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SCSL-2004-16-PT

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(575 - 579)

**SPECIAL COURT FOR  
SIERRA LEONE**

**Case No. SCSL-2004-16-PT**

Before: Judge Bankole Thompson, Presiding  
Judge Benjamin Mutanga Itoe  
Judge Pierre Boutet

Registrar: Robin Vincent

Date filed: March 18, 2004

**THE PROSECUTOR**

**against**

**SANTIGIE BORBOR KANU**

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**KANU – MOTION FOR EXCLUSION OF PROSECUTION WITNESS STATEMENTS AND STAY  
ON FILING OF PROSECUTION WITNESS STATEMENTS  
PURSUANT TO RULES 5 AND 66(A)(i)**

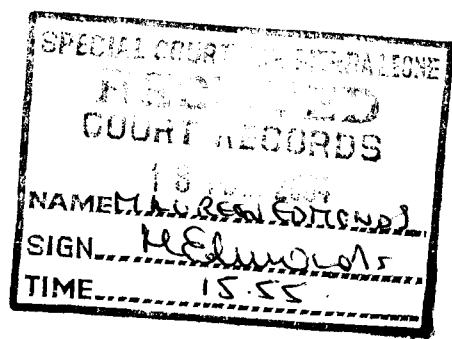
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## I INTRODUCTION

1. This Motion is filed with the Trial Chamber following the arguments made by the Defense at the Status Conference of March 8, 2004, where it was argued that the Prosecution failed to comply with Rule 66(A)(i),<sup>1</sup> in order to formalize these arguments and to officially request for an order of the Trial Chamber to sanction this non-compliance.
2. It is the understanding of the Defense that the Trial Chamber would consider this issue raised at the Status Conference of March 8, 2004. Nonetheless, the Defense deems it in the interest of justice to reiterate its arguments by means of a formal motion, also in order to provide the Trial Chamber with the proper legal instrument to grant relief according to Rule 5 of the Rules.

## II ARGUMENTS AS TO EXCLUSION OF PROSECUTION WITNESS STATEMENTS

3. Rule 66(A)(i) of the Rules indicates that the Prosecutor shall “[w]ithin 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 bis at trial.”
4. The last sentence of abovementioned Rule indicates that “[u]pon good cause being shown, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time”. The Defense holds that the Prosecution has never requested such order, nor has the Trial Chamber ever issued an order that the witness statements filed after October 23, 2003 could be disclosed.
5. On several occasions after October 23, 2003, the Prosecution has filed substantial amounts of disclosing witness statements, *inter alia*:

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<sup>1</sup> See Defense Notes for Status Conference in *Prosecutor v. Kanu*, at 2 – 3.

- March 18, 2004;
  - the week of March 8, 2004;
  - beginning of March 2004;
  - end of February 2004;
  - mid-February 2004;
  - beginning of February 2004; and
  - November 2003.
6. As the Prosecution failed to show good cause, in order to justify the exceeding of the time limit set out in Rule 66(A)(i) of the Rules, and this good cause was even not established during the Status Conference of March 8, 2004, the Defense herewith seeks relief according to Rule 5 of the Rules to the extent that all witness statements of the Prosecution delivered after October 23, 2003, should be excluded from the case file and the trial. Clearly, the ongoing disclosure of witness statements does infringe the object and purpose of Rule 66(A)(i), which also aims to protect an effective preparation and participation of the Accused at trial.<sup>2</sup>
7. This object and purpose of Rule 66(A)(i) should be interpreted in view of the principle of fair and expeditious trials, as enshrined, for instance, in the ICCPR and the ACHR.<sup>3</sup> More specifically, this Rule may be seen as an exponent of the derivative principle of equality of arms. After all, the discovery process, to which Rule 66(A)(i) belongs, “*is regulated in detail so as to guarantee the defense as far as possible.*”<sup>4</sup> Therefore, the disclosure of evidentiary material, inclusive the mentioned witness statements, must be done by the Prosecution within the time limit set in the Rules.<sup>5</sup>

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<sup>2</sup> See also Antonio Cassese, *International Criminal Law* (2003) at 416 – 417, speaking about the “*prescribed time limit*” of thirty days after the initial appearance of the Accused.

<sup>3</sup> See Articles 14(1) and Article 26 respectively; Sierra Leone acceded to the ICCPR on November 23, 1996 and to the ACHR on September 21, 1983.

<sup>4</sup> Cassese o.c., at 396, also referring to Rule 66(A) of the ICTY Rules of Procedure and Evidence.

<sup>5</sup> *Ibid.*

8. Rule 66(A)(i) specifically refers to “*copies of the statements of all witnesses (emphasis added, GJK) whom the Prosecution intends to call to testify and all evidence (...).*” Therefore, Rule 66(A)(i), which distinguishes from Rule 66(A)(i) of the ICTY RPE,<sup>6</sup> clearly leaves no room for any other interpretation than sought in this Motion.
  
9. As a consequence, the Defense holds the opinion that in the event this Motion would be granted, the Prosecution should not be allowed to present the witnesses who gave their written testimony after October 23, 2003, at trial so that they cannot be called at trial as Prosecution witnesses. Support for the requested sanction, i.e. exclusion of the disclosed Prosecution witness statements after October 23, 2003, and exclusion from testifying at trial, may be found in Rule 5 of the Rules, delineating the possibility to grant relief in the event of non-compliance with the Rules raised by a party at the earliest opportunity. It is this relief that is sought by the Defense.
  
10. **In the alternative**, in the event the Trial Chamber would not grant this primary sanction, the Defense respectfully prays the Chamber to order that the Prosecution is not allowed to file any witness statements as from a date to be set by the Trial Chamber onwards in the interest of justice and/or to set a date after which the disclosed witness statements are no longer to be accepted as disclosed materials in the sense of Rule 66(A)(i).

### **III RELIEF SOUGHT**

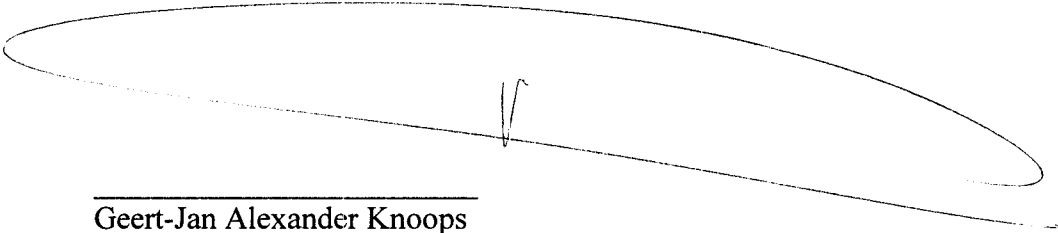
11. For these reasons, the Defense respectfully prays the Trial Chamber of the Special Court to issue an order to the following extent:

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<sup>6</sup> This Rule refers to the “*supporting material*” which accompanies the indictment.

- (i) **Primarily**, that all witness statements filed and still to be filed by the Prosecution after October 23, 2003, should be disregarded, and excluded from the case file of the Accused;
- (ii) As a consequence, that the Prosecution is barred from calling the witnesses at trial who gave their written testimony, disclosed by the Prosecution after October 23, 2003; and
- (iii) **Alternatively**, that the Prosecution is barred from filing further witness statements as from a date to be determined by the Trial Chamber in the interest of justice and/or that the Trial Chamber set a date after which the disclosed witness statements are no longer to be accepted as disclosed materials in the sense of Rule 66(A)(i).

Respectfully submitted,  
Done at this 18<sup>th</sup> day of March 2004



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Geert-Jan Alexander Knoops  
Lead Counsel