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SCSL-2004-16-PT  
(S600-5609)

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SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995  
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE TRIAL CHAMBER

Before: Hon. Judge Pierre Boutet, Designated Judge

Registrar: Robin Vincent

Date: 30 July 2004

PROSECUTOR	Against	Alex Tamba Brima Brima Bazy Kamara Santigie Borbor Kanu (Case No.SCSL04-16-PT)
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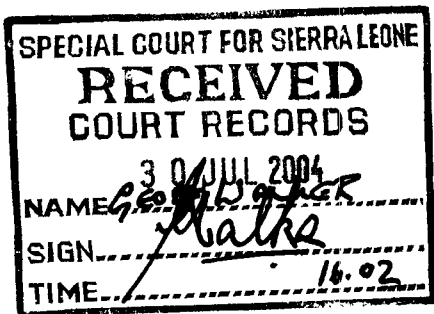
KANU- DECISION ON MOTIONS FOR EXCLUSION OF PROSECUTION WITNESS STATEMENTS AND STAY ON FILING OF PROSECUTION STATEMENTS

Office of the Prosecutor:  
Luc Côté  
Robert Petit

Defence Counsel for Alex Tamba Brima:  
Karim Khan

Defence Counsel for Brima Bazy Kamara:  
Ken Fleming

Defence Counsel for Santigie Borbor Kanu:  
Geert-Jan Alexander Knoops



I, **JUDGE PIERRE BOUTET** of the Special Court for Sierra Leone (“Special Court”), sitting as Designated Judge pursuant to Rule 28 of the Rules of Procedure and Evidence (“Rules”);

**SEIZED** of the Motion for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Witness Statements Pursuant to Rule 5 and 66(A)(i) filed on 18 March 2004 (“First Motion”) and of the Additional Motion for the Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Witness Statements Pursuant to Rule 5 and 66(A)(i) (“Additional Motion”) filed on 19 March 2004 on behalf Santigie Borbor Kanu (“Accused”);<sup>1</sup>

**NOTING** the joint Prosecution Response to Defence Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statements Pursuant to Rules 5 and 66(A)(i) (“Joint Response”), filed on 26 March 2004 by the Office of the Prosecution (“Prosecution”) and the Reply thereto filed on 31 March 2004 by the Defence (“Reply”);

**NOTING** the Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004 (“Order to File Disclosure Materials”);

**COGNISANT** of Article 17 of the Statute of the Special Court (“Statute”) and particularly noting Rules 5, 6 and 66 of the Rules;

**NOW CONSIDERS** the matter on the basis of the written briefs of the Parties;

## I. BACKGROUND

1. Rule 66(A) of the Rules (“New Rule 66(A)”) was last amended during the 5<sup>th</sup> Plenary Meeting of the Judges of the Special Court, held in Freetown between 11 March and 14 March 2004, and it now reads as follows:

... the Prosecutor shall:

- (i) Within 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.

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<sup>1</sup> The Motion and the Additional Motion will also be jointly referred herein as “Motions”.

(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 60 days before the date for 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.

2. The previous applicable provisions of Rule 66(A) of the Rules ("Old Rule 66(A)") read as follows:

... the Prosecutor shall:

(i) Within 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. Upon 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.

## II. SUBMISSIONS OF THE PARTIES

### *The First Motion and the Additional Motion*

3. Through the filed Motions, the Defence reiterates arguments pursuant to Rule 5 and 66(A)(ii) of the Rules that were raised during the Status Conference held on 8 March 2004 ("Status Conference"). With the First Motion, Defence Counsel seeks the exclusion of several Prosecution witness statements disclosed after the 30 days envisaged by the Old Rule 66 and argues that consequently such witnesses should not be called at trial unless good cause was shown by the Prosecution for their late disclosure.<sup>2</sup>
2. In the alternative, the Defence requests the Court to order in the interest of justice that the Prosecution not be allowed to file any witness statements as from a date to be set by the Trial

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<sup>2</sup> First Motion, paras 6 and 9.

Chamber, or to set a date after which disclosure of witness statements should no longer be accepted pursuant to the provisions of Old Rule 66(A)(i) of the Rules.<sup>3</sup>

3. In its Additional Motion, the Defence reiterated the arguments raised in the First Motion seeking the exclusion of additional witness statements whose disclosure took place subsequent to the filing of the First Motion. In particular, the Defence stresses that several witness statements disclosed after 23 October 2003, had been obtained a considerable time before the Accused's Initial Appearance on 23 September 2003, and thus questions their late disclosure.<sup>4</sup> The Defence further avers that some witness statements had been available for more than a year before the Initial Appearance of the Accused and that their filing on 18 March 2004 constitutes a serious infringement of the mandatory disclosure procedure that is envisaged by the Rules.<sup>5</sup>

*The Prosecution's Joint Response*

4. The Prosecution submits that pursuant to its general duty to investigate and disclose evidence as provided in the Rules, the Old Rule 66 should be read as requiring the Prosecution to disclose within the 30 day deadline all witness summaries that it gathered at the stage of approval of an indictment and further to continuously disclose additional evidence subsequently gathered.<sup>6</sup> In addition, the Prosecution avers that further evidence obtained during their investigations could require, in some instances, that a particular witness, whose evidence that had been deemed to be of little value earlier in the process, would now be selected as witness for the trial.<sup>7</sup> It further submits that evidence of the statutory recognition of the Prosecution's continuous duty to investigate and disclose is found in Rule 68 of the Rules, which requires the Prosecution to continuously disclose exculpatory evidence to the Defence. In the view of the Prosecution, it would be absurd that the Statute and the Rules would provide for on-going investigations, as envisaged in Rule 68, yet prevent the Prosecution from disclosing and using evidence from on-going investigations, if the Defence motion was to pass scrutiny before the Trial Chamber.<sup>8</sup>

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<sup>3</sup> *Id.*, para. 10.

<sup>4</sup> Additional Motion, para. 2.

<sup>5</sup> *Id.*, para. 4.

<sup>6</sup> Joint Response, para. 6.

<sup>7</sup> *Id.*, para. 9.

<sup>8</sup> *Id.*, para. 8.

- 5. The Prosecution particularly submits that Old Rule 66 places the onus on the Defence to show good cause to obtain disclosure only of additional witness statements whom the Prosecution does not intend to call at trial.<sup>9</sup>
- 6. The Prosecution avers that any doubt regarding the interpretation of Rule 66 has now been clarified by the adoption of the New Rule 66 at the 5<sup>th</sup> Plenary Meeting of the Judges of the Special Court that was held between 11 and 14 March 2004. This new rule sheds light on the interpretation and meaning of the Old Rule 66.
- 7. Lastly, the Prosecution submits that the Defence has suffered no prejudice, since all the statements that are the subject of contention by the Defence were disclosed at the Pre-Trial stage of the proceedings, at a time when the trial date had not been set and thus, leaving ample time for the Defence to prepare for trial.<sup>10</sup>

*The Defence Reply*

- 8. In its Reply, the Defence variously contests the Prosecution’s assertions of its continuous duty to investigate and disclose under the Rules, as well as the Prosecution’s interpretation of Old Rule 66. The Defence also avers that the New Rule 66(A)(i) of the Rules is only applicable to evidence and witness statements disclosed by the Prosecution after 11 March 2004. Thus, it submits that all the statements disclosed by the Prosecution after October 2003 and before 11 March 2004, fall within the ambit of the Old Rule. In addition, the Defence submits that the Motion be disposed of under the Old Rule 66, opining that the retroactive application of New Rule 66 could cause prejudice to the rights of the Accused.<sup>11</sup>

**III. APPLICABLE LAW**

- 9. Article 17(4) of the Statute, on the rights of the accused, reads as follows:
  - 4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

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<sup>9</sup> *Id.*, para 13.  
<sup>10</sup> *Id.*, para. 18.  
<sup>11</sup> Defense Reply, para. 22.

- a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
- b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
- c. To be tried without undue delay;
- ...

10. In addition to the provisions of the Old and the New Rule 66(A), other Rules are relevant in connection with the present Motions. Rule 5 of the Rules reads as follows:

Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber or the Designated Judge may grant relief if the non-compliance has caused material prejudice to the objecting party.

11. Lastly, Rule 6(D) of the Rules provides that:

An amendment shall, unless otherwise indicated, enter into force immediately.  
The Registrar shall publish the amendment by appropriate means.

#### IV. DELIBERATIONS

12. The Motions raise issues relating to the interpretation of Old Rule 66(A) and its subsequent amendment into New Rule 66(A) adopted at the 5<sup>th</sup> Plenary Meeting of the Judges of the Special Court. The Motions are predicated on the contention by the Defence that by disclosing substantial amounts of witness statements on several occasions without showing good cause, the Prosecution has failed to comply with the requirements of the Old Rule 66(A)(i) of the Rules. They further argue that the on-going disclosure by the Prosecution infringes the object and purpose of Old Rule 66(A)(i) as it was prior to the most recent amendment, which aims and purpose is to protect the effective preparation and participation of the Accused at Trial.
13. What is in issue here is whether or not the aforementioned circumstances warrant the exclusion of the Prosecution witness statements. To arrive at a proper decision, it is essential to determine two issues:
- a. Whether the Old or the New Rule 66(A) is applicable to the Motions; and



- b. Whether the Defence will suffer any prejudice if the disclosed materials were not excluded.

A) *Which Rule is Applicable to the Motions?*

14. It is worth noting that Old Rule 66(A) was amended for purposes of clarity and better comprehension at the 5<sup>th</sup> Plenary Meeting of the Judges of the Special Court that was held between 11 and 14 March 2004, as a result of issues raised about its interpretation during the Status Conference held on 8 March 2004. Even though the amended Rule is more specific and clearly provides for continuous disclosure, it was nevertheless already understood prior to these amendments that the previous version of the Rule did impose upon the Prosecution a continuous disclosure obligation.
15. Both Motions were filed shortly after the adoption of the aforementioned amendments, respectively on 18 and 19 March 2004. Rule 6 of the Rules in this respect provides that an amendment of the Rules becomes effective from the date of its approval.<sup>12</sup> Therefore, the New Rule 66 as amended rather than the Old Rule 66 of the Rules became effective as of 14 March 2004 and was immediately applicable to the Motions pursuant to Rule 6 of the Rules as of that date.
16. It is my considered view that the Trial Chamber Order's to File Disclosure Materials already addressed in this case the submissions contained in the Motions and is in accordance with the scope and applicability of the provisions of New Rule 66(A).<sup>13</sup> The said Order directly refers to

<sup>12</sup> In addition, the record of that Plenary Meeting reveals that the Acting Principal Defender was present at the discussion on the proposed amendment to Rule 66 of the Rules.

<sup>13</sup> For a recent interpretation of the provisions of New Rule 66, see, in addition, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004 ("*Norman Decision*"), paras 5-6. Para. 5 provides for the following:

Rule 66 requires, *inter alia*, that the Prosecution disclose to the Defence copies of the statements of all witnesses which it intends to call to testify and all evidence to be presented pursuant to Rule 92bis, within 30 days of the initial appearance of the Accused. In addition, the Prosecution is required to continuously disclose to the Defence, the statements of all additional Prosecution witnesses it intends to call, not later than 60 days before the date of trial, or otherwise ordered by the Trial Chamber, upon good cause being shown by the Prosecution.

Further, see also *Prosecutor v. Sesay et al.*, Case No., SCSL-04-15-T, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, ("*Sesay Decision*"), paras 21-22. Para. 21 provides the following:

From an ordinary and plain reading of Rule 66(A)(ii) of the Rules, it is clear that it imposes a reciprocal obligation; one on the Prosecution and the other on the Defence. The first part of the Rule places the onus of showing good cause on the Prosecution, in a case where it intends to call additional witnesses

the discussions held during the Status Conference regarding compliance with the Old Rule 66(A)(i) and the varying interpretations that the parties had accorded to the Rule. The Order, in particular, recognizes the Trial Chamber's desire to ensure that the "rights of the Accused are not infringed, but rather are enhanced, by the amendment to Rule 66 of the Rules".<sup>14</sup>

**B) Will the Defence Suffer Any Material Prejudice from the Disclosure?**

19. In considering whether the Defence will suffer any material prejudice should their Motion not be granted, in addition to the finding of the Trial Chamber in its Order to File Disclosure Materials referred to above, further relevant jurisprudence from this Court as well as from the International Criminal Tribunal for former Yugoslavia ("ICTR") and the International Criminal Tribunal for Rwanda ("ICTR") do provide appropriate guidance on this matter.<sup>15</sup>
20. In its *Norman* Decision, the Trial Chamber of the Special Court held the following with reference to disclosure:

"It is of course the role of the Trial Chamber to enforce disclosure obligations in the interest of a fair trial, and to ensure that the rights of the Accused, as provided in Article 17(4)(e) of the Statute, to examine or have examined, the witnesses against him or her, are respected and where the evidence has not been disclosed or is disclosed so late as to prejudice the fairness of the trial, the Trial Chamber will apply appropriate remedies which may include the exclusion of such evidence."<sup>16</sup>

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to testify at the trial. [...] The second part of the Rule places the burden on the Defence to show good cause why the evidence of witnesses whom the Prosecution does not want to call to testify at trial should be disclosed to the Defence.

<sup>14</sup> Order to File Disclosure Materials, p. 3, 6-7. As a result, the Chamber already ordered the Prosecution to file a compliance report of its disclosure to date by 26 April 2004, a witness list of all witnesses it intends to call at trial, and to make any further disclosure to the Defence of any statements in full, with redactions as necessary pursuant to the various decisions for protective measures, that have not yet been disclosed for each witness that appears on the witness list. The Prosecutor filed its compliance report on disclosure on 26 April 2004 which it later amended on 11 May 2004. See Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of the Trial of 1 April 2004, 26 April 2004, Cover Sheet 2; Updated Compliance Report Filed Pursuant to Undertaking by the Prosecution in Pre-Trial Conference Held on 30 April 2004 (AFRC), 11 May 2004.

<sup>15</sup> On the applicability of jurisprudence from the ICTY and ICTR, see Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, paras 19-26.

<sup>16</sup> *Norman* Decision, para. 7. See also *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Ruling on the Oral Application of the Exclusion of Part of the Testimony of Witness TF1-199, 26 July 2004, para. 7; Ruling on Oral Application for the Exclusion of "Additional" Witness Statements for Witness TF1-060, 23 July 2004, para. 10; Ruling on the Oral Application for the Exclusion of Part of the Testimony of Witness TF1-199, 26 July 2004, para. 7. See also *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Scheduling Order, 29 April 1998.



21. In the case of *Prosecutor v. Bagosora*,<sup>17</sup> the Trial Chamber of the ICTR held that despite the failure of the Prosecution to strictly comply with its disclosure obligations vis a vis the Defence, it was clearly of the view that the Defence will not be prejudiced in any way since the trial had been postponed and the Defence will consequently have sufficient time to prepare for the trial.
22. Furthermore, in the case of *Prosecutor v. Furundzija*,<sup>18</sup> while the Trial Chamber of the ICTY noted with grave concern and deplored the Prosecution's failure to comply with its obligation to disclose to the Defence, it did not exclude the Prosecution witness statements,<sup>19</sup> but required the Prosecution to strictly comply with its order to provide full disclosure to the Defence by a particular date.
23. In the instant case, the Defence contention that the Prosecution has failed to comply with its disclosure obligations cannot be legally sustained in that, as demonstrated above, the Defence erred in its interpretation of the applicable provisions of Rule 66(A) either as these provisions existed before the amendment or since the new amendments.
24. In addition, I am of the view that the Defence will not be prejudiced in any way as a consequence of the disclosure practice so far undergone by the Prosecution, as the Motions have failed to show how such disclosure could *in concreto* prejudice the preparation of it case. All the statements whose disclosure is contested by the Defence in either the First Motion or the Additional Motion were disclosed well within the Pre-Trial stage. Indeed, no trial date has yet been set, thusfar in this case. Therefore, I find that the Defence has been provided with adequate notice of the case against the Accused and has sufficient time to adequately prepare for trial.<sup>20</sup>

**FOR ALL OF THE ABOVE REASONS,**

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<sup>17</sup> *Prosecutor v. Bagosora*, Case N. ICTR-96-7-T, Decision on the Motion by the Defence Counsel for Disclosure, 27 November 1997.(E)(v).

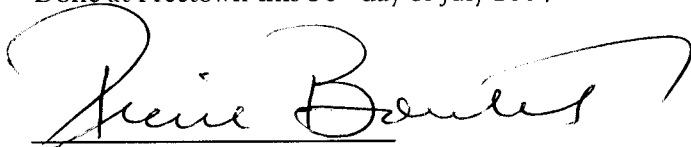
<sup>18</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Decision on Motion of Defendant Anto Furundzija to Preclude Testimony of Certain Prosecution Witnesses, 29 April 1998.

<sup>19</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Scheduling Order, 29 April 1998.

<sup>20</sup> Similarly, in the *Sesay* Decision the Trial Chamber found that the Defence in that case had sufficient time to prepare for the commencement of the trial scheduled for 5 July 2004 although it received redacted disclosure of several witness

DISMISS the Defence Motions.

Done at Freetown this 30<sup>th</sup> day of July 2004



Judge Pierre Boutet

Designated Judge



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statements as late as 26 April 2004, which coincide with the date of disclosure for several witness statements for this case. See *Sesay* Decision, para. 44. See also *id.*, Decision on Defence Motion, 15 July 2004, para. 12