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SCSL-2004-16-T

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(8632 - 8642)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Robin Vincent

Date filed: 12 May 2005

THE PROSECUTOR

Against

**Alex Tamba Brima
Brima Bazzy Kamara
Santigie Borbor Kanu**

Case No. SCSL – 2004 – 16 – T

**PROSECUTION RESPONSE TO JOINT DEFENCE MOTION FOR GENERAL
ORDERS PURSUANT TO RULE 54**

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Defence Counsel for Santigie Borbor Kanu
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Abibola E. Manley-Spaine

SPECIAL COURT FOR SIERRA LEONE
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SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR

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PROSECUTION RESPONSE TO JOINT DEFENCE MOTION FOR GENERAL
ORDERS PURSUANT TO RULE 54

I. Introduction

1. On 5 May 2005 the Defence filed the Joint Motion for General Orders Pursuant to Rule 54 (“the Motion”) seeking five specific orders arising from what is alleged to be interference by the national authorities of Sierra Leone with potential defence witnesses and the functions of Counsel.
2. The Motion alleges that:
 - a) Potential witnesses have been denied access to the detention facility to see the Accused.
 - b) The Military Police have interfered with a potential Defence witness by arresting him and searching his home.
 - c) The Military police have interfered with the free and independent exercise of Counsel’s functions by searching the premises of the clerk of one Counsel.
 - d) This interference can be attributed to the national authorities of Sierra Leone and is therefore in contravention of both the fair trial rights enshrined in Article 17 of the Statute and the independence of Counsel enshrined in Article 14 of the Agreement between the United Nations and

the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (“the Special Court Agreement”).

- e) This interference is also in contravention of the obligations of the Government of Sierra Leone to cooperate with all organs of the Special Court pursuant to Article 17 of the Special Court Agreement.
3. The Motion seeks, pursuant to Rule 54, Orders that:
 - a) The Registrar ensure that no potential or substantive AFRC witness be interfered with by Special Court security officers, the Military Police or any other State functionary.
 - b) Security personnel of the Special Court explain to the Chamber and the parties what use is made of biographical information collected from visitors.
 - c) Potential Defence witnesses be granted interim protection as deemed necessary by the Court.
 - d) State security officers be restrained from interfering with potential Defence witnesses.
 - e) The Registry seek the cooperation of the Government of Sierra Leone pursuant to Article 17 of the Special Court Agreement.
 4. The Prosecution submits that there is an insufficient factual basis to support the allegations outlined in paragraph 2 above. The Prosecution further submits that the relief sought is inappropriate. Accordingly, the Prosecution submits that the Motion should be dismissed in its entirety.

II. Argument

The Factual Allegations

5. The Motion states that following a Defence visit to Makeni Barracks by the Defence teams five persons, being both soldiers and ex-soldiers, attended the Special Court to discuss their willingness to give evidence as Defence witnesses

and were refused entry to the detention facility to speak directly to the Accused.¹ The statement of Claire Carlton-Hanciles annexed to the Motion simply states that “the Deputy Chief of Detention refused to allow the visit”.² However, the email exchange between Mrs Carlton-Hanciles and Mr Poraj-Wilczynski also annexed to the Motion makes plain that the persons concerned were asked to fill in an application to visit the detention facility and wait for approval.³ The denial of access was, it can be assumed, because approval had not yet been granted pursuant to this procedure.

6. Rule 41(A) of the Rules of Detention establishes that the Chief of Detention may impose restrictions upon visits received by the detainees which “the Chief of Detention, in consultation with the Registrar, may deem necessary in the interests of the administration of justice or the security and good order of the Detention Facility”. Rule 41(D) establishes that “[a]ll visitors shall comply with the separate requirements of the visiting regime of the Detention Facility”. Those requirements may include searches of person and possessions.
7. The reasons why records are kept of the identity of visitors to persons held in detention are so obvious as to need no elaboration.
8. The Prosecution submits that the procedure by which all visitors, including potential defence witnesses, must obtain approval to visit the Accused does not amount to a denial of access to the Detention Facility. Further, that any discomfort experienced by such potential witnesses when asked to submit to a reasonable procedure does not, and cannot, amount to interference with the rights of the Accused to a fair trial.
9. The Motion asserts that there is a “reasonable suspicion and belief of a nexus between” the visit of a potential witness to the Special Court premises and the subsequent searching of his home and arrest. The Prosecution submits that the only evidence of any connection between the two events is the statement of this

¹ The refused entry was not raised on 26 April 2005. See Transcript, 26 April 2005, p. 5. (line 25) to p. 6 (line 18).

² Para. 5, Statement of Claire Carlton-Hanciles, Legal Officer Defence Office, Annex C to the Motion.

³ See Annex D to the Motion.

potential witness that the Provost Marshall said “I have been informed by State House that you have been visiting the Special Court premises, what is your purpose of going there?”⁴

10. Notwithstanding this, there is no evidence that the earlier visit to the Special Court was the motivating factor in the alleged search and arrest.⁵ There is no irresistible temporal connection about the two events: his visit to the Special Court was in “early April 2005” and the alleged search and arrest occurred on 23 April 2005. Indeed, the evidence is that the military police were searching for military items.
11. In this regard it is to be noted that the alleged search of the home of Alpha Rogers, clerk to Mr Manley-Spain, was also conducted on suspicion that arms and ammunition were stored on those premises.⁶ Further, both searches were virtually simultaneous.⁷
12. The Prosecution submits that there is nothing before this Trial Chamber that will allow it to conclude conclusively that these two searches and the arrest of the potential witness were connected to the earlier attendance of that potential witness at the Special Court. There are far too many imponderables and many reasonably hypotheses can be formulated to fit the few known facts. To illustrate the point, it is not known if the Military Police executed more than two searches on 23 April 2005. It is possible that they were conducting an operation based upon information concerning the alleged whereabouts of military uniforms and equipment in Freetown.
13. Accordingly, the Prosecution submits that there is an absence of factual nexus between the incidents asserted and alleged interference by “Sierra Leone state

⁴ Annex A to the Motion, Registry Pages 8572-8573.

⁵ The Prosecution notes that the statement at Annex A to the Motion does not allege that the potential witness had visited or attempted to visit the Detention Facility. This is contrary to the submission made on 26 April 2005. See Transcript, 26 April 2005, p. 12 (lines 18-23).

⁶ Statement of Alpha Rogers dated 30 April 2005, Annex B to the Motion.

⁷ Alpha Rogers states that the search occurred at about 0630 on 23 April 2005 and the potential Defence witness states that the search occurred at about 0530. Cf submissions of Defence Counsel who stated on 26 April 2005 that the search of the home of Mr Manley-Spain’s clerk occurred on Sunday the 24th of April. See Transcript, 26 April 2005, p. 4, (lines 15-16).

security services and/or their operatives”⁸ in the preparation of the Defence for trial. No breach of the Article 17 rights of the Accused has been established.

14. Further it is submitted that no breach of Articles 14 or 17 of the Special Court Agreement can be substantiated. The argument made in the Motion is not just that the government of Sierra Leone has failed to honour these provisions, but has taken positive and deliberate action in breach of them. The allegation that the Government of Sierra Leone has contravened an agreement with the United Nations must, it is submitted, be supported by something more than the “reasonable suspicion and belief of a nexus” held by the Defence⁹, the belief of the Accused that there has been State interference¹⁰, or a “high level of coincidence” in the collective experience of the Defence.¹¹
15. The Prosecution submits that the Motion should be dismissed because of the lack of factual foundation.

Rule 54

16. The Motion seeks relief based principally upon Rule 54. Rule 54 establishes that the Trial Chamber may issue such orders “as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial”.
17. The Prosecution submits that the test of “as may be necessary” in Rule 54 has not been made out because of the lack of factual foundation in the Motion. The second proposed Order illustrates the point. The suspicion that “biographic information collected by the Special Court security personnel [is] channelled to state security functionaries for purposes that appear not be (sic) in the interests of the respective Defence teams”¹² cannot be reasonably held on the material before the Chamber. Further, the collection of information from visitors to the Detention Facility is clearly contemplated by Rule 41 of the Rules of Detention and an expected practice of all detention facilities.

⁸ Para. 8 of the Motion.

⁹ Para. 4 of the Motion.

¹⁰ Transcript, 26 April 2005, p. 5 (lines 18-24)

¹¹ Transcript, 26 April 2005, p. 6 (lines 19-24).

¹² Para. 21 of the Motion.

18. The Prosecution submits further that specific Orders sought with regard to the State of Sierra Leone or its functionaries are inappropriate. The first proposed Order asks the Registrar to do the impossible. Even if factually justified (and the Prosecution submits it is not), how is the Registrar to ensure that persons not under his control, namely the Sierra Leone Military Police or other State functionaries, behave in a certain way?¹³ Further, the first and fourth proposed Orders ignore the sovereignty of the State of Sierra Leone. All persons within the jurisdiction of Sierra Leone are subject to its laws. It is within the plenary power of the State to authorize its officials to exercise the functions of the State. This includes the authority of the Military Police to conduct searches in relation to people who are in some way connected to the Special Court. Finally, for the reasons outlined in paragraph 14 above, the fifth proposed Order, that the Registrar be directed to seek the cooperation of the Government of Sierra Leone in complying with the other Orders, borders on the offensive.¹⁴
19. With respect to proposed Order three that the Court make orders it deems necessary for the protection of potential Defence witnesses, the Prosecution submits that any application for protective measures for witnesses would more appropriately be made pursuant to Rule 75. In doing so the Defence should identify, by use of pseudonym if necessary, particular witnesses who require particular protection based upon appropriate evidence. The Prosecution submits that the proposed Order, which does not identify the persons to whom it would apply and requires the Court to deem what is necessary for unidentified persons, is not one that should be entertained by the Chamber.

¹³ The Prosecution refers to paras. 5-8 above outlining the total absence of evidence showing wrongdoing by Special Court security personnel vis-à-vis Defence witnesses.

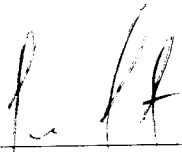
¹⁴ The Prosecution notes that the Motion cites "Prosecutor v Gagovic Order Pursuant to Rule 54 in Gagovic, May 13, 1997 cited at page 74, para. 4-26 of Archibold: International Criminal Courts; Sweet & Maxwell 2003" as authority for the proposition that the Trial Chamber is empowered to issue orders to the sovereign State of Sierra Leone in order to ensure a cessation of the interference of potential Defence witnesses. *Prosecutor v Gagovic*, Case No. ITR-96-23-R61, 'Order Pursuant to Rule 54', 13 May 1997, concerned an order to the Prosecutor to provide the Tribunal with information on the status of negotiations pertaining to obtaining custody of an accused. The Order is not available on the ICTY website. The Prosecution annexes a copy of the Order to this Response.

III. Conclusion

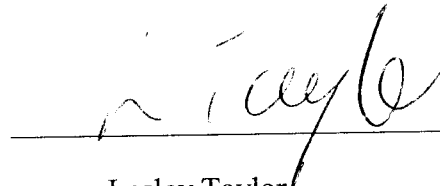
20. For the reasons articulated above, the Prosecution submits that the Motion should be dismissed because there is insufficient factual foundation for the allegations made therein and because it seeks inappropriate relief.

Filed this 12th day of May 2005,

In Freetown



Luc Côté
Chief of Prosecutions



Lesley Taylor
Senior Trial Counsel

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UNITED
NATIONS



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-96-23-R61

Date: 13 May 1997

Original: English

Before: Judge Lal Chand Vohrah
Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh
Order of: 13 May 1997

THE PROSECUTOR

V

DRAGAN GAGOVIĆ AND OTHERS

ORDER PURSUANT TO RULE 54

Office of the Prosecutor

Mr. Eric Ostberg
Ms. Hildegard Uertz-Retzlaff

I, Lal Chand Vohrah, Judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("International Tribunal"), in Chambers;

NOTING the indictment against Dragan Gagović and seven other persons ("accused persons") which was confirmed on 26 June 1996 ("Indictment");

CONSIDERING the Order of 25 November 1996 inviting the Prosecutor to submit by 2 December 1996, or by 9 December 1996 if Rule 60 of the Rules of Procedure and Evidence ("Rules") had not already been activated, a report on the measures taken to effect personal service of the Indictment on the accused persons;

CONSIDERING that the Office of the Prosecutor ("Prosecution") submitted a report pursuant to that invitation on 9 December 1996;

CONSIDERING that a public examination of the Indictment pursuant to Rule 61 can only be held if the requirements of Rule 60 have been met and if the Prosecution has satisfied the Judge who confirmed the Indictment that all reasonable steps have been taken to effect personal service of the Indictment;

CONSIDERING that pursuant to Rule 60, the Registrar caused copies of a form of advertisement of the Indictment to be sent to the appropriate authorities of the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska;

CONSIDERING that the authorities in the Republic of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina acknowledged receipt of copies of the said form of advertisement on 10 December 1996 and that on 20 December 1996, the Office of the High Representative for Implementing the Civilian Aspects of the Peace Accords in Sarajevo confirmed receipt of the form of advertisement and stated that it had been transmitted to the Minister of Justice of the Republika Srpska;

CONSIDERING that since copies of the form of advertisement of the Indictment have been transmitted as hereinbefore described, the requirements of Rule 60 have been satisfied;

CONSIDERING that the report of the Prosecution shows that all reasonable steps have been taken to effect personal service of the Indictment;

CONSIDERING that there is, therefore, no procedural impediment barring the public examination of the Indictment pursuant to Rule 61 at the present time;

CONSIDERING, HOWEVER, that by the said report, the Prosecution requested that a public examination of the Indictment should not be held at the time of the report, 9 December 1996, because such public examination may inhibit certain negotiations in relation to the possible surrender of one of the accused persons ("negotiations");


CONSIDERING that to date, the Prosecution has failed to give any notification of its progress on the said negotiations;

CONSIDERING FURTHER that the accused person with regard to whom the negotiations were being conducted has not been surrendered to the jurisdiction of the International Tribunal;

CONSIDERING THEREFORE that it is expedient that the Prosecution file a notification regarding the status of the said negotiations in order that it might be determined whether it is appropriate that a Trial Chamber of the International Tribunal should immediately proceed with the public examination of the Indictment pursuant to Rule 61;

FOR THESE REASONS, AND PURSUANT TO RULE 54

ORDER the Prosecution to file a notification with the Registrar on the status of the negotiations by 3 June 1997.



Lal Chand Vohrah
Judge, International Tribunal

Dated this thirteenth day of May 1997
At The Hague
the Netherlands.

[Seal of the Tribunal]