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SCSL-04-15-T.
(10506 - 10512)

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THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Hon. Justice Benjamin Itoe, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: **Mr. Robin Vincent**

Date filed: **18th February 2005**

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 04 – 15 – T

DEFENCE REPLY TO PROSECUTION CONSOLIDATED RESPONSE TO APPLICATION FOR LEAVE TO APPEAL – RULING (3RD FEBRUARY 2005) ON ORAL APPLICATION FOR THE EXCLUSION OF STATEMENTS OF WITNESS TF1 – 141 DATED RESPECTIVELY 9TH OCTOBER 2004, 19TH OCTOBER 2004, 19TH AND 20TH OF OCTOBER 2004 AND 10TH JANUARY 2005

Office of the Prosecutor
Luc Cote
Lesley Taylor
Karen Abugaber

Defence

Wayne Jordash
Sareta Ashraph
Chloë Smythe

SPECIAL COURT FOR SIERRA LEONE
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REPLY

1. The Prosecution response fails to address the real issues in the proposed appeal. It merely seeks to dispute the submissions and concerns of the Defence but offers no real reasoning or authority for the broad based and generalised assertions contained therein. The Defence reply is outlined below.

Prosecution assertion – "Evidentiary rulings are not subject to interlocutory appeal" (para.8)

2. This assertion is misconceived and demonstrably wrong. The Prosecution do not rely upon any authority from the International Tribunals because this approach is unjustifiable both from the practice of both the International Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR) and also the plain reading of Rule 73(B).[1] A cursory look at the ICTY and the ICTR jurisprudence is sufficient to counter this argument.

3. **Prosecution assertion - "the only possible way in which the accused could suffer irreparable prejudice is if they now waiver their rights to appeal" (para. 8)**

This assertion fails to address the submissions of the Defence with any particularity (see paras. 30 - 35 of the Defence Motion or address the Defence concerns. Instead the Prosecution seek to assert that "The 3 February 2005 ruling does nothing more than allow the Prosecution to attempt to call evidence of one witness that is germane to Counts in the Amended Consolidated Indictment" (para. 9) and yet fail to address why the ruling (sought to be challenged) is not of general application. The absurdity of the proposition is clear when considering the role of precedent in International Tribunal jurisprudence and given the Prosecution's *own* reliance on the principles derived from the Trial Chamber's previous "Ruling on Oral Application for the Exclusion of Additional Statements for witnesses TF1 – 060" (23rd July 2004)!

[1] This unsupported assertion is repeated in paragraph 17 of the Prosecution response but "watered down" to "not normally subject to appeal".

4. The Prosecution fail to address the central questions in this proposed appeal, namely (i) does the ruling allow the Prosecution to continually disclose *and rely upon* corroborative and/or supportive allegations throughout the trial process (as long as they emerge from existing witnesses and are a building block constituting an integral part of, and connected with, the same res gestae forming the factual substratum of the charges of the indictment) and (ii) is this a completely novel development in the jurisprudence which impacts upon the Accused right's pursuant to Article 17 of the Statute (and to such a degree that it ought to be considered by the Appeal Chamber at this stage).

5. The Prosecution's approach is contradictory but instructive. It is an approach which implicitly acknowledges in paragraph's 11, 17, 29, 30 and 31 of the response that the Defence will require additional time to deal with and/or effort vis a vis cross examination to counter the "supplemental" allegations and yet then seek to ignore what impact this additional "work" *might* have on the rights of the Accused pursuant to Article 17.

6. The Prosecution appear to misunderstand the test as outlined in Bagasora which is summarised in the "Decision on Admissibility of Evidence of Witness DP" (18th November 2003)[2] and which illustrates both the error of the Prosecution and the error of the Decision sought to be challenged:

   The test

   "First, is the disclosed evidence new? Second, **if** the evidence is new, what period of notice is required in order to give the Defence adequate time to prepare?" (para. 5)

   "If the evidence is not new, but is merely a detail supplementing evidence which has previously been disclosed in accordance with the Rules, then **it is immediately admissible.** If on the other hand, *the evidence is characterised as new*, then the Chamber assesses the extent of the new evidence, how incriminating it is, and its remoteness from any other incidents of which the Defence as notice, *to determine what period is adequate to give the Defence time to prepare".*

7. The granting of additional facilities (such as additional time) to allow the Defence an opportunity to prepare for the evidence is contingent upon the evidence being classified as new. By acknowledging that the Defence will require additional facilities to counter the evidence the Prosecution implicitly have conceded that the evidence is new. The Defence have no need for additional facilities in the event that the disputed evidence is merely supplementary. The grant of additional facilities to provide an opportunity to counter the evidence is the requirement which flows from a finding that the evidence is "new". The alternative is that the evidence is merely supplemental (to evidence already disclosed in the original statement(s)) and no additional facilities are required.

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[2] Prosecutor v. Bagosora, Case No: ICTR-98-41-T. Paragraphs 5 and 6.

8. **Prosecution assertion – "It is consistent with the purpose of Rule 66 and in keeping with the principle of orality, that the statements should not be excluded" (para. 19).**

The principle of orality does not describe a relationship between disclosure pursuant to Rule 66 and oral evidence in court. It is a rule which reflects no more than an intention "to establish direct evidence or the orality of evidence as a general rule for the manner in which the testimony of a witness is to be presented to a Chamber."[3] Thus the Appeals Chamber referred to the "fundamental principle" that "witnesses shall as a general rule be heard directly by the Judges of the Trial Chamber".[4] The principle of orality simply describes a preference for oral testimony rather than deposition/written evidence. It should not be misconstrued to allow the Prosecution increased flexibility in fulfilling disclosure requirements.[5] The Prosecution's reliance upon this rule to justify its approach to Rule 66 disclosure is wholly misconceived and wrong in law and contrary to the practice of International Tribunals.

9. The Prosecution's attempt to rely upon the Trial Chamber's finding in the CDF trial that "it is foreseeable that witnesses, by the very nature of oral testimony, will expand on matters mentioned in their witness statements"[6] is equally irrelevant. TF1 – 141 has not given oral evidence.

10. The Prosecution's reliance upon their "continuing obligation to disclose"[7] to justify an expansion of their case is a dangerous approach. It is irrelevant to the matters at hand - which involve an analysis of whether the supplemental/additional evidence ought to form part of the Prosecution case. It is not disputed that there is a duty to disclose the evidence but this does not settle the issue of whether it is admissible. If it did the original application to exclude and the subsequent ruling of the Honourable Trial Chamber would have been a complete waste of time and judicial effort – something which the Prosecution have not alleged in any of their submissions. Moreover such an approach would drive a "coach and horses" through the restrictions on disclosure pursuant to Rule 66. Rule 66 must be read purposively – the Prosecution have a duty to continuously disclose *but* there exists restrictions

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[3] See Aleksovski, Appeals Chamber Decision on Admissibility of Evidence as quoted in International Criminal Evidence: Judge May (2002).

[4] Kupresekic et al, Appeals Chamber Decision on Appeal against Ruling to proceed to Deposition, July 15th, 1999.

[5] Even if the principle of orality could be relied upon to justify disclosure of elements of their case for the first time orally (in court) it is clear that this disclosure should still be subject to an assessment of its "newness" which would allow judicial control of it and an assessment of its impact upon the Defence rights. It ill behoves the Prosecution to simply rely upon this principle as a means by which evidence may be "slipped in" at the last moment. It is the submission of the Defence that the principle (even if it did describe a relationship between written disclosure and oral testimony) could not override elemental considerations which attach to *prior* disclosure of the Prosecution case.

[6] See paragraph 19 of the Prosecution's response.

[7] See paragraph 20 of the response.

on the use of that disclosure (as acknowledged implicitly by the present discourse and debate). The alternative interpretation removes judicial control of the Prosecution case and hands it directly to the witness who gives the evidence.

11. **Prosecution assertion - "The Pre –trial Brief, at pages 8 – 22, as well as the Supplemental Pre- trial Brief, at pages 6 – 94, filed by the Prosecution also make specific reference to the allegations in the disputed statements (para. 23).**

The Defence reiterate its submissions as contained in footnote 16 and paragraphs 12 and 13 of the Motion. The fact that the Prosecution refer to practically *all* of the Supplemental Pre –trial Brief (88 pages!) as support of their contention that the allegations are not new simply demonstrates that they are unable to point to specific references to these allegations in either the indictment or the Pre- trial brief.

12. **Prosecution assertion – "It is certainly the case that in Canada and Australia the Crown is entitled to, and is obligated to disclose evidence relevant to the allegations at any time. Adjournments are often granted in such cases." (para. 30).**

The Prosecution submission ought to be carefully examined. The Prosecution have not disputed the submission contained in paragraph 36 of the Motion (that the decision appears to "allow for ongoing disclosure of the Prosecution case to a degree never permitted in any of the previous International Tribunals and unknown to most (if not all common law) national jurisdictions"). The Defence do not dispute that International and National jurisdictions "entitle" and even "obligate" the Prosecution to disclose evidence at any time. However all jurisdictions (national and international) have in place disclosure regimes which restrict the *reliance* on that disclosure after the case has commenced to ensure that the Defence know, in advance, not just the outline but the corroborative details of the case against them. The logic of this is clear. *How can the Defence know the case it has to meet if the Prosecution can continuously disclose and rely upon corroborative evidence throughout the trial?*

13. It is commonsense to have a mechanism by which evidence obtained late (with no fault on the part of the Prosecuting authority) might form part of the Prosecution case. This must however be the exception rather than the rule. The test for its admission into evidence must therefore be stringent. The test which the present decision creates is too broad. It creates a precedent which allows it to be the rule rather than the exception. Whilst the Prosecution seek to diminish its impact it follows, as day follows night, that they will take advantage of its breadth to continuously disclose corroborative details hence continuously amending their case according to the inroads the Defence make into it.

14. **The Defence reiterate its respectful submission, notwithstanding its boldness, that there is no test in any common law jurisdiction or International Tribunal which would allow the admission of the disputed statements of TF1 -141 without (i) characterising them as new (ii) without placing an obligation on the Prosecution to demonstrate why it ought to be allowed to rely upon them and (iii) in the event that the Prosecution satisfy the Court in this regard thereafter allowing the Defence additional facilities to deal with the new evidence.**

15. The Defence respectfully request leave to appeal the Ruling.

Dated this 18th day of February 2005

PP Wayne Jordash
Sareta Ashraph
Chloë Smythe

BOOK OF AUTHORITES

1. Prosecutor v. Bagosora, Case No: ICTR-98-41-T. Paragraphs 5 and 6.

2. Aleksovski, Appeals Chamber Decision on Admissibility of Evidence as quoted in International Criminal Evidence: Judge May (2002).

3. Kupresekic et al, Appeals Chamber Decision on Appeal against Ruling to proceed to Deposition, July 15th, 1999.