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SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

Before: Hon. Judge Pierre Boutet

Registrar: Robin Vincent

Date: 02 August 2004

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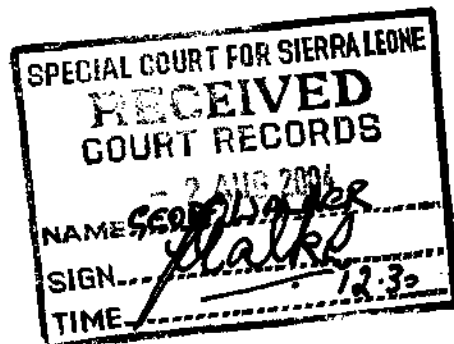
BRIMA- DECISION ON MOTION FOR EXCLUSION OF PROSECUTION WITNESS STATEMENTS AND STAY OF FILING OF PROSECUTION STATEMENTS

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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) ("Motion"), filed on 23 March 2004 by Counsel for the First Accused;

NOTING the "Prosecution Response to the Motion ("Response"), filed on 29 March 2004 by the Office of the Prosecution ("Prosecution") and the Defence Reply thereto filed on 1 April 2004 ("Reply");

NOTING the amendments to Rule 66(A) adopted at the 5th Plenary Meeting of the Judges of the Special Court that was held between 11 March and 14 March 2004;

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");

NOTING Rules 5, 6 and 66 of the Rules;

COGNISANT of Article 17 of the Statute of the Special Court ("Statute");

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)") as last amended at the 5th Plenary Meeting of the Judges of the Special Court, held in Freetown between 11 March and 14 March 2004, 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.
- (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 said Rule 66(A) of the Rules prior to this most recent amendment ("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 Motion

3. The Defence submits that by continuously disclosing witness statements to the Defence beyond 30 days after the Initial Appearance of the Accused without first showing good cause and seeking an order from the court, the Prosecution has breached its obligation to disclose under Old Rule 66(A)(i) of the Rules and should be sanctioned. The Motion is filed pursuant to Rule 5 of the Rules and as a sequel to the legal submissions made by the Defence during the Status Conference of March 8 2004.¹
4. Notwithstanding the fact that it is over a year since the Accused made his Initial Appearance on 17 March 2003, the Defence complains that the Prosecution continues to disclose an unceasing volume of witness statements as recently as 18 March 2004 in clear contravention of the provisions of Old Rule 66(A)(i) of the Rules.²
5. While recognizing the statutory right of the Prosecution under Rules 66 and 68 to continue disclosure, the Defence avers that such obligations must be dispensed in accordance with the law and the due process of the Special Court, that require the Prosecution to obtain an order

¹ Motion, Introduction.

² *Id.*, para. 4

from the Court in accordance with Old Rule 66(A)(i) of the Rules permitting it to disclose additional evidentiary material.³

6. Relying on jurisprudence from the International Criminal for the former Yugoslavia ("ICTY") in *Prosecutor v. Furundzija*,⁴ the Defence submits that the Prosecution has failed in its obligation to disclose under the Rules of Procedure and Evidence and should be sanctioned.⁵
7. The Defence seeks, *inter alia*, the exclusion from the case file of the Accused of all witness statements filed by the Prosecution after 18 April 2003 and, in the alternative, that the Prosecution be barred from further disclosure except where it shows good cause and pursuant to an order of the Chamber.

The Response

8. The Prosecution submits that the Motion is premised on an erroneous interpretation of the law. The Prosecution admits having disclosed statements to the Defence after 18 April 2003, but submits that these were in accordance with its disclosure obligations under Old Rule 66(A)(i) of the Rules.⁶
9. The Prosecution also submits that it will be cumbersome and frustrating to the legal process if, for each witness statement taken in the course of investigations, the Prosecution had to go before a Judge to show good cause why the statement should be disclosed.⁷ 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 in the immediate period after approval of the indictment or the initial appearance of an accused, would now be selected as witness for the trial.⁸
10. The Prosecution does not concur with the Defence's interpretation of the second prong of Old Rule 66(A)(i) of the Rules and submits that the requirement to show good cause is incumbent on the Defence rather than on the Prosecution. Although it concedes that the

³ *Id.*, para. 6.

⁴ *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 ("*Furundzija* Decision"). In that case, the Trial Chamber expressed its "grave concern at the unjustifiable failure of the Prosecution to comply with its disclosure obligations" under Rule 66.

⁵ *Id.*, para. 15.

⁶ Response, paras 3 and 6.

⁷ *Id.*, para. 10.

⁸ *Id.*, para. 10.

second prong is silent on which party bears the onus of showing good cause, a proper understanding of the Rule warrants the interpretation to be construed as placing the burden on the Defence to show good cause why Prosecution witnesses not intended to be called at trial should be disclosed to them.⁹

11. The Prosecution further submits that the exclusion of witnesses pursuant to the Motion, will be "too extreme a measure" and in violation of with the principle of proportionality. Although the *Furundzija* Decision, cited in the Motion, expressed grave concerns about the Prosecution's failure to comply with its disclosure obligations, it did not consequently bar the Prosecution from calling the affected witnesses, but ordered instead the Prosecution to make disclosure by a given deadline. Further, in *Prosecutor v. Bagosora*,¹⁰ the Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") found that although the Prosecution had not met its obligations to disclose, the Defence was not prejudiced because the trial had been postponed and there was sufficient time for the Defence to prepare for the Trial. In the instant case, there is no prejudice suffered by the Defence as all the contentious statements were disclosed at the pre-trial stage of the proceedings, with a trial date not set, leaving ample time for the Defence to prepare for trial.¹¹
12. Lastly, the Prosecution submits that the issue raised in the Motion regarding the contravention of its disclosure obligations to the Defence, has been rendered moot, as the recent amendments to the Rule 66(A)(i) sets forth a deadline of 60 days before the commencement of trial for disclosure of statements of witnesses the Prosecution intends to call to testify.¹²

The Reply

13. Although conceding on the amendment of Rule 66 of the Rule at the 5th Plenary Meeting of the Special Court, the Defence reiterates in its Reply the position that the Prosecution has to show good cause in order to continuously disclose to the Defence written statements pursuant to Rule 66 of the Rules.

⁹ *Id.* Para. 12

¹⁰ *Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, Decision on the Motion by the Defence Counsel for Disclosure, 27 November 1997 ("*Bagosora* Decision").

¹¹ Response, para. 19

¹² *Id.* Para. 20. See also paras 13-16.

III. APPLICABLE LAW

14. 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:

- 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;

...

15. In addition to the provisions of the Old and the New Rule 66(A), other Rules are deemed of relevance 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.

16. Lastly, Rule 6(D) of the Rules reads as follows:

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

IV. DELIBERATIONS

12. The Motion raises issues relating to the interpretation of Rule 66(A) as it were prior to its amendment and Rule 66(A) as adopted at the 5th Plenary Meeting of the Judges of the Special Court. I wish to observe that I have already dealt with very similar issues in a recent decision on two motions filed by another Co-Accused in this case, Santigie Kanu.¹³ Similarly, the Motion is based on the contention by the Defence that by disclosing substantial amounts of witness

¹³ Decision on Motions for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Statements, 30 July 2004. ("Kanu Decision").

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.

13. As discussed in the *Kanu* Decision,¹⁴ what is in issue here is whether or not the aforementioned circumstances warrant the exclusion of these Prosecution witness statements. To arrive at a proper decision on this issue, it is essential to determine:
- 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.

Due to its close similarity of the arguments, I consider that the discussion herein following should reiterate the findings held in the *Kanu* Decision.¹⁵

A) Which Rule is Applicable to the Motions?

14. Old Rule 66(A) was amended for purposes of clarity and better comprehension at the 5th Plenary Meeting of the Judges of the Special Court, as a result of the discussions about its interpretation held during the Status Conference 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. The Motion was filed on 23 March 2004, shortly after the adoption of the aforementioned amendments. Rule 6 of the Rules in this respect provides that an amendment of the Rules becomes effective from the date of its approval.¹⁶ Therefore, as already held in the *Kanu* Decision, 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 Motion as of that date.¹⁷
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

¹⁴ *Id.*, para. 13.

¹⁵ *Id.*, paras 12-24.

¹⁶ 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.

¹⁷ *Kanu* Decision, para. 15.

scope and applicability of the provisions of New Rule 66(A).¹⁸ The said Order directly refers to 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".¹⁹

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

19. In considering whether the Defence will suffer any material prejudice should its Motion not be granted, in addition to the finding of the Trial Chamber in its Order to File Disclosure Materials and in the *Kanu* Decision referred to above, further relevant jurisprudence from this Court as well as from the ICTY and the ICTR do provide appropriate guidance.²⁰
20. In its *Norman* Decision, the Trial Chamber of the Special Court held the following with reference to disclosure:

¹⁸ See *Kanu* Decision, para. 16. For an interpretation of the provisions of New Rule 66, see, in addition, *Prosecutor v. Norman et al.*, Case No. SCSL04-14-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., SCSL04-15-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 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.

¹⁹ 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.

²⁰ 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.

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.²¹

21. In the *Bagosora* Decision, as correctly referred to by the Prosecution in its Response, the Trial Chamber of the ICTR held that despite the failure of the Prosecution to strictly comply with its disclosure obligations vis à 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 *Furundzija* Decision, cited by both the Defence and the Prosecution, 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,²² but required the Prosecution to strictly comply with its order to provide full disclosure to the Defence by a particular date.
23. In the case under consideration, the Defence contention that the Prosecution has failed to comply with its disclosure obligations cannot be legally sustained in that, as discussed in Part A above, the Defence erred in its interpretation of the applicable provisions of Rule 66(A) of the Rules either as these provisions existed before the amendment or since the new amendments.²³
24. In addition, I would like to reiterate 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 Motion have failed to show how such disclosure could *in concreto* prejudice the preparation of its 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

²¹ *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.

²² *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Scheduling Order, 29 April 1998.

²³ See *Kanu* Decision, para. 23.

adequate notice of the case against the Accused and has sufficient time to adequately prepare for trial.²⁴

FOR THE ABOVE REASONS,

DISMISS the Motion.

Done at Freetown this 2nd day of August 2004



Judge Pierre Boutet

Designated Judge



²⁴ *Kanu* Decision, para. 24. 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 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