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SCSL-2004-16-PT
(797 - 802)

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**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 31, 2004

THE PROSECUTOR

against

SANTIGIE BORBOR KANU

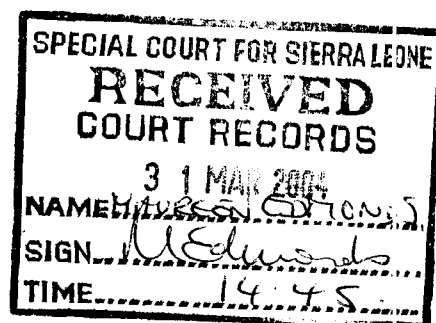
**KANU – DEFENSE REPLY TO PROSECUTION RESPONSE TO DEFENSE MOTION FOR
EXCLUSION OF PROSECUTION WITNESS STATEMENTS AND STAY ON FILING OF
PROSECUTION WITNESS STATEMENTS PURSUANT TO RULES 5 AND 66(A)(i) AND DEFENSE
ADDITIONAL MOTION**

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I INTRODUCTION

1. This Motion is in response to the “Prosecution Response to Defence Motion for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Witness Statements Pursuant to Rules 5 and 66(A)(i) and Defence Additional Motion,” (“**Prosecution Response**”) filed by the Prosecution on March 26, 2004, and in furtherance to the Defense “Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statements Pursuant to Rules 5 and 66(A)(i),” (“**Initial Motion**”) filed on March 18, 2004 and the Defense “Additional Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statements Pursuant to Rules 5 and 66(A)(i)” (“**Additional Motion**”).
2. This Reply will also address the question whether the Initial Motion should be disposed of based on the previous version of Rule 66(A)(i) (“**Rule 66(A)(i) old**”) or the amended version thereof (“**Rule 66(A)(i) amended**”), as the Prosecution in its Response first assesses Rule 66(A)(i) of the Rules before it was amended by the Trial Chamber at the Plenary held between March 11 – 14, 2004, which amendment was only made public to the Defense on March 23, 2004, therefore after the filing of the Initial Motion.

II CONTINUOUS OBLIGATION TO DISCLOSE AND INVESTIGATE

3. The Prosecution asserts that principles of international law, as well as the Special Court Statute, reflect the Prosecution’s continuous duty to investigate and disclose evidence to the Defense, even beyond the 30 day period mentioned in Rule 66(A)(i) old of the Rules. The Prosecution Response indicates that the *structure* of the Statute and the Rules are framed in such a way that they recognize the Prosecution’s continuous obligation to investigate and disclose. In order to support this argument, the Prosecution mentions several examples.
4. In the first place, the Prosecution seems to argue that Article 15 of the Statute, read in combination with Rules 2 and 50(B) of the Rules, implicitly recognize the Prosecution’s acquisition of additional evidence following the issuance of an indictment and the initial appearance of an accused. This interpretation, in the modest view of the Defense, is disputable.
5. The term ‘investigation’ is defined by Rule 2 of the Rules as “*all activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after the approval of an indictment.*” Rule 50 of the Rules provides for the option to amend an indictment. Apparently, the Prosecution holds that the Rules provide for the possibility to amend an indictment after the period of 30 days after the initial appearance of the accused, the Prosecution is thus allowed to continue disclosing witness statements after this 30 day period as well. However, the fact that an indictment may be amended after the initial appearance of the Accused does not as such support the Prosecution’s proposition that it is allowed to continue to disclose witness statements to the Defense after the 30 day period provided for in Rule 66(A)(i).

6. The Defense respectfully draws the attention to the Prosecution’s “Request for Leave to Amend the Indictment,” filed on February 9, 2004, in which it is argued that “[t]he Prosecution does not seek to disclose further materials relating to the new counts. It will rely on materials already disclosed to the Defence,”¹ and “the amendment is based on existing allegations in the current Consolidated Indictment as well as evidence already disclosed by the Defence,”² which argument was invoked as an argument to decide that the amendment will not unduly delay the trial of the Accused. Accordingly, this requested leave to amend the Indictment reinforces the argument that the Prosecution should indeed be confined to the time limit provided for in Rule 66(A)(i) old.
7. Secondly, the Prosecution bases its argument on Rule 73bis(E) of the Rules, that provides for the right of the Prosecution “to 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.” The Defense has a different interpretation of this Article than the Prosecution. In the humble opinion of the Defense, this Rule prevents the Prosecution to call at trial witnesses who did not previously testify, and whose statements were not disclosed at a prior stage to the Defense.
8. This Rule does therefore not implicitly reflect a Prosecution’s right to disclose witness statements after the 30-day time limit as provided for in Rule 66(A)(i) old.
9. In para. 7 of the Prosecution Response, it is said that in the general course of criminal trials, investigations do not end with the mere issuance of an indictment, but could continue right up until the completion of the trial. Such interpretation would certainly not be in accordance with the object and purpose of the Rules of Procedure and Evidence, both before and after the amendment.
10. Thirdly, the Prosecution relies on Rule 68 of the Rules, to substantiate the Prosecution’s continuous obligation to disclose evidence. Indeed, this Rule enhances the Prosecution’s obligation to continuously disclose evidence. However, this Rule limits this obligation to exculpatory evidence, therewith excluding this obligation with regard to other, possibly incriminating, evidence.
11. The Prosecution moreover contends that it would be an oxymoron that the Rules and the Statute would provide for ongoing investigations, and at the same time prevent it from disclosing and using evidence generated from this ongoing investigation. Rule 66(A)(i) old, however, only prevents the Prosecution from disclosing witness statements and evidence to be presented pursuant to Rule 92bis after the 30-day time period, and not from disclosing other materials.
12. In para. 9 of the Prosecution Response (while relying on Rule 47), it is stated that there exists a well established principle and practice of international criminal law which sets forth a lower threshold for the level of evidence required for the confirmation of an indictment than the threshold for the sufficiency of evidence required for the conviction of an accused person. The Defense however humbly reiterates that, as evidenced by Rule 68 of the Rules, the continuous obligation of the Prosecution to disclose evidence only applies to exculpatory evidence, and not to

¹ Prosecution “Request for Leave to Amend the Indictment,” filed on February 9, 2004, para. 10.

² *Ibid.*, para. 21.

incriminating or other evidence. Where the Prosecution thus mentions the “confirmation of an indictment,” it is the modest opinion of the Defense that the Prosecution under this Rule 68 is only obliged to disclose exculpatory evidence, instead of releasing evidence confirming the indictment.

13. Moreover, in reply to the Prosecution’s argument in para. 9 of its Response, relying on different threshold requirements as to information confirming an indictment and evidence required for the conviction of a person, it may be said that these elements do not inhere a different result. After all, evidence in support of the indictment is in most instances used as evidence at trial.

14. In the last part of para. 9 of the Prosecution Response, it is said that “[t]he 30-day time limit in Rule 66(A)(i) refers only to the statements in the Prosecution’s possession at the time of the issuance of the indictment and consequently, the 30-day period after the initial appearance of an accused.” This reference, at least, recognizes that the statements referred to in the Defense Additional Motion, namely statements from witnesses interviewed before the expiry of the 30-day time limit on October 23, 2003, but only disclosed to the Defense after expiry of this time limit, indeed fall outside the scope provided for in Rule 66(A)(i) of the Rules old.

III INTERPRETATION OF THE WORDING OF RULE 66(A)(i)

3.1 Rule 66(A)(i) Before the Amendment

15. In para. 11 of the Prosecution Response and onwards, the Prosecution provides an interpretation of the second limb of Rule 66(A)(i) of the Rules. The Prosecution indicates that, where the first limb of the Rule only refers to witnesses the Prosecution intends to call at trial (the text also indicates all evidence to be presented pursuant to Rule 92bis), the second limb refers to “additional prosecution witnesses,” i.e. other witnesses than the ones mentioned under the first limb, therefore witnesses who will not be called at trial by the Prosecution.

16. This interpretation seems to merit the conclusion that the authors of all witnesses, the statements of whom have been disclosed to the Defense after the 30-day time limit expired, will not be called at trial. For the Prosecution states that the second limb of Rule 66(A)(i), which second limb provides for the possibility of disclosing material after the 30-day time limit, is only applicable to witnesses who will not be called at trial.

3.2 Good Cause

17. As to the interpretation of the requirement of showing good cause, the Prosecution states that it is up to the Defense to show the existence of “good cause” for the disclosure of the statements of witnesses who will not be called at trial, and whose statements are taken after the aforementioned 30-day period. The primary concern of the Defense relates however to the element of good cause as envisioned by the first limb of Rule 66(A)(i) amended.

18. The reliance by the Prosecutor on good cause as set out in the second limb acknowledges the fact that of all witness statements disclosed to the Defense after October 23, i.e. 30 days after the initial appearance of the Accused, the Prosecution is not allowed to have these witnesses called at trial to testify.

3.3 Rule 66(A)(i) After the Amendment

19. During the fifth plenary meeting of the Judges of the Special Court, held between March 11 – 14, 2004, an amendment to Rule 66(A)(i) of the Rules was made.
20. The amendment of the Rules came into force “*immediately at the time of their approval by the Plenary Meeting and as reflected in the record thereof*,”³ i.e. between March 11 – 14, 2004. Rule 6(D) of the Rules moreover states that “[a]n amendment shall, unless otherwise indicated, enter into force immediately. The Registrar shall publish the amendment by appropriate means.” The amendment thus came into force “*immediately*” after the approval thereof by the Plenary, i.e. on March 11 – 14, 2004. The Defense consequently holds that the amended version of Rule 66(A)(i) is only applicable to evidence and witness statements disclosed by the Prosecution after March 11, 2004. All these materials disclosed by the Prosecution after October 23, 2003, and before March 11, 2004, therefore still falls under the old version of the Rules.
21. Again, it should be stressed that the Initial Motion was filed before the amended Rule 66(A)(i) was officially published through the Court Management on March 23, 2004.
22. The Defense holds the humble opinion that the amendment should not be applied retroactively, as it would prejudice the rights of the Accused. Therefore, the Initial Motion is to be disposed of under Rule 66(A)(i) old.

IV TIMING OF THE DEFENSE MOTION

23. The Prosecution in para. 16 of its Response indicates that the Defense argument was not brought “*at the earliest opportunity possible*,” as required by Rule 5 of the Rules. However, the Defense stresses that the first Status Conference in the case of the AFRC, held on March 8, 2004, was the earliest practicable opportunity for the Defense to raise this issue before the Trial Chamber, at which occasion the Defense indeed brought this argument forward.⁴ Rule 65bis of the Rules explicitly points out that a Status Conference provides the Accused with the right to “*review the status of his case and to allow the accused the opportunity to raise issues in relation thereto*.” It is the humble opinion of the Defense that this first Status Conference was thus to be considered the earliest opportunity for the Defense to raise this issue before the honorable Trial Chamber.

V RELIEF REQUESTED

24. The Prosecution specifies in para. 17 of its Response, that, as an alternative, the relief sought by the Defense should not be granted.
25. In the first place, the Prosecution states that the relief sought in para. 11(i) of the Initial Motion is not appropriate, as said witness statements were not filed but rather disclosed. In any event, the relief evidently sought is that all witness statements disclosed and still to be disclosed by the Prosecution after October 23, 2003, should be

³ See Memorandum accompanying the Amended Rules of Procedure and Evidence dated March 23, 2004, filed in the Registry case file as page 745.

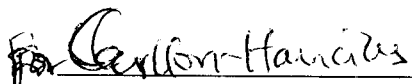
⁴ See Defense notes for Status Conference March 8, 2004, p. 2 – 3.

disregarded, and that the Prosecution is not allowed to call these witnesses to testify at trial.

- 26. Secondly, the Prosecution argues that the relief sought in para. 11(ii) of the Initial Motion is not an appropriate remedy, as the Rules do not provide for such a remedy. In the humble view of the Defense, Rule 66(A)(i), both old and amended, is designed, *inter alia*, to protect the rights of the Accused. If the Prosecution was to be allowed to trespass this Rule, not just once, but on a repeated basis, without any consequences imposed on the Prosecution therefore, the Accused's right to a fair trial would be seriously infringed. A remedy, aside from Rule 5, may well be found in the general principles of international criminal law and human rights instruments which apply to all international criminal court proceedings.
- 27. Furthermore, the Prosecution contends that the remedy sought is too extreme and not in accordance with the principle of proportionality, relying on *Prosecutor v. Bagasora*, in which the ICTR held that although the Prosecution had not met its disclosure obligations, the Defence was not prejudiced because the trial had been postponed. The Defense, in its humble view, leaves this decision to the honorable Trial Chamber in order to assess this issue at the perhaps most appropriate moment, i.e. after the last Prosecution witness statements have been disclosed to the Defense under Rule 66(A)(i).
- 28. In light of the above, the Defense therefore respectfully prays the honorable Trial Chamber to order:

- (i) **Primarily**, that all witness statements disclosed and still to be disclosed 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 at trial the witnesses who gave their written testimony and which statements were only disclosed by the Prosecution after October 23, 2003; and
- (iii) **Alternatively**, in the event the honorable Trial Chamber would adjudicate the Initial Motion based on Rule 66(A)(i) old, that the Prosecution is barred from filing further witness statements as from a date to be determined by the honorable Trial Chamber in the interest of justice and/or that the honorable Trial Chamber will set a time limit 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 31st day of March 2004


Geert-Jan Alexander Knoops – Lead Counsel