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SCSL-04-15-T
(17180 - 17190)

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THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Registrar: **Mr. Lovemore Green Munlo**

Date filed: 26th January 2006

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 2004 – 15 – T

REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION REQUESTING THE EXCLUSION OF PARAGRAPHS 1, 2, 3, 11 and 14 OF THE ADDITIONAL INFORMATION PROVIDED BY WITNESS TF1-117 DATED 25th, 26th, 27th AND 28th OCTOBER 2005.

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Reply

Avoidance of the issue

1. In the Defence Motion requesting the exclusion of the Paragraphs 1, 2, 3, 11 and 14 of the additional information provided by witness TF1-117 ("The Motion) the Defence inter alia noted:

"Whilst Rule 66 does oblige the Prosecution to continually disclose new evidence up to 60 days prior to trial, it does not oblige *or allow* continued investigation into new evidence through existing witnesses. Rule 66 allows the Chamber to exclude new evidence not disclosed within the proper time period barring a showing of good cause.

If such new evidence is not excluded, the potential growth of the Prosecution's case will remain limitless until the end of the trial. Whatever the technical definition's employed by the jurisprudence (at the Special Court or elsewhere) it is unarguable that (i) the case against Mr Sesay is growing (ii) that the Prosecution are directing its growth to purposely bolster the various weakness in its case and (iii) that the Defence are being forced to defend a moving target. **Whenever the Defence successfully challenge an area of evidence the Prosecution knowingly and wilfully seek further evidence from its witnesses. Never before has this being allowed in any International Tribunal. The Defence seek a response to this specific allegation against the Prosecution. It is the Defence expectation that the Prosecution will ignore this assertion (or fail to identify any other court where this occurs) because it knows it to be true and in the context of fair trial rights pursuant to Article 17 of the Statute and the practice of all other tribunals indefensible. It is a retrograde technique, which rides roughshod over fair trial rights"** (emphasis added).

2. The Prosecution in their response (dated 23rd January 2006) have predictably failed to address or deny this allegation. The Prosecution are engaged in a process, which is unfair and not supported by the jurisprudence of any of the International Tribunals. It is unfortunate that they consider it more appropriate

to waste time seeking sanctions against Defence Counsel[1] rather than addressing allegations of unfair practice leading to substantial breaches of Article 17 of the Statute of the Special Court.

"As noted in Halilovic[2] (which the Prosecution curiously appear to believe supports their ongoing rolling disclosure programme)[3]

"Considering that the Prosecution is required at all times to complete its disclosure obligations with due diligence and that continued disclosure of material on a piecemeal basis over an extended period of time is an inefficient use of resources available to both parties and not in the interests of the good administration of justice, and may, if such practice continues without justification, adversely affects the rights of the Accused pursuant to Article 21[4] of the Statute to be informed of the case against him and to have adequate time and facilities for the preparation of his defence". (Emphasis added).

The Prosecution assertion:
"The defence have had ample time to investigate the information and the law is settled on this point as a result of four prior decisions in this trial" (para. 20 of the Response).

3. The Prosecution attempt to stifle legal argument, whilst refusing to address allegations of unfairness, is unfortunate. Each piece of evidence alleged to be new and therefore alleged to be inadmissible has to be considered in order for an appropriate remedy (if required) to be fashioned. There is nothing in the previous decisions, which could sensibly be interpreted as precluding applications to exclude evidence alleged to be new nor would it be in the interests of justice for the Prosecution to have been granted *carte blanche* admissibility for all ongoing disclosure. As noted inter alia by Trial Chamber I at the International Tribunal for Rwanda,[5] when considering a proposed appeal concerning late disclosure in supplemental statements,

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[1] See para.20 of their Response.
[2] Case No. IT-01-48-PT, Decision on Prosecution's Application for Leave to Disclose Further Material and Defence Renewed Motion to Cease Investigations, 30th September 2004 pp.2.
[3] See para. 15 of their Response and paragraphs 12-14 of this Reply.
[4] Corresponding to Article 17 of the Statute for the Special Court.
[5] The Prosecutor v Bagasora, Case No. ICTR-98-41-T, Decision on Certification of Appeal concerning Will-Say Statements of Witnesses DBQ. DP and DA, para. 8.

"Different remedies were adopted in different cases, depending on the circumstances confronting the Chambers, including the nature of the evidence, when it was disclosed, and its relation to other evidence in the case...the appropriate remedy requires a particular factual enquiry into the evidence in question".

"In the Chamber's view, this decision involves an exercise of discretion based on an assessment of the factual significance of the evidence, within the framework of clear legal guidelines".[6]

Proofing

4. The Prosecution in their Response allocate 7 paragraphs (paras.8-14) to defending their use of proofing sessions and yet at no stage have the Defence alleged that the general practice of proofing is impermissible or improper when conducted fairly and with due regard to Rule 66 of the Rules and Article 17 of the Statute of the Special Court. This is demonstrably not the issue. The real issue, which the Prosecution have avoided addressing, is that the proofing being pursued is demonstrably different to that conducted by any Prosecution, in any other International Court or any fair adversarial system. This is amply demonstrated by the jurisprudence, which they misguidedly and selectively quote in their Response.

Prosecutor v. Blagojevic and Jokic, Decision on Prosecution's unopposed Motion for Two day Continuance for the Testimony of Momir Nikolic, Case No. IT-02-60-T, 16th September 2003(Prosecution footnote 14).

5. In paragraph 11 of the Response the Prosecution concludes that in Blagojevic the Trial Chamber "recognised that new information when gathered in proofing sessions, is admissible but it must be disclosed with enough advance notice that that defence has adequate time to consider the new information".

[6] Supra para. 10.

This is not true. The Trial Chamber stated that, "all such proofing sessions of witnesses – particular witnesses whom it expected to testify at length – should be completed in sufficient time to allow the Defence to consider any new information gathered through such sessions".[7] The Trial Chamber did not consider the admissibility of the "new" information and was not faced with an application to exclude the evidence pursuant to the Bagosora[8] criteria and did not therefore consider whether the Prosecution could rely upon it.

Prosecutor v. Mrksic Radic Sljivancanin, Case No. IT-95-13/1-T, transcript 8th November 2005, pp. 1323-1334 ("Mrksic")

6. In paragraph 13 of the Response the Prosecution quote selectively from the arguments and the observations made by Trial Chamber II. The arguments did not revolve around the admissibility of "new" evidence. The Defence were objecting to late service of supplemental statements (or "agenda"), which were clarifications (and therefore not new evidence). As noted by Prosecution Counsel Mr Agha in the Prosecution's reply to the objections,[9]

"So in many instances, the witness has not seen their statement until they arrive here for proofing. So in fairness to the witness, they are given the opportunity to confirm that it's correct, because that is a statement we have disclosed to the Defence. And if there are errors which they feel have been misinterpreted or are not clear, then, by way of fairness, we disclose that to the Defence as soon as possible and, admittedly, that usually only a day or two before the evidence because it is the first opportunity in which the witness has the chance to clarify the statement... And if your Honours would look at the addenda submitted so far, they are not lengthy, and usually they clear up some key points" (pp.1325).

"So actually far from any committing of perjury it was just making the correction. The Prosecution submits that obviously it doesn't hope in all cases

[7] Page 2.
[8] See footnote 1 of the Motion to exclude.
[9] Page 1325, line 10 – 25; pp.1326 line 1-15.

that there be addenda. It's only if the witness feels that something has been misinterpreted and it can be difficult as the two languages are concerned" (pp. 1326 line 8-13).

7. Moreover the Trial Chamber understood that it was being asked to deliberate upon "addenda indicating that the witness takes a different position about some matter that is recorded in the earlier statement. The addenda may also identify some change the witness wishes to make to evidence given previously in another trial in this Tribunal" (pp.1329 line 14 – 17). Accordingly the Chamber ruled,

"What has happened in each case is that the witness, having arrived in the Hague some days before now giving evidence in this trial, a number of matters have been identified by that witness in which the witness considers what is in the previous statement or in the witnesses previous evidence is not what the witness presently understands the truth to be. Clearly if the witness is now called by the Prosecution to give evidence on oath, the witness will give evidence according to what the witness understands the truth to be. The witness's memory of events may have changed in the intervening years. The witness may have come to understand things differently, having heard something different from some other source. There can be a number of reasons why a witness now has an understanding of a fact which is different to from that which the witness had in 1995 or 1998 or at some other years more recent." (pp.1330 line 16-25 & pp.1331 line 1-3).

8. The Trial Chamber thus concluded that,

"Where a witness indicates to a party calling that witness that they propose to change the evidence they have previously given or a statement they previously made on a material point, if that statement or that evidence is known to the other side, it is proper that notice be given to the other side of the change" (pp. 1323 line 3-7).

9. The issues in the present Motion are thus quite different than in the case of Mrksic. In that case the Prosecution quite reasonably understood the role of proofing to be to assist the witness and the Court in clarifying the witness's memory and thereafter providing those clarifications to the Defence to allow the Court to consider any changes in recollection, which had occurred since the events had been first recorded. The Prosecution in that case did not actively seek to bolster their case according to the weaknesses exposed by the Defence. The Prosecution in that case had due regard to fairness and did not carefully watch the development of the case and thereafter systematically seek new evidence from every witness to repeatedly and purposely strengthen its case. The Prosecution in that case did not interview their witnesses anew to bolster an unreliable case nor did it refuse to acknowledge its calculated technique. The Prosecution in that case did not continuously rely upon supplemental statements/addenda which implicated the accused for the very first time one or two years after the first statement was taken, nor seek to rely upon supplemental statements which far outweighed the evidence originally served. A very good example of the latter is the evidence of witness TF1-361 who was "proofed" in relation to his 11-page statement (dated 11th June 2004). The proofing on these 11 pages lasted for 9 days (18th, 19th, 21st, 24th, 25th, 26th 17th January 2005 and 15th and 18th February 2005) and gave rise to 46 pages of supplementary evidence. Are the Prosecution really suggesting that this 9-day proofing process involved simply recording clarifications or changes in the witnesses' recollection arising from his original statement?

10. The Trial Chamber in the Mrksic case summed up their consideration of the issues arising from the service of clarification and noted,

"The only other matter, which I think should be mentioned, is that in the circumstances that have occurred so far, the Chamber sees no reason for (the) present concern that there has been any active course of conduct to encourage a witness to change their present understanding of the relevant facts. The Chamber naturally is alert to that, as the Defence naturally will be. But at the moment, the circumstances appear to the Chamber to be explicable by the

ordinary fallibility of human recollection, or in at least one case, by the witness having gained additional knowledge, in particular by reading a book. So that we don't have any concern that there has been conduct of that nature" (pp. 1334 line 9-24).

11. The Defence are indeed naturally concerned and submits that it is clear that the conduct of the Prosecution during their so – called proofing goes well beyond the permissible bounds of proofing. It is not a process of clarification. It is a process of actively seeking new evidence which gives rise to evidence on new topics.

Prosecutor v. Halilovic, Case No. IT-01-48-PT, "Decision on Prosecution's Application for Leave to Disclose Further Material and Defence Renewed Motion to cease Investigations", 20th September 2004. (Prosecution Footnote 18).

12. Equally misconceived is the attempt by the Prosecution to derive some support for their conduct from the aforementioned case of Halilovic. This authority does not support the proposition that the Prosecution are permitted to continue its investigations after an indictment has been confirmed. Admittedly this assertion did form part of the Prosecution application but the Trial Chamber disregarded this aspect of the submissions in its decision. The pleading in paragraph 15 of the Response gives the erroneous impression that the Trial Chamber considered this submission to be relevant to the issue of whether the Prosecution *ought to be granted leave to disclose and rely upon further material.*

13. The Prosecution rely upon the Halilovic case and yet fail to appreciate that it supports the Defence contention that the Prosecution's duty to disclose ought to be subject to stringent restrictions pursuant to Rule 66 and Article 17 (see paragraph 2 above for the anxiety expressed by the Trial Chamber). The Trial Chamber in that case had in two previous rulings, following a Defence objection to the continued disclosure after the date set by the pre-trial Judge

pursuant to Rule 66,[10] ordered that any further disclosure could only be made with "the leave of the pre – trial Judge"[11]accompanied with the following justification,

"(f)or each item disclosed pursuant to Rule 66A(ii), the circumstances in which the additional material was obtained, the reason why the material was not disclosed within the time frame set by the pre-trial Judge, and identifying any new material or allegations not already raised in other statements of the same witness already disclosed[12]"

14. It is significant that these restrictions were made before the Trial had commenced and even before a Trial Chamber had been allocated the case (hence why the Pre- trial Judge still had jurisdiction to adjudicate on issues of disclosure). Hence there was not even the suggestion that the trial would have to be adjourned or that the new disclosure was being actively sought in order to shore up a weak case according to its progress. It was simply an application to prevent the Prosecution from making additions to their case pre-trial, which was successful. The Trial Chamber, which ordered the restrictions, was presided over by one of the most experienced Judges at the International Criminal Tribunal for Yugoslavia; Judge Robinson (now Presiding Judge in the Milosevic case). It recognised that there should be a date – well before the commencement of the Trial – when the Prosecution's case *in its totality* should be known to the Accused. It recognised that the Prosecutions duty to disclose all relevant material did not equate to an unfettered right to rely upon it to bolster their case throughout the course of the trial.

[10] Prosecutor v. Halilovic: No. IT-01-48-PT, Decision on Defence Objection to Prosecution Continued Disclosure, 7th May 2004 & Prosecutor v. Halilovic: No. IT-01-48-PT, Decision on Prosecution's Application for Leave to Disclose Further Material and Defence Renewed Motion to Cease Investigations, 30th September 2004 pp.2.
[11] Prosecutor v. Halilovic: No. IT-01-48-PT, Decision on Defence Objection to Prosecution Continued Disclosure, 7th May 2004 pp.3: Order 3 and Decision on Prosecution's Application for Leave to Disclose Further Material and Defence Renewed Motion to Cease: pp.2 Order 3.
[12] pp. 2:Order 2

Conclusion

15. The Defence submits that the Prosecution's rolling disclosure program and their abject failure to justify it, or explain it, is a breach of Article 17 of the Statute. The Defence did not (and does not) know the case it has to meet. The Defence is being forced into defending a case, which grows by the day – not by spontaneous recollection by Prosecution witnesses but by a deliberate policy of re-interviewing existing witnesses on new topics with the calculated aim of bolstering an unreliable weak case. In light of the growth of the Prosecution case and in order to prevent the efficacy of Rule 66 from being further eroded the only fair remedy, whether new evidence is obtained spontaneously or otherwise, is to exclude all new evidence (including the additional evidence provided by TF1 –117 on the 25th, 26th, 27th and 28th October 2005) until and unless the Prosecution show good cause pursuant to Rule 66.

Dated this 26th day of January 2006

Chantal Refahi

Wayne Jordash
Sareta Ashraph
Chantal Refahi

Book of Authorities

Prosecutor v. Halilovic: No. IT-01-48-PT, Decision on Defence Objection to Prosecution Continued Disclosure, 7th May 2004.

Prosecutor v. Halilovic: No. IT-01-48-PT, Decision on Prosecution's Application for Leave to Disclose Further Material and Defence Renewed Motion to Cease Investigations, 30th September 2004.

Prosecutor v. Bagasora: Case No. ICTR-98-41-T, Decision on Certification of Appeal concerning Will-Say Statements of Witnesses DBQ. DP and DA, 5th December 2003.

Prosecutor v. Mrksic Radic Sljivancanin, Case No. IT-95-13/1-T, Transcript 8th November 2005, pp. 1323-1334.

Prosecutor v. Blagojevic and Jokic, Decision on Prosecution's unopposed Motion for Two day Continuance for the Testimony of Momir Nikolic, Case No. IT-02-60-T, 16th September 2003.