

**SPECIAL COURT FOR
SIERRA LEONE**

Case No. SCSL-2004-16-PT

TRIAL CHAMBER II

Before: Judge Teresa Doherty, Presiding
Judge Julia Sebutinde
Judge Richard Lussick

Registrar: Robin Vincent

Date filed: February 3, 2005

THE PROSECUTOR

against

SANTIGIE BORBOR KANU

**KANU – REPLY TO “PROSECUTION RESPONSE TO ‘KANU – DEFENSE MOTION FOR
DISMISSAL OF COUNTS 15 – 18 OF THE INDICTMENT DUE TO AN ALIBI DEFENSE AND LACK
OF *PRIMA FACIE* CASE”**

Office of the Prosecutor:

Luc Coté
Lesley Taylor

Defense Counsel:

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

Neil Gibson
Gibson
17:20

I INTRODUCTION AND PROSECUTION INTENTION TO FILE WITHDRAWAL MOTION

1. On January 20, 2005, the Defense filed its “Kanun – Defense Motion for Dismissal of Counts 15 – 18 of the Indictment Due to an Alibi Defense and Lack of *Prima Facie* Case” (“**Dismissal Motion**”). In Response thereto, the Prosecution filed its “Prosecution Response to ‘Kanun – Defense Motion for Dismissal of Counts 15 – 18 of the Indictment Due to an Alibi Defense and Lack of *Prima Facie* Case,’” (“**Prosecution Response**”) on January 31, 2005, in reply to which the Defense herewith files its “Kanun – Reply to ‘Prosecution Response to ‘Kanun – Defense Motion for Dismissal of Counts 15 – 18 of the Indictment Due to an Alibi Defense and Lack of *Prima Facie* Case’” (“**Defense Reply**”).
2. The mere fact that the Prosecutor’s announced in para. 7 of its response to file a motion of withdrawal of counts 15-18, in view of the fact that a motion to amend the Amended Consolidated Indictment as far as counts 15 -18 is concerned requires judicial finding of your honourable Trial Chamber, may not render a decision on the instant motion by itself unnecessary. In addition, the Defense holds that now that the Prosecutor in para. 25 of its Response raises the fundamental argument that an alibi defense can not be raised before the commencement of the Trial, saying that the argument of the Defense “...is based on a misunderstanding of the fundamental legal nature of alibi evidence and its status as a defence’,” a ruling of your honourable Trial Chamber may contribute to the development of this issue within contemporary international criminal law and therefore may be seen as being in the interest of justice.

II FACTUAL ASSERTIONS

Whereabouts of Accused from April – June 2000

3. In para. 13 of the Prosecution Response, it is indicated that the Prosecution does not contest the Accused’s argument that from June 2000 to December 2000 he was incarcerated at Pademba Prison.
4. The Prosecution did, however, indicate that it contests the Accused’s argued alibi as to the months April – June 2000. The inability to obtain pertinent information with

respect to the period of April-June 2000 can not be attributed to the Defence in view of the fact that the letter of Brigadier Dumbuya of 7 July 2004 specifically states "From 1997 to May 2000 when the verification process took place, no personnel records were maintained." Apparently the personnel record of the Accused was not kept by the national authorities so that it is not justified to say, as the Prosecution does in para. 16 of its Response, that the Defense "failed" to obtain pertinent information with respect to this period.

5. In view of the established and agreed fact that the Accused was detained in the period between June-December 2000, amounting to an at least *prima facie* evidence for the purported alibi defense, it is hard to imagine that the Accused was physically involved in the counts 15-18 in the short period of April-June 2000. In conjunction with the observation that the inability to produce the personnel record of the Accused relating to the place of employment during the period April-June 2000 should be attributed to the local authorities and not the Accused, supports the Defense arguments.
6. Furthermore, the particular letter of brigadier Dumbuya does not refute the assumption of the Prosecutor in para. 17 of the Response that the Accused in the period April-June 2000 was not a serving member of the Army. In para. 4 and 5 of the letter of 7 July 2004, it is only said that pay vouchers for the Accused are not hold by the military authorities because during that period such vouchers were written by hand, so that copies of the pay vouchers were not retained at the pay centre during that time. In no way, the letter refutes the Defense argument that the Accused, within that period was part of the Sierra Leonean Army.
7. In para. 20 the Prosecutor asserts that there is absolutely no documentary evidence confirming the presence of the Accused in the Army and that such would raise doubt as to the accuracy of his claims. Attached to this reply goes as **exhibit 1** a copy of the Accused's soldiers discharge book from the Sierra Leonean Army, which document indicates that the Accused was enlisted on 3 December 1999 within this Army and discharged on 28 August 2000. This document clearly refutes the Prosecution's thesis and accordingly provides further factual basis for the alibi for the period April-June 2000.

8. The Defense observes that the Prosecution does not address the defense arguments as developed in paras. 29-33 of the Defense Motion, particularly the argument that once a defense of alibi is raised, the Accused bears no onus of establishing that alibi, but that rather the Prosecution bears the burden to eliminate any reasonable possibility that the evidence of alibi is true. Although this observation by the Trial Chamber was made at the trial, the underlying rationale extends to a situation prior to the commencement of the Trial (see section IV below).

III NATURE OF ALLEGATIONS

9. In paras. 22 – 24 of the Prosecution Response, the Prosecution indicates that, as the Accused is charged with forming a part of a joint criminal enterprise, the actual physical presence of the Accused is not required for his criminal responsibility, and that therefore, an alibi on his side, would not relieve him from this alleged joint criminal enterprise.
10. Contrary to the Prosecution's argument in para. 23, saying that the crimes alleged in counts 15-18 were a "reasonably foreseeable consequence of the joint criminal enterprise," it is not realistic to assume that an individual who remains in custody can be found guilty of the concept of joint criminal enterprise (3rd Category) in that he "reasonably can foresee" certain crimes as a consequence of a certain joint criminal enterprise and can be said to accept such consequences.
11. Contrary to the argument of the Prosecution in para. 24, there is no legal foundation for the argument that an alibi only exonerates an accused when direct physical presence and perpetration is the only basis upon which guilt can be established. No precedent or legal source exists to the extent that the Accused is not able to invoke an alibi defense when the underlying charges pertain to alleged participation in a joint criminal enterprise. Even when the particular charges do not require "actual physical presence," the establishment by means of an alibi that the Accused could not have been present at a certain location at a certain time, can establish the absence of a *prima*

facie case for joint criminal enterprise, particularly when the factual elements of the indictment assume the physical presence of the Accused.¹

IV ASSESSMENT OF AN ALIBI DEFENSE PRIOR TO TRIAL

12. Although the Defense agrees that in principle the defense of alibi can only best be assessed at the Trial, no rule of (international) criminal law exists that excludes the invocation of this defense before the commencement of the Trial. Domestic criminal law for instance in the Netherlands and Belgium envisions several examples to the extent that Judges before the commencement of a trial released an accused based on the existence of an alibi.

13. The Prosecution's thesis is also refuted by looking into the case law of the ICTY. One of the Trial Chambers of the ICTY in *The Prosecutor v. Limaj et. al.*² dismissed the indictment against the co-accused, Mr. Agim Murtezi, in its entirety (whereby the Accused was immediately set free) due to the Defence argument that Mr. Murtezi could not have been present at the crime scene as set forth by the indictment. According to the Court transcripts of this case of 28 February 2003, the ICTY dismissed this indictment before the commencement of the trial in that case, namely at the end of the session at which the Defence argument was heard. Interestingly, also in this case, the Defence referred to reasons of judicial economy and the prejudice a continuation of the trial would cause for the accused in view of the purported alibi. The relevant pages of the Court transcript are attached to this reply as **exhibit 2**.

14. In para. 26-27 of the Reply, the Prosecution enters into the qualification of an alibi as a "defense". The Defense observes that the issue of qualification of an alibi, does not affect the substantive arguments of the motion and therefore can not justify its dismissal.

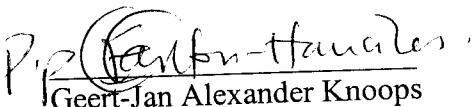
V RELIEF SOUGHT

¹ The current Amended Consolidated Indictment in the instant case warrants this interpretation.

² Case No. IT03-66-PT.

1. On the basis of the foregoing arguments, the Defense herewith respectfully prays the honorable Trial Chamber to grant this motion in that the exculpatory materials pertaining to this alibi leads to a lack of probable cause or *prima facie* case with regard to the Accused's alleged involvement in the incidents referred to in counts 15 – 18 of the Indictment, and accordingly requests the honorable Trial Chamber to dismiss these counts in the case against the Accused.

Respectfully submitted,
Done on this 3th day of February 2005


Geert-Jan Alexander Knoops
Lead Counsel

ATTACHMENT.

1. Letter from Legal Officer, Office of the Principal Defender, The Special Court for Sierra Leone.



**SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PRINCIPAL DEFENDER**

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4th February 2004

The Presiding Judge
Trial Chamber II
Special Court for Sierra Leone
New England
Freetown

Dear Your Honour,

**RE: ATTACHMENTS TO THE KANU REPLY TO
"PROSECUTION RESPONSE TO KANU-DEFENCE
MOTION FOR DISMISSAL OF COUNTS 15-18 OF THE
INDICTMENT DUE TO AN ALIBI DEFENCE AND LACK
OF PRIMA FACIE CASE."**

I write to inform your Honour that the Lead Counsel for the Accused Santigie Borbor Kanu, Professor Geert Jan Knoops, resides in the Netherlands. He has tried for the past two days to send the above-mentioned attachments to me by fax but was unable to do so as the fax never arrived at the Special Court.

The alternative open to him is to send it by DHL as soon as reasonably practicable.

We regret that it could not be attached with the Reply that was filed today. We shall file the attachments as soon as they are received

Yours Faithfully,

A handwritten signature in cursive script, appearing to read 'Claire Carlton-Hanciles'.

Claire Carlton-Hanciles
Legal Officer

CC: Office of the Prosecutor
The Chief of Court Management