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SCSL-2004-16-T
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

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

Registrar: Mr Robin Vincent

Date filed: 25 April 2005

THE PROSECUTOR

Against

ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

CASE NO. SCSL – 2004 – 16 – T

PROSECUTION SUBMISSIONS IN RESPONSE TO RELIEF REQUESTED BY DEFENCE IN THEIR REPLY DATED 12 APRIL 2005 AND IN THEIR RESPONSE TO SUBMISSIONS DATED 19 APRIL 2005

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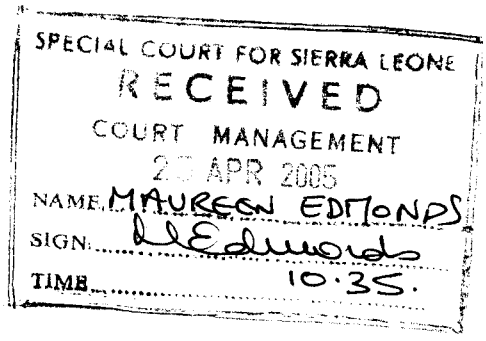

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I. Background

1. By their Joint Defence Response to Submissions on Objection to Question Put by Defence in Cross-Examination of Witness TF1-227 and Motion To Rule on Additional Information and Order of Witnesses the Defence have sought an Order that:

i The additional information served by the Prosecution in relation to upcoming witnesses in these proceedings falls under Rule 66 (A)(i) of the Rules and thus the Prosecution is obliged to disclose such material 42 days before the witness is called;

ii Alternatively, the Prosecution should provide such material at least two weeks before the witness testifies;

iii The Prosecution should provide the Defence and Trial Chamber with a list of the order in which it intends to call witnesses to testify, 14 days in advance of their testimony. (Paraphrased.)[1]

2. The Defence application was not sought by a separate Motion but in the body of submissions filed on a related issue by order of the Trial Chamber on 12 April 2005.

3. By their Joint Defence Reply to Prosecution Response to Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68,[2] the Defence sought relief in addition to that sought by their Motion dated 9 March, namely an order that "the Prosecution, by destroying the materials requested by the Defence in its Motion, has failed to fulfil its disclosure obligations under Rules 66 and 68."[3]

4. The Defence made further observations on the issue of the disclosure of additional information generally in open court in submissions on 22 April 2005.[4]

5. The Chamber has indicated that it will give a ruling on both of the issues raised by the Defence in their Joint Defence Response and in their Joint Defence Reply on the Tuesday 26 April 2005. The Prosecution files these Submissions in Response following the Trial Chamber's indication that it might do so.[5]

II. Joint Defence Response to Prosecution Submissions

6. The Trial Chamber in the *Norman* and others case has made the following finding on the proper interpretation of Rule 66 (A) subsections (i) and (ii) of the Rules:

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[1] Dated 19 April 2005 ("Joint Defence Request"); see para. 40.
[2] Dated 12 April 2005 ("Joint Defence Response").
[3] Dated 12 April 2005, para. 16.
[4] Trial Transcript 22 April 2005 pp 52-53.
[5] Trial Transcript 22 April 2005, p 55.

"As a matter of statutory interpretation, it is the Chamber's opinion that 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 92*bis*, 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.*"[6] [Emphasis added]

7. It has also found that Rule 66(A)(ii) imposes an obligation upon the Prosecution to continuously disclose to the Defence new developments in the investigation in the form of "will-say" statements, interview notes, or in any other forms obtained from a witness at any time prior to the witness giving evidence at the trial. This obligation includes an obligation to disclose additional information obtained during proofing or interviews of witnesses in advance of their testifying.[7] The principle has been reiterated in recent Decisions of Trial Chamber 1,[8] and is now, it is submitted, a matter of settled and well-established practice in this court.

8. Rule 67(D), Rule 66 (A)(ii) and Rule 68, taken together, define the Prosecution's continuing disclosure obligations under the Rules. The obligation of continuing disclosure in respect of existing witnesses flows from a purposive interpretation of Rule 66 (A) (ii) which has in mind the object and purpose of all of the Prosecution disclosure obligations under the Rules (including Rule 73 *bis* (B)(i) (pre-trial brief) and Rule 47(C)

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[6] *Prosecutor v. Sam Hinga Norman* and others, Case No. SCSL-04-14-PT, "Decision on Disclosure of Witness Statements and Cross-Examination", 16 July 2004 ("16 July 2004 Decision"), para. 5; cited in the current case in the Witness TF1-141 Decision, and in the Witness TF1-060 Decision.

[7] *Prosecutor v. Sesay* and others, "Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060", 23 July 2004, para. 15; *Prosecutor v. Sesay* and others, "Ruling on Disclosure Regarding Witness TF1-195", 4 February 2005 ("Witness TF1-195 Decision"); and "Ruling on Disclosure Regarding Witness TF1-015", 28 January 2005 ("Witness TF1-015 Decision"); *Prosecutor v. Sesay* and others, "Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 dated respectively 9th October 2004, 19th and 20th of October 2004, and 10th January 2005", 3 February 2005 ("Witness TF1-141 Decision), para. 24.

[8] *Prosecutor v. Sesay* and others, Witness TF1-195 Decision; and Witness TF1-015 Decision; Witness TF1-141 Decision, para. 24; Witness TF1-060 Decision, para. 15.

(indictment)).[9] The Prosecution does not, as the Defence suggests,[10] disclose its additional information in relation to existing witnesses under Rule 67 (D), whether taken in isolation of Rule 66(A)(ii) and Rule 68, or at all, and the wording of Rule 67(D) does not place a limit on the sort of material which the Prosecution is obliged to disclose. The Prosecution, further, takes issue with the Defence submission that its characterization of the additional information obtained in the course of proofing as "additional information" is, or is intended to be, "misleading".

9. Given time constraints in the investigation stage, there will, necessarily, be differences – modifications or clarifications of existing statements, and additional information - between what a witness will testify to and the information contained in original statements taken up to two or three years prior to a witness testifying. The Defence submission that proofing of Prosecution witnesses should be confined to the "technicalities of the preparation of the witness"[11] runs counter to what is accepted and well-established practice both in this court, and in the ad hoc Tribunals. The Prosecution has made submissions on the practice of proofing witnesses in its earlier filing, and does not propose to reiterate those submissions herein.[12]

10. The Prosecution has, and will continue to make, every effort to disclose additional information obtained in the course of proofing as early as possible. However, 42 days is not a target which the Prosecution is able to meet. The Special Court's Witness Unit, not the Prosecution, arranges the accommodation of witnesses in Freetown and witnesses are brought to Freetown to stay in that accommodation before and during their testimony.

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[9] To provide a means of safeguarding that the principles enshrined in Article 17 of the Special Court Statute are met. Article 17(4) includes the following rights: "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;…"

[10] Defence Submissions, para. 22.

[11] Ibid.

[12] See the Prosecution Submissions on Objection to Question Put by Defence in Cross-Examination of Witness TF1-227", 14 April 2005 ("Prosecution Submissions on Objection"), paras. 21-22; citing a decision of the ICTY in *Prosecutor v. Limaj*, Case No. IT-03-66-T, "Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses", 10 December 2004.

Witnesses are not generally made available to the Prosecution for proofing until they are brought to Freetown under the care of the Witness Unit. It would of course be an impossible demand of the Witness Unit to require all witnesses (potentially in at least 2 trials) to be accommodated by them for a minimum period of 6 weeks, such as to allow the Defence request to be met.

11. The Prosecution is obliged to disclose additional information arising in the course of proofing. Even if proofing is confined to mere "technicalities", for example, reading a witness's original statement back to him/her, there is always the real possibility that the witness will voluntarily provide additional information, whether asked about additional matters or not. Would the Defence, in these circumstances, prefer to be taken entirely by surprise with such information being disclosed for the first time in oral testimony in open court?

12. The Defence has made an alternative application that the Prosecution provide additional information obtained from witnesses at least two weeks prior to the witness testifying. The Prosecution makes submissions on this alternative proposition as follows: Wherever substantial disclosure is made in respect of a witness, then the Prosecution will make every effort to meet a target of disclosure two weeks prior to the witness testifying. However, there will inevitably be situations where witnesses can only be made available for proofing by Prosecution Counsel for the first time within a few days prior to their testifying. This has led and will inevitably lead to further occasions when the Prosecution is obliged to disclose material up to a day before the witness testifies. If the Defence teams find that they have insufficient time to prepare the cross-examination of a witness where the two-week benchmark is not met and substantial material is disclosed, then it will undertake to put that witness back in the list.

13. Thus far, disclosure within the two week period has generally been limited to one or two pages, or less. The Defence have never suggested that they would not be in a position to deal with late disclosed material (if led in evidence) and have not suggested by their submissions that they have ever been put in

the position of being specifically prejudiced by the late disclosure of additional information. At paragraph 32 of their submissions, they have suggested that late disclosure, generally, "hampers the preparation of the Defence". They cite resource and staffing issues in support of this submission. Such issues, the Prosecution submits, are matters internal to the Defence teams, and do not merit consideration by this Chamber. All Defence counsel charged with representing their clients' interests in these proceedings should be and are capable of making decisions on issues as they arise. The Prosecution notes the wording of Article 45 (C)(iv) of the Rules of Procedure and Evidence.[13]

14. In all the circumstances, the Prosecution submits, there are no grounds for requiring, as a matter of course, the disclosure of additional information two weeks (or more) prior to a witness testifying. The Prosecution will continue to make every effort to disclose additional information as early as possible. It repeats its earlier submission that it will seek to accommodate any requests by the Defence to put a witness back in the list where they are unable to deal with any significant matters in continuing disclosure of a substantial nature. To require a minimum disclosure period, as a matter of course, for additional information obtained in proofing, will inevitably lead to difficulties in scheduling upcoming witnesses, and may lead to delays and gaps in the timetable - in circumstances where the lateness of the disclosure may not prejudice the Defence in their cross-examination of a witness at all.

15. The Prosecution notes the oral submissions made on the general issue of disclosure of additional information – and on the specific issue of information disclosed in relation to witness TF1-004 - by Counsel for the Accused Brima on 22 April.[14] Counsel submitted that disclosure of additional information, and the process by which that information is obtained, is placing "the administration of justice at great risk of being in utter disrepute", within the

[13] Rule 45(C)(iv): "Such counsel … shall : … have indicated their willingness and full-time availability to be assigned by the Special Court to suspects of accused."
[14] Transcript 22 April 2005, p. 52.

meaning of Rule 95.[15] This sort of language, and the invocation of Rule 95, carries with it of course a suggestion of impropriety on the Prosecution's part. If there is a specific allegation to be made, then, it is submitted, it should be articulated and substantiated so that the Prosecution may meet it. Unfounded and non specific use of this sort of language is mischievous and cannot possibly assist the Chamber in their deliberations in this case.[16]

Order of witnesses

16. The Prosecution has complied with the Trial Chamber's Order of 9 February 2005 in providing a list to the Defence and the Trial Chamber of the next 10 witnesses to be called at trial and a copy of their witness statements 14 days prior to the testimony of the first witness of each group. Changes in order, within the block of 10 witnesses, has been unavoidable but not, it is submitted, such as to leave the Defence with insufficient time to prepare witnesses in the block of 10. If the Defence are ever put in a position that they are prejudiced by a change in the order of the witnesses within the block of 10, then, it is submitted, this is a matter which they should raise, on a witness by witness basis, first with the Prosecution[17] and, if necessary, with the Chamber. The Prosecution is not in breach of the Order of 9 February, and there are no grounds which merit a sanction or a further Order by the Chamber.

Order that the Prosecution has failed to fulfil its disclosure obligations

17. The Defence application for further Relief[18] carries with it a yet further suggestion of impropriety on the part of this Prosecution which is both

[15] Ibid, pp. 52-53.
[16] The Prosecution further notes a suggestion made in the Joint Defence Response that interviews of witnesses conducted by members of the Prosecution team may not be conducted in accordance with ethical rules because not necessarily conducted by Counsel admitted to the bar (paras. 7-8). In fact, all proofing in preparation of testifying is conducted by Counsel admitted to the bar. Prior interviews and statements may be taken either by Counsel or OTP investigators. If it is suggested that interviews have been conducted, or statements taken, improperly, then a specific allegation, if any, should be articulated and substantiated.
[17] The Defence has not once indicated to the Prosecution that the changes that have been communicated both to the Defence and to the Chamber has caused difficulty.
[18] By their Reply dated 12 April 2005.

unsubstantiated and unfounded. The Prosecution, by its Response,[19] has made its position clear.[20] There has been no breach of its disclosure obligations under Rule 66. The Prosecution adds that it has also complied with its disclosure obligations under Rule 68. Any suggestion to the contrary should be supported by a *prima facie* showing that further exculpatory material exists, and is in the possession of the Prosecution.[21] The Prosecution repeats and adopts the submissions made at paragraphs 20 to 21 of its Submissions on Objection: there is a presumption of propriety on the part of the Prosecution in its compliance with the rules of disclosure. Any allegation by the Defence as to a violation of the disclosure rules by the Prosecution should be substantiated with *prima facie* proof of such a violation.

18. Specifically the Prosecution notes that the obligations imposed upon it by Rules 66 and 68 are to disclose statements and materials. It does not impose upon the Prosecution the obligation as to what form those statements and materials must take. The transposition of information, both exculpatory and inculpatory, from raw form collected in various circumstances in the field into a standardized form, with the concomitant destruction of the former and disclosure of the latter does not breach the spirit or purpose of the Rules.

19. In the circumstances, the Prosecution requests that the Defence requests for relief be denied in their entirety.

Dated this 25th day of April 2005

In Freetown,

Sierra Leone

For the Prosecution,

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[19] "Prosecution Response to Joint Defence Motion on Disclosure of all Original Wintess Statements, Interview Notes and Investigators' Notes pursuant to Rules 66 and/or 68", 6 April 2005.
[20] In particular, paras. 4 and 11-13.
[21] See *Prosecutor v. Sesay* and others, "Sesay – Decision on Defence Motion for Disclosure pursuant to Rules 66 and 68 of the Rules", 9 July 2004.

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