

**SPECIAL COURT FOR  
SIERRA LEONE**

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

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

Registrar: Robin Vincent

Date filed: August 4, 2004

**THE PROSECUTOR**

**against**

**SANTIGIE BORBOR KANU**

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**KANU – APPLICATION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL AGAINST THE  
“DECISION ON MOTIONS FOR EXCLUSION OF PROSECUTION WITNESS STATEMENTS AND  
STAY ON FILING OF PROSECUTION STATEMENTS” OF JULY 30, 2004**

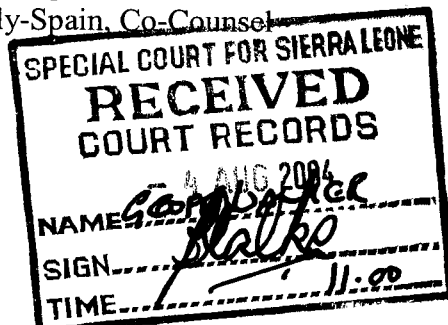
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Office of the Prosecutor:

Luc Coté  
Robert Petit

Defense Counsel:

Geert-Jan Alexander Knoops, Lead Counsel  
Carry J. Knoops, Co-Counsel  
A.E. Manly-Spain, Co-Counsel



## I INTRODUCTION

1. In furtherance to the “Kanu – Decision on Motions for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Statements,” (“**Application**”) of July 30, 2004, the Defense herewith files its “Kanu – Application for Leave to File an Interlocutory Appeal from ‘Decision on Motions for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Statements’ of July 30, 2004,” (“**Decision**”).

## II TIME LIMIT

2. As a preliminary remark, the Defense wishes to indicate that, although the Decision was filed with the Registry on July 30, 2004, the Defense was only served with a copy on August 2, 2004, as **exhibit 1** shows.<sup>1</sup> It is therefore the Defense’s contention that the three day time limit as provided for in Rule 73(B) should be regarded as starting on August 2, 2004, and that therefore, the filing of this Motion on August 4, 2004, is in time.

## III EXCEPTIONAL CIRCUMSTANCES

3. Sub-Rule 73(B) of the Rules specifies that “in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal.” The Defense contends that both of these cumulative criteria are fulfilled in the instant case, on the basis of the following four arguments:
  - 3.1 Method of Disclosure Is Urgent Pre-Trial Matter
    4. The Defense submits, in the first place, its wish to put these arguments concerning the Prosecution’s disclosing behavior before the Appeals Chamber, as this matter cannot be cured by the final disposition of the trial, but only at this – pre-trial – stage. If this

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<sup>1</sup> Exhibit 1 indicates that the e-mail with attachment document no. 101 in the AFRC case was sent to the Defense on August 2 (“Verzonden: maandag 2 augustus 2004 12:30,” which means: “Sent: Monday August 2, 2004 12:30pm”).

matter is not resolved at this very moment, i.e. before the commencement of the trial, all witness statements already disclosed and still to be disclosed to the Defense will be taken into account, while it is the Defense submission that a substantial amount of these should be disregarded by the Trial Chamber during trial.

5. As will be set out below, the interpretation of the proper method to dispose of Prosecution disclosure obligations concerns a fundamental legal interpretation of the law, and the Defense cannot be asked to wait with presenting this argument at a later stage in the proceedings. For disclosure is a pre-trial matter, and only relates to the pre-trial phase. Therefore, at no later instance can the Defense bring these arguments forward to be dealt with by the honorable Appeals Chamber. Given the fact that the underlying issues of the impugned Decision concern the very basis of the case against the Accused, namely the evidence on which the Prosecution bases its case, denying leave to appeal would in fact lead to denial of an individual's fundamental right to appeal, considering the fact that this denial cannot be repaired at any later stage of the proceedings. Thus, a possible conviction of the Accused may very well depend on a final decision on the underlying matters of the Decision. As this regards matters which are very fundamental (see arguments below), this should be dealt with by the Appeals Chamber in second instance, especially given the fact that several parts of the Defense Motion underlying the Decision were not dealt with by the honorable Trial Chamber.
6. The Defense humbly submits that only this issue in itself suffices the threshold of "exceptional circumstances" as required by Rule 73(B), and denying this Application would moreover cause irreparable prejudice to the Accused. Dealing with this Application by the Appeals Chamber at this stage of the proceedings would therefore allow a fair and expeditious continuation of the trial, denial of this Application would prevent such continuation.

### 3.2 Trial Chamber Did Not Rule on "Good Cause" Requirement

7. In the second place, exceptional circumstances are constituted by the fact that the honorable Designated Judge of the Trial Chamber, in the humble opinion of the Defense, erred in its Decision, by not granting sufficient weight to the requirement of "good cause" in Rule 66(A)(ii) of the Rules. The honorable Trial Chamber did not

sufficiently address this explicit obligation of the Prosecution as set out in the Rules. By not adequately addressing it, the Trial Chamber leaves open the interpretation of this “good cause” requirement, which may give rise to future motions to be filed on this specific issue. As this matter was specifically addressed in the Defense Motions underlying the impugned Decision, and the Trial Chamber did not address it, this may constitute an exceptional circumstance in the sense of Rule 73(B) of the Rules.

8. The result of this is that the Prosecution is – contrary to a fair interpretation of Rule 66(A) of the Rules – allowed to continue disclosing witness statements in fact without having to show the “good cause” required by that same Rule. Thus, it is of the utmost importance, that the ambiguity, left by the impugned Decision, be cleared by a final decision of the Appeals Chamber on this matter of procedural importance. The fact that the Prosecution is, contrary to the clear provision of the Rules of Procedure and Evidence, allowed to continue disclosing witness statements, constitutes irreparable prejudice to the Accused, in the sense that (i) this cannot be cured after the trial stage has taken its start, as it concerns material on which the Prosecution will base its case, and (ii) the fact that the honorable Trial Chamber did not sufficiently address in its impugned Decision the Defense’s submission that the Prosecution had not fulfilled the requirement of “good cause” under Rule 66(A)(ii).

### 3.3 Trial Chamber Did Not Condemn Prosecution

9. In the third place, the honorable Designated Judge of the Trial Chamber in its Decision did not specifically address the practice of the continuing disclosure behavior of the Prosecution.
10. Although the impugned Decision paraphrases several important decisions from the ICTY and ICTR, indicating the Prosecution’s failure in those cases to strictly comply with its disclosing obligations,<sup>2</sup> the Trial Chamber does not explicitly elaborate on the current case, i.e. whether the Prosecution has in fact, as submitted by the Defense and opposed by the Prosecution, breached its disclosure obligations. However, by mentioning both the *Bagosora* and *Furundzija* decisions, in which the ICTY and

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<sup>2</sup> See paras. 21 and 22 of the Decision.

ICTR Trial Chambers reprimanded the Prosecution for not complying with its disclosure obligations, the Trial Chamber seems to suggest that also in the current instance the Prosecution did not comply with its obligations.

- 11. The Decision then mentions that the Defense erred in its interpretation. However, it does not, as mentioned above, elaborate on the “good cause” requirement, which formed an essential part of the Defense argument, contained in the amended version of Rule 66(A)(ii).
- 12. Again, in the humble opinion of the Defense, this part of the Decision gives rise to ambiguity, and therefore the fact that the Decision did not explicitly condemn the Prosecution disclosure behavior in itself may qualify as an exceptional circumstance justifying interlocutory appeal. It may be said that this also causes irreparable prejudice to the Accused, as this cannot be cured after the trial stage has taken its start; will lead to further ambiguity surrounding the – ongoing – Prosecution disclosures, and will thus lead to a situation detrimental to the Accused.

3.4 Interpretation of Rule 66(A)

- 13. With respect to the fourth argument, and a third issue actually left untouched by the Trial Chamber in its Decision, the Defense refers to its second limb of its prayer on p. 5 of its “Kanu – Motion for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Witness Statements Pursuant to Rules 5 and 66(A)(ii),” filed on March 18, 2004. This limb indicates the Defense request to determine that the Prosecution is barred from calling the witnesses at trial whose written statements were disclosed to the Defense only after October 23, 2003, i.e. more than thirty days after the initial appearance of the Accused.
- 14. Again, an even more principle argument than the two foregoing arguments, concerns a fundamental principle of procedural law. This question – again left untouched by the impugned Decision – concerns the interpretation of the law.

15. On the one hand, Rule 66(A)(i) indicates, as far as relevant, that the Prosecution shall, within thirty days after the initial appearance of the Accused “disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify (...)” Rule 66(A)(ii), on the other hand, reads that the Prosecution shall “[c]ontinuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify,” thus leaving out the difference between witnesses whom the Prosecutor intends to call to testify, and additional witnesses whom the Prosecutor intends to call to testify.
16. It is the humble Defense submission that this Rule 66(A)(i) and (ii) are ambiguous as to the content of the first category of witnesses – the ones of which the Prosecutor ‘shall’ disclose within 30 days of the initial appearance of the Accused – and the second category – of ‘additional’ witnesses of whom the Prosecutor only has the time limit of “not later than 60 days before the date for trial,” provided for in Rule 66(A)(ii).
17. This ambiguity of the law may cause new interpretative questions for the Defense in future cases.
18. Again, the exceptional circumstances may result from ambiguity in law, in that the ambiguous and enigmatic wording of the text of the Rules itself may justify interlocutory appeal. Irreparable prejudice may arise from the fact that the outcome of this ambiguity – without a clear interpretation from a Chamber – works to the detriment of the Accused, as the Prosecution can go ahead filing the witness statements at any time it wishes (no single disclosure was done under Rule 66(A)(i), i.e. within thirty days of the initial appearance of the Accused). Without a clear ruling on the exact interpretation of Rule 66(A)(i) and (ii), and the possible contradictory nature thereof, the Prosecution is allowed to disclose its statements with whatever nature at any time, as long as it is disclosed before not later than 60 days before the starting date of the trial. This may infringe the fair outcome of the trial.

3.5 Conclusion

19. All the foregoing arguments in the humble opinion of the Defense separately constitute exceptional circumstances and may lead to irreparable prejudice to the Accused, if leave for appeal would not be granted to the Defense. Alternatively, taken together, these arguments may also constitute exceptional circumstances and irreparable prejudice to the Accused.

20. These foregoing arguments also lead the Defense to the opinion that this Application concerns matters which are distinguishable from other situations in which the honorable Trial Chamber decided on interlocutory appeal; moreover, in view of the Defense, the current Application raises issues as to the development of procedural law of this Special Court, sufficient to qualify for interlocutory appeal, and finally, a decision on these issues by the Appeals Chamber may lead to clarity and thus may avoid future disputes over similar issues on the scope of Rule 66(A).

**V PRAYER**

21. For the above reasons, the Defense prays the honorable Trial Chamber to grant the Defense leave to appeal from the Decision.

Respectfully submitted,  
Done at this 4<sup>th</sup> day of August 2004

*P.P. Geert-Jan Alexander Knoop*  
Geert-Jan Alexander Knoop  
Lead Counsel