination of expert witnesses whose statements are contested. The Rule provides as follows:

**"94 bis: Testimony of Expert Witnesses**

- (A) Notwithstanding the provisions of Rule 66 (A), Rule 73 bis (B) (iv) (b) and Rule 73 ter (B) (iii) (b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty one days prior to the date on which the expert is expected to testify.
- (B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:
  - (i) It accepts the expert witness statement; or
  - (ii) It wishes to cross-examine the expert witness.
- (C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person."

<sup>13</sup> *The Prosecutor v. Nahimana*, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para.20 and *The Prosecutor v. Nahimana*, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective measures, 14 September 2001, para.5

<sup>14</sup> *The Prosecutor v. Basogora*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E), 26 June 2003, para.14.



25. The purpose of this Rule (which is identical to Rule 94 bis of the ICTR Rules of Procedure and Evidence) is to expedite trial proceedings by arranging for early exchange of expert reports to facilitate identification of the issues in dispute and to identify the need or otherwise to call the expert witnesses to testify in person<sup>15</sup>. Although the Rule does not contain a definition of “an expert” or what qualifies as “expert evidence or opinion” international tribunals have had occasion to interpret and apply similar provisions, thereby greatly contributing to the jurisprudence in this area. The International Criminal Tribunal for the Former Republic of Yugoslavia (ICTY) has defined an expert as “a person whom by virtue of some specialised knowledge, skill or training, can assist the court to understand or determine an issue in dispute.”<sup>16</sup> Similarly the International Criminal Tribunal for Rwanda (ICTR) has observed that “the role of an expert is to assist the Chamber in understanding the context in which the events took place. The expert must possess a relevant specialised knowledge acquired through education, experience or training in his proposed field of expertise.”<sup>17</sup> The ICTY has further held that “an expert witness is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon and of the methods used when applying his or her knowledge, experience or skills to form his or her opinion.”<sup>18</sup> Lastly the ICTY has held that “the admission of evidence should clearly be distinguished from the weight and probative value that will eventually be given to each piece of evidence. The weight to be attributed to an expert witness statement will be appreciated by the Trial Chamber at the end of the trial and in light of all the evidence adduced.”<sup>19</sup>

26. Guided by the above law and jurisprudence, the Trial Chamber now proceeds to consider the merits of the Prosecution Motion and defence Response.

#### IV- THE MERITS OF THE APPLICATION

##### **The Defence’s preliminary objection to combined Prosecution Reply:**

27. The Trial Chamber wishes to express its strong disfavour for the practice of combining pleadings or submissions for which the Rules prescribe different filing time limits. As the Defence has rightly observed, Rule 7 (C) of the Rules provides that “unless otherwise ordered by the Trial Chamber, a response to a motion shall be filed within ten days while a reply to response shall be filed within five days.” We note that in this case the Prosecution’s Combined Reply comprises two pleadings, namely the Prosecution Response to the Defence Reply (for which a filing time limit of five days is applicable), and the Prosecution’s Reply to the Defence Notice and Request (for which a filing time limit of ten days is applicable). The proper and preferred course of action is for the parties to file the various responses and replies in separate documents in order to avoid confusion over issues as well as time frames. In the present case we observe that the irregularity by the Prosecution has not occasioned a miscarriage of justice as their “Combined Reply” was filed on the 18 May 2005, five days after the

<sup>15</sup> *International Criminal Practice* by Jones and Powles, 3<sup>rd</sup> Edition, para. 8.5.736

<sup>16</sup> *The Prosecutor v. Stanislav Galic*, IT-98-29-T, Decision Concerning the Expert Witness Ewa Tabeau and Richard Philips, 3 July 2002; and *The Prosecutor v. Stanislav Galic*, IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003.

<sup>17</sup> *The Prosecutor v. Casimir Bizimungu, et al*, Case No. ICTR-99-50-T, Oral Decision on Qualification of Prosecution Expert Sebahire Deo Mbonyikebe, 2 May 2005; and *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-I, Decision on Defence Motion to Disqualify Expert Witness Alison Des Forges, and to Exclude Her Report, 14 July 2004.

<sup>18</sup> *The Prosecutor v. Galic*, IT-98-29-T, Decision Concerning the Expert Witness Ewa Tabeau and Richard Philips, 3 July 2002;

<sup>19</sup> *The Prosecutor v. Stanislav Galic*, IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003.



filing of the Defence Reply. The Prosecution therefore appears to have complied with both time limits prescribed by Rule 7 (C). The preliminary objection is accordingly overruled.

**The Application to vary the Prosecution Witness List pursuant to Rule 73 *bis* (E):**

28. In determining whether or not to grant this application, the Trial Chamber is mindful of the need to balance the Prosecution's duty under the Statute to present the best available evidence to prove its case, with the rights of the accused persons Brima, Kamara and Kanu to have adequate time and facilities to prepare their defence, and to be tried without undue delay. In this case, the requirement to illustrate "*good cause*" and "*the interests of justice*" connotes a responsibility upon the Prosecution to advance credible reasons or justification for failing to disclose to the Defence the existence of Mrs. Bangura as a potential Prosecution witness and to disclose her report within the time frames prescribed under Rule 66 (A) (ii) of the rules. In particular the Prosecution must establish to the satisfaction of the Trial Chamber the following:

- (i) That the reasons or explanation advanced by the Prosecution are directly related and material to the facts in issue;
- (ii) That the facts to be provided by Mrs. Bangura in her report and eventually her testimony, are relevant and material to determining the issues in the AFRC Trial and would contribute to serving and fostering the overall interests of the law and justice;
- (iii) That granting at this stage, leave to call a new witness and the disclosure of a new statement will not unfairly prejudice the right of the accused to a fair and expeditious trial as guaranteed by Article 17 (4) (a) and (b) of the Statute as well as Rule 26 *bis* of the Rules;
- (iv) That the evidence the Prosecution is now seeking to call, could not have been discovered or made available at a point earlier in time, notwithstanding the exercise of due diligence on their part.<sup>20</sup>

29. We note the Prosecution submissions that the evidence of Mrs. Bangura is intended to replace that of Ms. Beth Vann who the Prosecution decided they weren't calling as a witness after coming to the conclusion that "*most aspects of sexual violence could be proved solely by the testimony of first-hand witnesses, without the need for Ms. Vann's type of expert testimony*". We further note the Prosecution submissions that the subject of forced marriages during the Sierra Leone conflict is an extremely sensitive topic, particularly given its distinct social and cultural consequences and its uniqueness to the Sierra Leone conflict and that the Trial Chamber would best be served to hear testimony from Mrs. Bangura, a Sierra Leonean expert on the matter. We note the Prosecution explanation that the earliest opportunity they had to disclose the existence of Mrs. Bangura as a potential Prosecution and her report to the Defence was in May 2005 after she had submitted her report to the Prosecution, and not before. We note and accept the fact that "forced marriage" is one of the forms or acts of the crime of "sexual violence" as charged in Counts 6-9 of the Further Amended Consolidated Indictment.<sup>21</sup> We further note and accept the Prosecution submission that Mrs Bangura's evidence is intended to include (a) the context within which forced marriage occurred during the conflict; (b) the socio-cultural meaning of forced marriage during the conflict; and (c) the long-term social, cultural,

<sup>20</sup> These four criteria were considered by Trial Chamber I in *Issa Hassan Sesay et al*, Case No. SCSL-2004-15-T, Decision on Prosecution Request to Call Additional Witnesses and disclose Additional Witness statements, 11 February 2005.

<sup>21</sup> *The Prosecutor v. Alex Tamba Brima et al*, Case No. SCSL-04-16-T, Further Amended Consolidated Indictment, 18 February 2005, paragraphs 51-57



physical and psychological consequences of forced marriage during the conflict for its victims, all of which factors are relevant and material to the facts in issue in the trial. We also note and accept the Prosecution submission that Mrs. Bangura is not expected to testify until a later stage of the proceedings, once key evidence is presented before the court in order to give the Defence adequate time to prepare. We note that apart from arguing that the Prosecution should have disclosed the existence of Mrs. Bangura and her intended testimony to the Defence as soon as they had identified her as a potential Prosecution witness (i.e. on 14/02/05), the Defence do not controvert the Prosecution submissions nor do they allege any actual prejudice occasioned to them by this application. Accordingly, the Trial Chamber is satisfied that the explanation or justification provided by the Prosecution for calling Mrs. Bangura as a Prosecution witness, is credible. We also find that the proposed testimony of Mrs. Bangura is relevant and material to the indictment and to the facts in issue. We accept the Prosecution explanation that until they had actually seen and approved a draft report of Mrs. Bangura's findings, the Prosecution could not present Mrs. Bangura as a potential witness. We note that the Prosecution filed this application on 4 May 2005 the same day they received Mrs. Bangura's draft report. We are therefore satisfied that the Prosecution has not exhibited lack of due diligence in this regard. In the premises we find that the Prosecution has demonstrated the ingredients of "good cause" and "interest of justice" warranting the granting of their application pursuant to Rule 73 bis (E) of the Rules.

#### **The Defence Notice and Application to Exclude Mrs. Bangura's Expert Testimony:**

30. We note that under the provisions of Rule 94 bis (B) of the Rules a party opposing the filing of the statement of an expert witness has two options, namely (a) to notify the Trial Chamber that it accepts the expert witness statement, in which case the Trial Chamber may admit the statement without necessarily calling the witness to testify; or (b) to notify the Trial Chamber that it wishes to cross-examine the expert witness, in which case the witness will necessarily appear in court for purposes of cross-examination. There is no third option under the Rule whereby the Trial Chamber is permitted, at the request of the opposing party, to exclude or lock out an expert witness or her evidence, much less at this early stage when the witness has not yet testified. We note the Defence submissions that in their opinion, since Mrs. Bangura's educational background is not in sociology, anthropology, psychology, medicine or other related field but rather is in insurance, she is not qualified to give expert opinion on the subject of forced marriages. We note further the Defence objection to the admission in evidence of Mrs. Bangura's report (Annex B) as expert opinion on the subject of forced marriages on the grounds that "(a) the title of the report seems to suggest that Mrs. Bangura has particular knowledge of the RUF and AFRC organisations, which fact is not elaborated upon by the Prosecution in their Motion nor in Mrs. Bangura's curriculum vitae, to the prejudice of the Defence; (b) the report is not relevant to the AFRC case as it is mainly confined to research conducted in the province of Kailahun which Mrs. Bangura alleges "was the only district that the RUF had control of during the entire period of the war"; (c) the report is inaccurate and incomplete as it omits to refer to relevant sources and data for the assertions contained therein; (d) the conclusion on page 10 of the report to the effect that "early or arranged marriages are no longer common in Sierra Leone" is grossly incorrect and is unsubstantiated; (e) the list of references used by the authors of the report is inadequate and insufficient to provide a proper basis for their research; and (f) the report contains numerous and unfounded statements, conclusions and generalisations that disqualify it from the status of expert opinion". It is our considered view that all the above concerns are matters that go to the weight and not admissibility of the evidence, and that can adequately be tested during cross-examination. The weight to be attributed to expert evidence will be determined by the Trial Chamber not at this stage but rather at the end of the trial and in light of all the evidence adduced. We also note that in the interests of justice and a fair trial, the Defence are themselves entitled not only to cross-examine Mrs. Bangura but also to submit expert findings to the contrary and to call their own expert witness or witnesses in their defence.



31. Regarding Mrs. Bangura's qualifications as "an expert" or lack thereof, we adopt the accepted qualitative definition that "*an expert must possess relevant specialised knowledge acquired through education, experience or training in the proposed field of expertise*" and the defined role of an expert as being "*to assist the Chamber to understand or determine an issue in dispute and the context in which the events took place.*" We note and accept the Prosecution submissions that despite Mrs. Bangura's educational background being in the field of insurance, her extensive experience is a material factor that qualifies her as an expert with relevant specialised knowledge on the issue of forced marriage during the Sierra Leone conflict. We note from Mrs. Bangura's curriculum vitae (Annex A) that as Coordinator and co-founder of the organisation known as "Campaign for Good Governance" (CGG) she has extensive experience in monitoring human rights abuses across Sierra Leone including police stations, rebel-controlled areas, and refugee camps for returning women and internally displaced persons. She also has experience in documentation of human rights violations across Sierra Leone for over five years and in providing care and support to victims of domestic and sexual violence, which experience the Prosecution submits is a relevant factor in determining her expertise on the subject of "forced marriages during the Sierra Leone conflict". We also note the acknowledgment in paragraph 1.1 of Mrs. Bangura's report that "*her testimony is based on her experience as a campaigner for women's and civil rights in Sierra Leone, upon personal experience in dealing with women victims of forced marriages and also upon extensive secondary and primary data.*" More importantly, we note and accept the Prosecution submissions that Mrs. Bangura's testimony will "*assist the Chamber to understand or determine the issues of sexual violence and forced marriages during the conflict in Sierra Leone and the context in which the events took place.*" In the premises we find no merit in the Defence objection to Mrs. Bangura's qualifications and hold that she possesses relevant experience and that the Prosecution is entitled to call her as an expert witness and to disclose her report to the Defence pursuant to the provisions of Rule 94 *bis* of the Rules.

32. Regarding the Defence application to exclude Mrs. Bangura's report (Annex B) we note that this application is pre-mature as the Prosecution has not yet applied to tender the said report in evidence and the Defence has indicated pursuant to Rule 94 *bis* (B) of the Rules that they intend to cross-examine Mrs. Bangura on that report. The Prosecution application was limited to leave to add Mrs. Bangura to their witness list and to formally disclose her report or statement to the Defence in discharge of their disclosure obligations under the Rules.

33. Regarding the Defence application for leave to cross-examine Ms. Christina Solomon as co-author of Mrs. Bangura's report, we note the Defence submission that "Mrs. Bangura may not be able to answer some of their questions in cross-examination thereby necessitating Ms. Solomon's testimony." In our view the Defence is merely speculating as to Mrs. Bangura's competence and ability to testify. We also note and accept the Prosecution submissions that Ms. Solomon did not co-author the said report with Mrs. Bangura but merely provided support in the compilation of the said report and that the entire report represents the opinion of Mrs. Bangura alone. More importantly, we are of the view that the Prosecution enjoys a prosecutorial latitude in the domain of the strategies it puts into place to establish its case particularly in light of the provisions of Article 15 (1) of the Statute which confers on the Prosecutor the competence to act independently as a separate organ of the Special Court (within the limits and confines of the law and the doctrine of equality of arms). Accordingly we do not consider it to be in the interests of justice at this stage to curtail that independence by compelling the Prosecution to call Ms. Christina Solomon as their witness, at the behest of the Defence.




## V-DISPOSITION:

FOR THE ABOVE REASONS THE TRIAL CHAMBER

GRANTS the Prosecution application pursuant to Rule 73 *bis* (E) of the Rules;

DENIES the Defence application to exclude the expert evidence of Mrs. Zainab Hawa Bangura, and the Defence application to cross-examine Ms. Christina Solomon;

NOTES that the Defence intends to cross-examine Mrs. Zainab Hawa Bangura upon her expert statement pursuant to Rule 94 *bis* (B) of the Rules; and

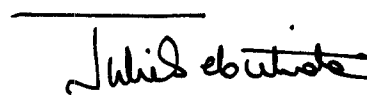
## ORDERS THAT:

- (i) The Prosecution is granted leave pursuant to Rule 73 *bis* (E) of the Rules to vary their Updated Witness List of 28 April 2005 by adding the name of Mrs. Zainab Hawa Bangura.
- (ii) The Prosecution is granted leave to disclose Mrs. Bangura's report pursuant to Rule 66 (A) (ii) of the Rules, to the Defence not later than Friday 12 August 2005. For the purposes of this order, The Trial Chamber hereby authorises Court Management Section to accept the Prosecution's disclosure of this document during the Court recess and to serve it upon the defence without delay.
- (iii) The Prosecution shall call on Mrs. Bangura to testify only after the expiry of the month of September 2005 in order to give the Defence sufficient time to prepare, unless an earlier time is agreed to by consent of the parties.

Justice Teresa Doherty gives a separate concurring opinion.

Done at Freetown, Sierra Leone, this 5<sup>th</sup> day of August 2005.

  
Justice Richard Lussick

  
Justice Julia Sebutinde

