

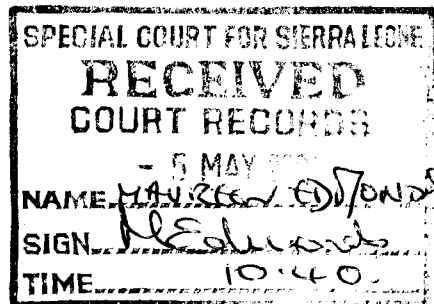
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**THE SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE**

IN THE TRIAL CHAMBER

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

Date filed: May 2004



THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANAH

ALLIEU KONDEWA

CASE NO. SCSL-2004-14-PT

**MOTION TO COMPEL THE PRODUCTION OF EXCULPATORY
WITNESS STATEMENTS, WITNESS SUMMARIES AND
MATERIALS PURSUANT TO RULE 68**

Office of Prosecutor:

Mr. Luc Cote
Mr. James C. Johnston

Applicant's Counsel:

Mr. Charles F. Margai
Mr. Yada H. Williams
Mr. Thomas G. Briody
Ms. Susan L. Wright
Mr. Ansu Lansana

I. INTRODUCTION

1. That the Accused Allieu Kondewa made his first appearance before this Hon. Court on 2nd July 2003 on an eight count indictment for the offences of: Crimes Against Humanity; Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II; and Use of Child Soldiers.
2. That the Accused, Allieu Kondewa has been receiving disclosure materials from Prosecutor's office since that date and as recently as 30th April 2004. Although these materials include exculpatory evidence, they are so heavily redacted that they have been rendered virtually useless for the purposes of investigation and case preparation.
3. That the 30 day period subsequent to the initial appearance of the Accused, Allieu Kondewa expired on the 31st July 2003.
4. That the late and piecemeal disclosure of witness statements substantially infringes on the rights of the Defendant guaranteed under Article 17 (4)(b) of the Statute of the Special Court and the Article 7 of the African Charter on Human and People's Rights.
5. Upon information and belief, the Prosecutor is in possession of additional materials whose disclosure is required by Rule 68.

ARGUMENT

6. That the Prosecutor was under obligation within 30 days of the initial appearance of the accused to make a statement under Rule 68(B) of the Rules "*disclosing to the defence the existence of evidence known to Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of Prosecutor evidence*". In interpreting ICTY Rule 68 (which is nearly identical to this Court's Rule 68), the Trial Chamber noted that Prosecutor bears "sole responsibility for disclosing to the Defence the evidence which tends to suggest the

innocence or mitigate the guilt of the accused...”¹ This responsibility extends to “any material which may put the accused on notice that material exists, and it is not limited to material which is itself admissible in evidence.”²

7. That the Prosecutor is also “*under a continuing obligation*” to make statements concerning any exculpatory materials and/or materials that might mitigate the guilt of the Accused, Allieu Kondewa whenever any exculpatory/mitigating materials comes into his possession.
8. That the Prosecutor has, in breach of the said Rule, never made the statement required of them. As a consequence, the onus is not on the Defence to make a *prima facie* showing of exculpatory evidence.³ The burden falls squarely on the Prosecutor.⁴ That fact notwithstanding, by identifying the source and nature of this exculpatory evidence (redacted witness statements), the Defence has made such a *prima facie* showing.
9. That disclosure materials have been served on the Accused, Allieu Kondewa on divers dates since his arrest and each set of materials have been accompanied by letters signed by or on behalf of James C. Johnson, Senior Trial Counsel attached to the Prosecutor’s office. Copies of some of the said letters referred to above dated the 18th November 2003, 18th March 2004, 1st April 2004, 26th April 2004 are attached as Annex B.
10. That the contents of these letters/exhibits and the materials supplied thereto do not in way satisfy the requirements of Rule 68.

¹ *Prosecutor v. Tihomir Blaskic*, Decision on Defence Motion for Sanctions (29th April 1998), paragraph 14.

² *Prosecutor v. Milorad Krnojelac*, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68 (1st November 1999), paragraph 2.

³ It is not until the Prosecution fulfills its obligations that the Defence is required to submit *prima facie* proof tending to make it likely that the undisclosed evidence is exculpatory and is in the Prosecutor’s possession. See. e.g. *Prosecutor v. Tihomir Blaskic*, Decision on Defence Motion for Sanctions (29th April 1998), paragraph 14.

⁴ See, e.g. *Prosecutor v. Zejnil Delalic, et al.* Decision on the Request of the Accused Hazim Delix Pursuant to Rule 68 for Exculpatory Information (24th June 1997), paragraph 4.

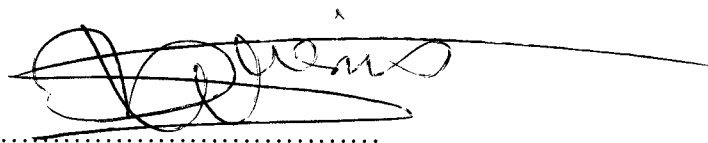
11. The ongoing non-disclosure of documents and witness statements by the Office of Prosecutor undermines the ability of Mr. Kondewa to effectively prepare a defence and violates Rule 68.
12. The Prosecutor's Motion dated the 2nd July 2003 for "IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE AND URGENT REQUEST FOR INTERIM MEASURES UNTIL APPROPRIATE PROTECTIVE MEASURES ARE IN PLACE" was made pursuant to Rules 53, 54, 69, 73 and 75 of the Rules of Procedure and Evidence of the Special Court and does not exclude the Prosecutor's obligation to comply with Rule 68(B).

RELIEF OR DECLARATION SOUGHT:

1. That Prosecutor's conduct complained of above is in violation of Rule 68(B).
2. An order compelling the Prosecutor to say whether he has such exculpatory/mitigating materials in his possession.
3. An order compelling the Prosecutor to make a statement(s) under Rule 68(B) disclosing to the defence the existence of evidence known to Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of Prosecutor evidence.
4. An order compelling the Prosecutor to provide un-redacted copies of witness statements which contain exculpatory evidence.

ALLIEU KONDEWA

By his counsel,



YADA HASHIM WILLIAMS

Dated: 5th May 2004

Annex A – List of Authorities

- 1 . *Prosecutor v. Tihomir Blaskic*, Decision on Defence Motion for Sanctions (29th April 1998).
- 2 . *Prosecutor v. Milorad Krnojelac*, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68 (1st November 1999).
- 3 . *Prosecutor v. Zejnil Delalic, et al.* Decision on the Request of the Accused Hazim Delix Pursuant to Rule 68 for Exculpatory Information (24th June 1997).

Annex B – Correspondences

- 1 . 18th November 2003
- 2 . 18th March 2004
- 3 . 1st April 2004
- 4 . 26th April 2004

Annex A – List of Authorities

IN THE TRIAL CHAMBER

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Before:

Judge Claude Jorda, Presiding
Judge Fouad Riad
Judge Mohamed Shahabbudeen

Registrar:

Mrs. Dorothee de Sampayo Garrido-Nijgh, Registrar

Order of:

29 April 1998

THE PROSECUTOR

v.

TIHOMIR BLASKIC

**DECISION ON THE DEFENCE MOTION FOR
"SANCTIONS FOR PROSECUTOR'S REPEATED VIOLATIONS OF RULE 68
OF THE RULES OF PROCEDURE AND EVIDENCE "**

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Defence Counsel:

Mr. Anto Nobile
Mr. Russell Hayman

Trial Chamber I 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 (hereinafter "the Tribunal") received a motion for "Sanctions for the Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence" (hereinafter "the Motion"), filed by the Defence on 8 December 1997. The Prosecution responded to the Motion on 13 February 1998 and the Defence replied on 18 March 1998.

I. Claims of the Parties

1. Following the testimony of Lieutenant-Colonel Bryan Watters on 10 and 11 November 1997, the Defence submitted that the Prosecutor had committed a serious violation of her obligations under Rule 68 of the Rules of Procedure and Evidence (hereinafter "the Rules"). According to the Defence, the violation was twofold: first, failing to disclose significant exculpatory information contained in a

British Battalion Military Information Summary (hereinafter "Milinfosum No. 170") of which it received only a heavily redacted version; second the Prosecution's attempt to elicit from Colonel Watters testimony directly contradicting such exculpatory evidence.

2. The Defence states that it received from the Prosecution approximately 63 heavily redacted versions of the Milinfosums, including Milinfosum No. 170, the latter of which allegedly contained only one paragraph regarding a supposed meeting between the commanders of the British troops operating under the United Nations flag (BritBat) and HVO and BiH forces as well as a summary of a cease-fire order issued by the accused on 18 April 1993. In the non-disclosed portions of Milinfosum No. 170, on which the Defence bases its Motion, it appears that:

"A meeting between local commanders in Vitez school produced a cease-fire agreement. However, there are as yet little indications that this agreement has reduced activity on the ground. *CO 1 Chesire has agreed with 3 Corps BiH and Central Bosnia HVO that the national cease-fire signed by Boban and Izetbegovic should be effective from 2359B hrs tonight.*" (Emphasis in the Defence motion)

3. The Defence considers that this information contradicts the statements of Lieutenant-Colonel Watters who allegedly attempted to downplay the significance of the cease-fire agreement and to attack its legitimacy by stating *inter alia* that neither BritBat nor the European Community Monitoring Mission (ECMM) had been involved in negotiating such a cease-fire. The Defence argues that, on the contrary, this portion of the Milinfosum confirms both the fact that local negotiations for a cease-fire - allegedly involving BritBat - occurred and that the agreement among the parties as to when the cease-fire would be implemented was reached.

4. In the opinion of the Defence, it was doubly wronged by the Prosecutor's conduct insofar as the Prosecutor not only failed to disclose the exculpatory information to it before the start of trial and then attempted to elicit contradictory testimony from Colonel Watters, but also failed to disclose the information after the said testimony, although the information in question, in addition to its exculpatory nature, bore directly on the credibility of a Prosecution witness, as stipulated in Rule 68.

5. When, having obtained an unredacted version of the same Milinfosum from a confidential source, it realised the above, the Defence asked that the Trial Chamber immediately order the following measures: (i) that the unredacted text of Milinfosum No. 170 (Exhibit B attached to the Motion and filed under seal) be admitted as Defence evidence; (ii) that Colonel Watters' testimony during re-direct examination and his testimony in response to questions from the Presiding Judge of the Trial Chamber regarding the non-disclosed exculpatory evidence be stricken or, in the alternative, that the witness again be called to appear as a Prosecution witness so that the Defence might resume its cross-examination limited to the points mentioned in the documents which, wrongfully, were not disclosed; and iii) that the Prosecution disclose to the Defence all the Milinfosums without redaction which have previously been produced in redacted form.

6. The Prosecutor submits that there was no violation on her part of the disclosure obligation under Rule 68 allegedly consisting of a wrongful withholding of exculpatory information. On the contrary, she states that she did disclose Milinfosum No. 170 on 10 March 1997 to which the cease-fire agreement in question was attached. Moreover, she specifies that she also provided the Defence with two other relevant documents: in August 1996, the diary of Lieutenant-Colonel Robert Stewart (Commander of the Chesire Regiment), which contains the following entry about the day of 18 April:

"I spoke to Enver Hadzihasanovic [Commander of BiH 3rd Corps] and Timomir [sic] Blaskic on the telephone after this. Apparently Boban and President Izabegovic [sic] have agreed a cease-fire. I agreed with both of them that it should come into effect at midnight. We shall see.";

and on 9 May 1996, excerpts from Colonel Stewart's book, *Broken Lives*, which describes his experience in Bosnia and contains the following passage:

"I remained in the school and telephoned Enver Hadzihanovic and Timomir [sic] Blaskic. Apparently Mate Boban and President Izetbegovic had agreed to a cease-fire, which both Enver and Timomir [sic] know about. The three of us agreed that all fighting should therefore stop at midnight. We knew that this would give time for appropriate orders to filter down to the lowest levels."

Although this specific passage from the book was not specifically disclosed to the Defence, the Prosecution submits that, the very fact of disclosing other excerpts from it in May 1996, means that the Defence was made aware of the book's existence and therefore had ready access to it for extracting information necessary for the preparation of the defence of the accused and for the cross-examination of the Colonel Watters, Colonel Stewart's second-in-command.

7. In any case, since the Prosecution is of the opinion that the willingness to enter into a cease-fire agreement, after the commission of crimes, cannot in and of itself absolve or mitigate the guilt of the accused, such willingness does not constitute exculpatory evidence within the meaning of Rule 68, which is why the Prosecutor did not envisage it as such.

8. The Prosecution consequently maintains the following viewpoints: i) it asserts that it did not wrongfully withhold exculpatory evidence covered in Rule 68, and argues, on the contrary, that it did disclose the information in question; ii) according to the Prosecution, mere willingness to enter into a cease-fire agreement is not exculpatory as such in respect of crimes already committed; iii) since the said agreement was not considered to be relevant to the charges in the indictment, the alleged omission was therefore not known to the Prosecution during and after the examination of Colonel Watters and; iv) rejecting the Defence allegation that the incident in question demonstrates "the fierce competitive environment of adversary litigation" while accusing it of being "overzealous" in order to gain a tactical advantage, the Prosecution maintains that the fact the Defence did not have a non-redacted version of the said Milinfosum during the cross-examination of Colonel Watters did not derive from a failure on the part of the Prosecution but rather from the risk inherent in the accused's tactical decision not to proceed with the pre-trial inspection provided under Sub-rule 66(B) of the Rules, in order to avoid the subsequent obligations in respect of reciprocal disclosure.

9. On the basis of this argument, the Prosecution requests that the Trial Chamber dismiss not only the motion to strike certain excerpts of Colonel Watters' testimony, but also the motion asking the Trial Chamber to order the disclosure to the Defence of complete Milinfosums from which the exculpatory evidence thus far provided was taken. However, it reaffirms its willingness, as expressed at trial already, to have Colonel Watters appear again in order to permit the Defence to conduct a new cross-examination focused on the contested excerpt of the Milinfosum. And it does not object to admitting Exhibit B attached to the Motion as a Defence exhibit.

10. In its reply of 18 March 1998, the Defence refutes the Prosecution's arguments and confirms the terms of its motion.

II. Analysis of the Claims of the Parties

11. The Trial Chamber notes that the parties agree on two points: the admission of Milinfosum No. 170 (Exhibit B attached to the Motion) as Defence evidence and the possibility of calling Mr. Watters again as a Prosecution witness. This further appearance would resolve the alternative issue of striking the excerpts of Colonel Watters' testimony which are viewed as hostile toward the accused.

12. The remaining point of contention relates to the scope of the Prosecution's obligation to disclose exculpatory evidence pursuant to Rule 68 of the Rules which states:

"The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence".

13. The Tribunal has previously been called upon to deal with the issue of disclosure. In particular, seised of a Defence Motion to compel the production of discovery materials filed on 26 November 1996, this Trial Chamber handed down a Decision on the motion to compel the production of discovery materials on 27 January 1997 (hereinafter "the Decision").

14. In that Decision, the Trial Chamber stated that the Prosecution bore sole responsibility for disclosing to the Defence the evidence which tends to suggest the innocence or mitigate the guilt of the accused and that it did so under its own responsibility and under the supervision of the Trial Chamber which, in case of an established failure to comply, would have to draw all the

consequences, particularly at trial (the Decision, paragraph 50). In respect of the scope of this obligation, the Trial Chamber added:

"If the Prosecution fulfills its above indicated obligations but the Defence considers that evidence other than that disclosed might prove exculpatory for the accused and was in the possession of the Office of the Prosecutor, it must submit to the Trial Chamber all prima facie proofs tending to make it likely that the evidence is exculpatory and was in the Prosecutor's possession. Should it not present this prima facie proof to the Trial Chamber, the Defence will not be granted authorisation to have the evidence disclosed."

15. The argument which is the subject of this motion touches on the same issue as the foregoing hypothesis, that is, the one which allegedly demonstrates a misunderstanding as to whether some of the evidence is of an exculpatory nature, after an initial disclosure by the Prosecutor pursuant to Rule 68 of the Rules. And, beyond determining whether the excerpt in question is exculpatory in nature, in the end the question amounts to the following: Is the Prosecutor, in addition to the general and positive obligation of Rule 68, obliged to disclose the entire documents from which exculpatory evidence is extracted, or may the Prosecutor extract only the said evidence for disclosure to the Defence?

16. The proceedings before the Tribunal are supported by the principles of an adversarial system and a balanced trial. According to the aforementioned Decision, it is, of course, the responsibility of the Prosecution to disclose all potentially exculpatory evidence. In this view, an established extraction of the said evidence from its context would not, in principle, be conducive to a full understanding of the text nor permit one to measure its full scope. However, in the case at hand, the evidence which the Defence accuses the Prosecution of having extracted from Milinfosum No. 170 constitutes a cohesive whole which is distinct from the remainder of the text. Its extraction does not hinder the understanding of the full message. The Prosecution moreover remains the master of its own strategy and it is under no obligation to question a witness on an entire document about which the witness allegedly had or might have had knowledge.

17. Having said this, the Defence motion makes it necessary for the Trial Chamber to assess the nature of the passages extracted by the Prosecutor from Milinfosum No. 170. In this regard, the Trial Chamber notes two outstanding aspects. First, the passages of Milinfosum No. 170 disclosed to the Defence (Exhibit A attached to the Motion) clearly indicate the existence of a cease-fire agreement signed by the accused on 18 April 1993. This necessarily implies that, for such an agreement to have been signed, local level discussions had taken place. Second, in addition, according to the text, it also appears that the accused allegedly received "orders from the Chief of Staff of the HVO in Herceg-Bosna".¹

18. To be sure, the main passage in Milinfosum No. 170, which the Defence accuses the Prosecutor of not having disclosed, states somewhat the circumstances in which the cease-fire agreement was allegedly implemented at the local level. However, this precision seems to be of little significance because the details on the negotiation process of the agreement do not seem indispensable for the Defence to use a cease-fire agreement, whose existence was duly disclosed by the Prosecutor. In all, the Defence had sufficient evidence necessary for preparing the cross-examination of Colonel Watters and it cannot be maintained that the Prosecutor violated Rule 68 of the Rules.

19. In addition, although the Trial Chamber appreciates the concern of the Defence in respect of the legitimate interests of the accused, it is nonetheless of the opinion that a full disclosure of all the Milinfosums - until now disclosed in excerpt form - would be unjustified and excessive. First, as shown above, one cannot speak of "repeated violations" of Rule 68 of the Rules. The reservations allowed in respect of this disclosure would be limited to the form of the said disclosure insofar as if it were to be taken out of context, the exculpatory evidence could not be used effectively by the Defence. Therefore the Trial Chamber, using its powers of supervision over disclosure, asks the Prosecutor to verify the Milinfosums in its possession and, possibly, to disclose to the Defence sufficiently cohesive, understandable and usable versions of exculpatory evidence contained in the 63 Milinfosums identified by the Defence.

20. Furthermore, by expressly restricting itself to Rule 68 of the Rules, the Defence, while requesting such broad access to Prosecution documentation, is avoiding the reciprocal obligation which it would have pursuant to Rules 66 and 67 of the Rules. Acceding to its request without limitations would consequently disturb the balance of the trial, particularly since such a disclosure would manifestly occur beyond the strict requirements of Rule 68 which requires the disclosure of exculpatory "evidence" and not all or an entire section of the Prosecutor's documentation. Furthermore, the Prosecution must be able to redact from the documents it discloses the passages which are confidential and constitute neither incriminating nor exculpatory evidence within the meaning of Rule 68.

21. All these considerations lead the Trial Chamber to deem that the Prosecutor's obligation is, in part and of necessity, tinged with subjectivity, which also leads the Judges to presume that the Office of the Prosecutor has acted in good faith. As in the present case, and as acknowledged in principle in its aforementioned decision of 27 January 1997, the Trial Chamber alone shall determine any established violations, possible sanctions and, lastly, the consequences to be drawn at the time of trial as regards the probative value of the evidence.

III. DISPOSITION

For the foregoing reasons,

Ruling *inter partes* and in public,

THE TRIAL CHAMBER having considered the motion filed by the Defence and,

PURSUANT TO RULE 54 of the Rules of Procedure and Evidence of the Tribunal,

NOTES the agreement of the parties to the admission of Exhibit B attached to the Motion and filed under seal,

NOTES also the agreement of the parties to the possibility of calling Colonel Brian Watters back to the witness stand, so that the Defence may resume its cross-examination on the passage omitted from Milinfosum No. 170,

REQUESTS the Registrar to include Exhibit B attached to the Motion among the exhibits,

ORDERS the Prosecution to have Colonel Watters appear again within a relatively short period of time and within the time it has been allotted by the Trial Chamber for the presentation of its evidence,

ORDERS the Prosecution to examine the Milinfosums previously produced in redacted form in order to be certain that it did not fail to disclose to the Defence exculpatory evidence falling within the framework of Rule 68,

STATES that, in cases where there is additional evidence to disclose, such disclosure should be conducted in sufficiently cohesive versions; that, furthermore, the Prosecutor shall especially avoid taking the said evidence completely out of context so as to facilitate their use by the Defence of the accused; and that a report on this examination and the possible disclosure shall be submitted to the Trial Chamber and to the Defence no later than 30 June 1998.

DISMISSES the Defence request relating to the full disclosure of all British Battalion Military Information Summaries ("the Milinfosums").

Done in French and English, the French version being authoritative.

(signed)

Claude Jorda
Presiding Judge of the Trial Chamber

Done this twenty-ninth day of April 1998
At The Hague,
The Netherlands

(Seal of the Tribunal)

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- 1. See Exhibit A attached to the Motion

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IN TRIAL CHAMBER II

Before: Judge David Hunt, Pre-Trial Judge

Registrar: Dorothee de Sampayo Garrido-Nijgh

Decision of: 1 November 1999

PROSECUTOR

v

Milorad KRNOJELAC

**DECISION ON MOTION BY PROSECUTION TO MODIFY
ORDER FOR COMPLIANCE WITH RULE 68**

The Office of the Prosecutor:

**Mr Dirk Ryneveld
Ms Peggy Kuo
Ms Hildegard Uertz-Retzlaff**

Counsel for the Accused:

**Mr Mihajlo Bakrac
Mr Miroslav Vasic**

1. At the Status Conference held on 14 September last, I informed the prosecution that, because there had been a number of problems in trials recently with its compliance with the obligations imposed by Rule 68 of the Rules of Procedure and Evidence, I proposed to ensure compliance in this particular trial by requiring someone such as the case manager to take responsibility for saying that there had been a complete search for the material to which Rule 68 applies. I said at the time that it would be like an affidavit of discovery as it is known in common law systems.

2. I then proposed that the following orders be made:

1. The prosecution is to comply, on or before 15 November 1999, with its obligation pursuant to Rule 68 of the Rule and Procedure and Evidence to disclose to the defence the existence of evidence known to it:

(a) which in any way tends to suggest the innocence of, or to mitigate the guilt of, the accused, or

(b) which may affect the credibility of the prosecution evidence.

The expression "evidence" is intended to include any material which may put the

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accused on notice that material exists which may assist him in his defence, and it is not limited to material which is itself admissible in evidence.

2. On or before that date, the prosecution is to file an affidavit of its case manager for this case, sworn in accordance with the law and procedure of the State which such affidavit is signed, in which he or she testifies:

(a) that a full search has been conducted throughout the materials in the possession of the prosecution or otherwise within its knowledge for the existence of such evidence; and

(b) that he or she is aware of the continuing nature of the obligation pursuant to Rule 68.

3. The response by the prosecution at the Status Conference was two fold. First, it was suggested that the team analyst, as the person most intimately involved in assembling the material and who is employed on a professional level, would be the person more appropriately required to sign the affidavit than the case manager. Secondly, clarification was sought in relation to the swearing of the affidavit.

4. I accepted the change in the identity of the officer to swear the affidavit, and pointed out that the wording relating to the swearing was taken from Rule 94ter. The orders were then made.

5. Following the Status Conference, the prosecution filed a Motion seeking a modification of the requirement that an affidavit be sworn. A number of submissions have been made.

6. One submission is that Rule 94ter is inapplicable. It was, however, never suggested that it is. It was only the wording relating to the manner in which an affidavit is to be sworn which was adopted. It has been adopted in other cases as well, as a convenient form in which evidence may be provided.¹

7. A second submission was that the Trial Chamber should be prepared to accept as sufficient the assurance of counsel charged with the responsibility of conducting the trial. Such assurances have unfortunately proved to be insufficient in the trials where problems relating to compliance with Rule 68 have arisen before. Such problems would appear to arise mainly because there are so many people involved in the prosecution team that there is no *one* person upon whom the responsibility rests and who can genuinely give such an assurance from personal knowledge after taking the steps necessary to ensure its accuracy.

8. A third submission was that it was inappropriate that a junior member of the team such as a case manager or an analyst should swear such an affidavit. For the reason already stated, it is precisely such a person who would be expected to have the personal knowledge in order to do so. The suggestion that it be the analyst, who was said to be the one person with the most intimate knowledge of the material in the possession of the prosecution or otherwise within its knowledge, was made by the prosecution itself.

9. A fourth submission was that, if the intention in requiring an affidavit was that greater reliance may be placed on the assertion of compliance because of the penal consequences provided under the relevant State law for false swearing, the immunity of the prosecution staff against legal process in respect of words spoken or written and all acts performed by them in their official capacity would negate such an objective.² With all due respect, the objective was made clear at the time. It was to impose some type of additional onus on the prosecution to ensure compliance with the rule, so that one person would take responsibility for giving such an assurance. Having to swear an affidavit is an effective way of focussing the mind of the deponent upon his or her responsibilities. The affidavit was to be filed in the Tribunal, and was to be a practical way of avoiding that person having to give

oral evidence in the interlocutory proceedings under solemn declaration in accordance with Rule 90.³

10. A fifth submission was that there is no provision in The Netherlands for swearing affidavits for use in legal proceedings. This has now become apparent. There must nevertheless be some additional onus placed upon the prosecution to ensure compliance with the rule, as the experience in other cases has shown is necessary. It is suggested by the prosecution that it merely provide –

[...] a signed Report detailing the specific steps taken and the efforts made by the prosecution to comply with its ongoing obligations under Rule 68.

Insofar as this proposal was intended to be no more than an assurance by counsel that Rule 68 has been complied with, I would not accept it. The "signed Report" must be compiled by a person within the prosecution team who can, from personal knowledge, give the assurances which must presently be given by way of affidavit. It is a matter for the prosecution to nominate the appropriate person to do so, but the person who signs the report will have to identify his or her knowledge of that material which enables him or her to give those assurances. The second order made on 14 September will be varied accordingly. In the light of the statement by counsel at the Status Conference that the analyst on the team is the one with the most intimate knowledge of the material in the possession of the prosecution or otherwise within its knowledge, if the person who signs the report is other than the analyst, I would expect this identification to be made in some detail.

11. The orders are now in the following terms:

1. The prosecution is to comply, on or before 15 November 1999, with its obligation pursuant to Rule 68 of the Rule and Procedure and Evidence to disclose to the defence the existence of evidence known to it:

(a) which in any way tends to suggest the innocence of, or to mitigate the guilt of, the accused, or

(b) which may affect the credibility of the prosecution evidence.

The expression "evidence" is intended to include any material which may put the accused on notice that material exists which may assist him in his defence, and it is not limited to material which is itself admissible in evidence.

2. On or before that date, the prosecution is to file a signed report by a member of its team for this case in which he or she certifies:

(a) that a full search has been conducted throughout the materials in the possession of the prosecution or otherwise within its knowledge for the existence of such evidence; and

(b) that he or she is aware of the continuing nature of the obligation pursuant to Rule 68.

The member of the team who signs the report is to identify in the report his or her knowledge of that material which enables him or her to so certify.

Dated this 1st day of November 1999,
At The Hague,
The Netherlands.

Judge David Hunt
Pre-Trial Judge

[Seal of the Tribunal]

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1. See for example, *Prosecutor v Delalic*, IT-96-21-A, Decision on Motion by Esad Landžo to Preserve and Provide Evidence, 22 April 1999, at p 4.
 2. Such an immunity is provided to the prosecution staff by Article V, Section 18, of the 1946 Convention on the Privileges and Immunities of the United Nations, made applicable to them by Article 30.3 of the Tribunal's Statute, but it is subject to waiver by the Secretary General of the United Nations.
 3. I note that Rule 91 ("False Testimony under Solemn Declaration") is not applicable in relation to affidavit evidence given in accordance with Rule 94^{ter}, but sanctions relating to false testimony by the deponent played no part in making the order.

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IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding

Judge Elizabeth Odio Benito

Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 24 June 1997

PROSECUTOR

v.

**ZEJNIL DELALIC
ZDRAVKO MUCIC, also known as "Pavo"
HAZIM DELIC
ESAD LANDZO, also known as "Zenga"**

**DECISION ON THE REQUEST OF THE ACCUSED HAZIM DELIC PURSUANT TO
RULE 68 FOR EXCULPATORY INFORMATION**

The Office of the Prosecutor:

Mr. Eric Ostberg Mr. Giuliano Turone

Ms. Teresa McHenry Ms. Elles van Dusschoten

Counsel for the Accused:

Ms. Edina Residovic, Mr. Ekrem Galijatovic, Mr. Eugene O'Sullivan, for Zejnir Delalic

Mr. Zeljko Olujic, Mr. Michael Greaves, for Zdravko Mucic

Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic

Mr. John Ackerman, Ms. Cynthia McMurrey, for Esad Landzo

I. INTRODUCTION

Pending before this Trial Chamber of the International Criminal 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") is a Request Pursuant to

Rule 68 of the Rules of Procedure and Evidence of the International Tribunal (the "Rules") for Exculpatory Information, filed by the Defence for Hazim Delic ("the Defence") on 21 April 1997 (Official Record at Registry Page ("RP") D 3385 - D 3392) ("the Request").

The Office of the Prosecutor ("the Prosecution") filed a Response to Hazim Delic's Request Pursuant to Rule 68 for Exculpatory Information ("the Response") on 2 May 1997 (RP D 3511 - D 3526). On 15 May 1997, both the Prosecution and the Defence ("the Parties") argued their positions orally before the Trial Chamber.

The Trial Chamber, having considered the written submissions and oral pleadings of the Parties, Hereby issues its decision.

II. DISCUSSION

1. The Defence

1. The Defence submits the Request pursuant to Rule 68 of the Rules. This reads:

Rule 68

The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

2. The Defence requests the Trial Chamber to order the Prosecution to provide copies of documents in its possession which tend to negate the guilt of the accused. In particular, the Defence requests access to and photocopies of all documents, which are in the possession or control of the Prosecution and contain evidence which show that: (1) the armed forces of the Republic of Serbia did not conduct their operations in accordance with the laws and customs of war; (2) the forces of the Bosnian Serbs did not conduct their operations in accordance with the laws and customs of war; (3) the forces of the Bosnian Serbs were not commanded by a person responsible for his subordinates; (4) the forces of the Bosnian Serbs did not have a distinctive insignia visible at a distance; (5) the forces of the Bosnian Serbs did not carry arms openly (RP 3389).

3. The Defence argues that the Prosecution has continuously asserted that the people detained at the Celebici camp were prisoners of war within the meaning of Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 ("Geneva Convention on Prisoners of War"). According to the Defence, any evidence which tends to show that the detainees could not enjoy this status because the requirements set out in Article 4 of the Geneva Convention on Prisoners of War were not met, negates the guilt of the accused, and is therefore exculpatory information within the meaning of Rule 68 of the Rules. The Defence states that such information should, therefore, be disclosed to the Defence.

4. The Defence refers to the *Decision on Production of Discovery Materials* rendered by Trial Chamber I in the case of the *Prosecutor v. Tihomir Blaskic* (Prosecutor v. Tihomir Blaskic, No. IT-95-14-T, Decision on Production of Discovery Materials, 27 January 1997). According to the Defence, the Trial Chamber in that case required of the Defence a *prima facie* showing of the exculpatory nature of the evidence sought. If such a showing were made, the burden would then shift to the Prosecution to state whether it has the materials in its possession, whether they contain exculpatory information and whether it believes the information is protected from disclosure by Rule 66 (C) or some other provision of the Rules.

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5. The Defence asserts that, according to Article 4(A)(2) of the Geneva Convention on Prisoners of War, irregular armed forces are protected only if they comply with certain requirements, one of them being that these forces have conducted their operations in accordance with the laws and customs of war. Evidence in the hands of the Prosecution which demonstrates that Bosnian Serb forces, to which some of the detainees at the Celebici camp allegedly belonged, violated the laws and customs of war is exculpatory in the sense that it disproves one of the elements of the crime, the protected status of the victims. According to the Defence, the numerous indictments issued against the Bosnian Serbs by the Prosecutor show *prima facie* that the Prosecution possesses evidence of such violations of the laws and customs of war, committed by the Bosnian Serb forces.

6. The Defence argues that, if there are any problems of confidentiality impeding the disclosure of the requested information, the Trial Chamber should order that the evidence be produced under appropriate protective measures. Restricting the dissemination of the evidence, and requiring that the evidence be disclosed only in closed session are some measures suggested by the Defence.

2. The Prosecution

7. The Prosecution asserts that it has already provided the Defence with all the necessary and relevant information and that any additional information is completely irrelevant. The Prosecution believes that the Request should be dismissed, as the Defence has not established a *prima facie* case.

8. The Prosecution argues that, as a matter of law, it is not necessary to disclose any materials concerning the status of the victims as prisoners of war, as it is irrelevant for the applicability of the 1949 Geneva Conventions and Article 2 of the Statute of the International Tribunal. According to the Prosecution, the people detained at the Celebici camp were protected persons under the Geneva Conventions, either as prisoners of war or as civilians. The Prosecution asserts that it is, therefore, not necessary to evaluate at this moment the evidence of the status of the victims as prisoners of war.

9. Further, the Prosecution argues that in law, under the 1949 Geneva Conventions and the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, even if violations of the laws and customs of war were committed by Bosnian Serb forces or even by some of the victims in this case, this does not mean that the protection afforded to those persons as prisoners of war would be lost. The Prosecution adds that the irregular forces that were operating in the Konjic municipality did meet the conditions of the Geneva Convention on Prisoners of War as, in general, those forces were obeying the laws and customs of war. The Prosecution further considers that the conduct of other irregular forces outside of the Konjic region is completely irrelevant.

10. The Prosecution asserts that violations of the laws and customs of war can never be justified by prior violations of such laws and customs by the opposing party. It is, in the opinion of the Prosecution therefore, not necessary to consider any materials concerning the commission of violations of the laws and customs of war by the Yugoslav's People's Army (JNA), the army of the Federal Republic of Yugoslavia (Serbia and Montenegro) (VJ), the Bosnian Serb Army (VRS) or others.

11. Finally, the Prosecution argues that it has already disclosed all material in its possession as part of the full and open disclosure provided by the Prosecution throughout these proceedings. According to the Prosecution, the Defence has not made a *prima facie* showing that any information concerning any irregular forces operating outside of the Konjic municipality is relevant and exculpatory.

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III. ANALYSIS

12. Exculpatory material within the meaning of Rule 68 of the Rules is such material which is known to the Prosecutor and which is favourable to the accused in the sense that it tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. It is important for the exercise of the power to compel disclosure for the applicant to show that the Prosecutor knew of the existence of the material and that it is in his possession.

13. As both parties quite correctly indicated, the Defence is required to make a *prima facie* showing of the exculpatory nature of the information which it seeks from the Prosecution. This principle was stated clearly in the case of the *Prosecutor v. Tihomir Blaskic* (*Prosecutor v. Tihomir Blaskic*, IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997) ("*Blaskic Decision*"). In this case Trial Chamber I decided that the Defence "must submit to the Trial Chamber all *prima facie* proofs tending to make it likely that the evidence is exculpatory and is in the Prosecutor's possession" ("*Blaskic Decision*", para. 50). The first question before the Trial Chamber is, therefore, whether the Defence has succeeded in establishing, *prima facie*, the exculpatory nature of the materials sought.

14. For a correct appreciation of the Request, it is necessary to place it within the framework of the general duty of the Prosecution to disclose information under Rule 66 of the Rules. Rule 66 (B) provides for the disclosure of evidence in the custody or control of the Prosecutor which is material to the preparation of the Defence. In the *Blaskic Decision*, the Trial Chamber stated that evidence "which is material for the preparation of the Defence" necessarily includes evidence "which in any way tends to suggest the innocence or mitigate the guilt of the accused" (*Blaskic Decision*, para. 49). It is clear that information which is exculpatory will always be material for the preparation of the Defence. When deciding the *Motion by the accused Zejnil Delalic for the disclosure of evidence* (*Prosecutor v. Zejnil Delalic*, IT-96-21-T, Decision on Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996) ("*Delalic Decision*"), Trial Chamber II stated that "[t]he Defence has failed to identify specific material that the Prosecution has within its custody and control to which it has not given the Defence access. Given the absence of a specific identification of material evidence that the Defence alleges the Prosecution has withheld, it is inappropriate for the Trial Chamber to intervene at this time" (*Delalic Decision*, para. 10).

15. The Trial Chamber agrees with the position taken in both cases and firmly believes that any request for disclosure of information should clearly specify the material desired. The Request before the Trial Chamber fails to do so. It generally refers to all the evidence in the hands of the Office of the Prosecutor concerning the conduct of forces of the Republic of Serbia, the Bosnian Serbs and others. The Rules permitting disclosure of certain documents cannot be used freely as a means to obtain all information from the Prosecution and then subsequently to determine whether it can be used or not.

16. The Trial Chamber is not persuaded by the arguments of the Defence, stating that any information concerning possible violations by the Bosnian Serb troops or by other irregular forces outside the Konjic region can be considered as exculpatory. The Trial Chamber does not consider it opportune to enter into a discussion concerning the requirements that need to be met for someone to be considered a prisoner of war. This is a matter which will be considered by the Trial Chamber once all the evidence has been presented to it.

17. However, the Trial Chamber fails to see how information about possible violations of the laws and customs of war by certain armed forces might tend to suggest the innocence of the accused or mitigate his guilt. First, the Indictment against Hazim Delic charges him in various counts with a Grave Breach of the Geneva Conventions of 1949, punishable under articles 2 and 7(1) of the Statute of the International Tribunal. The Indictment does not at any time restrict the application of the 1949 Geneva Conventions to the Geneva Convention on Prisoners of War. Hence, the victims can be

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protected either as prisoners of war or as civilians, under the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention on the Protection of Civilians"). Any information showing that the victims perhaps cannot be considered as prisoners of war does not suggest the innocence of the accused, as these persons might well be protected under the Geneva Convention on the Protection of Civilians. Secondly, the Trial Chamber does not see how this information could mitigate the guilt of the accused. It is clear that prior violations of the laws and customs of war can never be considered as an excuse for later violations of such laws and customs. This would only lead to a further escalation of criminal violence.

18. The Trial Chamber believes, therefore, that the Defence has failed to indicate the specific material it regards as exculpatory and which should be disclosed pursuant to Rule 68. Moreover, the Defence has failed to show *prima facie* that the information it seeks to be disclosed is in actual fact exculpatory.

IV. DISPOSITION

THIS TRIAL CHAMBER,

For the foregoing reasons,

CONSIDERING RULE 68

PURSUANT TO RULE 54,

HEREBY DENIES the Request Pursuant to Rule 68 for Exculpatory Information.

Done in both English and French, the English text being authoritative.

Adolphus
Godwin
Karibi

-
Whyte

Presiding
Judge

Dated this twenty-fourth day of June 1997,

The Hague.

The Netherlands.

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[Seal
of
the
Tribunal]

Annex B – Correspondences



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SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

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Office of the Prosecutor
18 November 2003



Mr. James MacGuill
MacGuill & Company Solicitors
34 Charles St. west
Dublin, Ireland

Re: **The Prosecutor Against Allieu Kondewa, SCSL-2003-13-1**

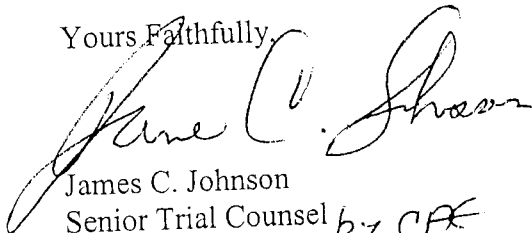
Dear Sir:

Pursuant to its continuing disclosure obligations under the Rules of Procedure and Evidence including Rules 66 and 68, the Prosecution hereby serves you with the attached witness statements and summaries of expected testimony. The Prosecution has also provided you with a detailed receipt itemizing the witness statements and summaries disclosed. Please review the receipt and material provided, sign the receipt and return it to the Prosecution as soon as possible. Please advise the Prosecution in writing of any missing witness statements or summaries of expected testimony.

This disclosure has been made subject to the "Orders for Immediate Protective Measures for Witnesses and Victims and Non-Public Disclosure" issued on 10 October 2003. The disclosed material is intended solely for your use in connection with the above-captioned case. The material is not to be disclosed to the public or the media, nor kept for personal use. Should you withdraw from representation of this Accused prior to the conclusion of proceedings in this case, please remit the disclosed materials to your replacement counsel or to the Defence team. At the conclusion of proceedings in this case, all material disclosed to the defence team by the Prosecution be remitted to the Registry for appropriate disposition.

Thank you for your cooperation.

Yours Faithfully,


James C. Johnson
Senior Trial Counsel *by CFX*

CC: Court Management (Case File)



SPECIAL COURT FOR SIERRA LEONE

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Office of the Prosecutor
18 March 2004

Mr Charles Margai
Banta Chambers
N01 Goderich Street
Freetown
Sierra Leone

Re: **The Prosecutor Against Samuel Hinga Norman (et al), SCSL-2004-14-PT**

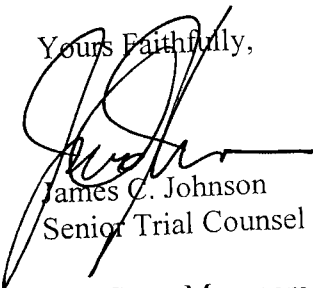
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Thank you for your cooperation.

Yours Faithfully,



James C. Johnson
Senior Trial Counsel

CC: Court Management (Case File)

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SPECIAL COURT FOR SIERRA LEONE

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**Office of the Prosecutor
1 April 2004**

Mr Charles Margai
Banta Chambers
N01 Goderich Street
Freetown
Sierra Leone

Re: The Prosecutor Against Samuel Hinga Norman (*et al*), SCSL-2004-14-PT

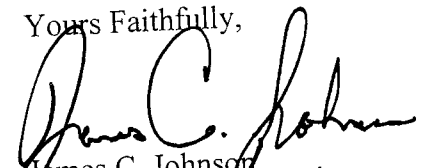
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Thank you for your cooperation.

Yours Faithfully,


James C. Johnson
Senior Trial Counsel *by CAC*

CC: Court Management (Case File)

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**Office of the Prosecutor
26 April 2004**

Mr Charles Margai
Banta Chambers
N01 Goderich Street
Freetown
Sierra Leone

Re: The Prosecutor Against Samuel Hinga Norman (*et al*), SCSL-2004-14-PT

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Yours Faithfully,

James C. Johnson
Senior Trial Counsel

CC: Court Management (Case File)