SCSL-2004-15-PT
(6513 - 6567)

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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

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

Registrar: Robin Vincent

Date filed: 9 June 2004

THE PROSECUTOR

Against

ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-2004-15-PT)

SESAY – PROSECUTION'S RESPONSE TO DEFENCE'S MOTION FOR DISCLOSURE PURSUANT TO RULE 66 AND RULE 68

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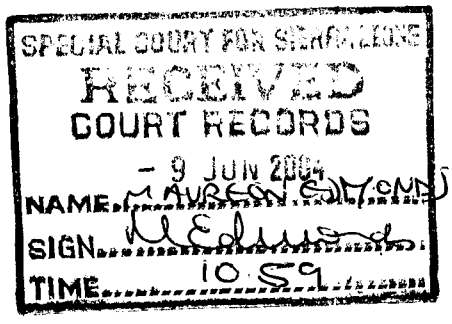

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I. BACKGROUND

1. On 28 May 2004, Counsel for Accused Sesay ("Accused") filed a Motion ("Defence Motion") requesting the Chambers to order the Prosecution to allow access to the Defence to evidence it does not seek to rely upon, in the alternative, that the Prosecution provide a schedule of the evidence it does not seek to rely upon. The Defence further requests the Trial Chamber to order the Prosecution to comply with its Rule 68 obligations and also to disclose the items listed in paragraph 17 of the Defence Motion pursuant to Rule 66(A)(ii). The Prosecution files this response to the Defence Motion.

II. DEFENCE SUBMISSIONS

2. The Defence argues that the Prosecution agreed during the Pre-trial Conference on 6 May 2004 to give the Defence access to the evidence which it had in its possession and which pursuant to Rule 66(A) (ii) it did not seek to rely upon and that the Defence did not pursue its request at the Pre-trial Conference for the said evidence based on the Prosecution's "clear commitments".

3. The Defence further contends that on 10 May 2004, the Defence requested the Prosecution to provide dates for the Defence to peruse the said evidence and that the Prosecution's reply to the same was that the Prosecution was willing to grant access to any non-disclosed material in its possession, in accordance with the provision of Rule 66(A). The Defence argues that in breach of the Prosecution's "explicit guarantee" it is now insisting that the Defence must show that the statements are material to the preparation of the Defence and that it must apply to the Trial Chamber for the same.The Defence disputes the Prosecution's assertion that it has served all the evidence which ought properly to fall within the ambit of Rule 68.

III. ARGUMENTS

A. PROCEDURAL MATTER

4. The Prosecution notes that the Defence in their Motion make a number of insinuations suggesting that the Prosecution has been untruthful and unfair.[1] As this response shows the same is not supported by the facts. The Prosecution notes that this is not the first time the Defence has made similar accusations and used language that would be inappropriate in any national jurisdictions even more so in front of an International Tribunal. The Prosecution draws the attention of the Chamber to these immoderate comments noting that the Chamber has on previous occasion admonished Counsel regarding the same.[2]
5. Further, the Prosecution notes that the Defence is seeking to turn the debate into a personal rather than a legal one. Throughout the Defence Motion, reference is made to the names of individuals within the Office of the Prosecutor. The Prosecution believes that for the serenity and professionalism of the arguments,

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[1] Some examples are as follows: in footnote 4, the Defence refers to the "machinations of the Prosecution"; in paragraph 6, it states that the Prosecution did not remain true to their stated guarantee; In paragraph 7(ii) it states that "It must be assumed that the experienced Prosecutors in this case were well aware of this jurisprudence and yet felt it appropriate to take no lesson or warning from it. Instead their approach, sadly oft repeated, was to seek to obtain as much advantage for themselves, irrespective of the rights of the accused to a fair and expeditious trial."

[2] *Prosecutor v Sam Hinga Norman et al*, SCSL-04-14-PT, Decision on *inter partes* Motion by Prosecution to freeze the account of the Accused Sam Hinga Norman at Union Trust Bank (SL) Ltd or at any other Bank in Sierra Leone, 19 April 2004, para 17.

personality and names of individuals should yield to more neutral terms such as "Prosecutions" and "Defence". Based on the principle that the Prosecution "is one and indivisible", there is no legitimate reason to quote the names of individual members of the Prosecution in a public motion in front of an international tribunal.

6. Furthermore, the Prosecution submits that the Defence Motion violates Article 4 (G) of the *Practice Direction on Filing Documents before the Special Court for Sierra Leone*, signed by the Registrar and entered into force on 27 February 2003 as amended on 1st June 2004 which states that the typeface must be "Times New Roman" font with 1.5 line spacing. The Defence Motion has a single line spacing. The Prosecution submits that it has to answer a motion which had it complied with the Practice Directions would have exceeded the 10 page limit.

B. The Prosecution's alleged statement at the Pre-trial Conference

7. The Defence states that the Prosecution made a clear and categorical statement at the Pre-trial conference on 6 May 2004 that it would give the Defence access to the evidence which it had in its possession and which pursuant to Rule 66(A)(ii) it did not seek to rely upon.
8. The Prosecution notes that there was no Pre-trial conference in respect of the said Accused on the said date. The Prosecution submits that to date there has only been one Pre-trial conference in the case involving the Accused and that the said conference was held on 29 April 2004 and not on 6 May 2004 as alleged.
9. Further, with reference to the transcript of the Pre-trial conference, the Prosecution categorically denies giving the said, or any, guarantee to the Defence. At the said conference, Counsel appearing for the Accused raised the issue of rule 66 (A)(ii) and submitted that the rule places the burden upon the Defence to show good cause. He argued that in the absence of any indication of the materials the Prosecution has it will be difficult for the Defence to show good cause.[3]

[3] See transcripts Sesay et al 29 April 2004 Gifty C. Harding – SCSL – Trial Chamber I – pages 59 -60 lines 21 – 37 and 1.

10. In response, the Prosecution pointed out that the rule was basically used in the ICTR to get copies of statements made by witnesses that were used in other cases. Prosecuting Counsel stated that the Defence was now asking the Prosecution to produce a witness list with summaries of what every witness interviewed by the Prosecution. Counsel for the Prosecution clearly stated that it was "a very serious task to ask and it's a very serious task to do." He further stated that he would completely disagree with this suggestion and indicated that the Defence will not be showing good cause. He then proceeded to note that the third part of Rule 66(A) (clearly referring to rule 66(A) (iii)) provides that on the application of the Defence the Prosecutor shall permit them to inspect documents and materials in his possession.[4]

11. Counsel for the Accused then proceeded to interpret what Counsel for the Prosecution had stated following which the Learned Presiding Judge noted as follows:

> "The difficulty, of course, Counsel, is that we are at a loss to be able to sort of agree with your position, although it sounds very attractive without some concrete situation. I mean, now, being asked to interpret the rule without a practical problem that you are coming with, I think when you come with a practical concrete case, then the Court may be able to apply its mind as to how the Rule should be interpreted in the interest of protecting the Defence, but at the same time, not encroaching upon the Prosecution's prerogative."

12. The Prosecution submits that to describe the submissions by the Prosecution at the Pre-trial conference as a "clear commitment" that it will give the Defence access to the evidence in its possession is erroneous. The Defence may have misconstrued the Prosecution's position. The Prosecution made it amply clear that Rule 66(A) was divided into three parts, the statement made regarding access to materials in the possession of the Prosecutor was clearly in reference to Rule 66(A) (iii) and not to Rule 66(A) (i) or (ii) as suggested by the Defence. The Prosecution further emphasised that this could only be done following an application by the Defence.

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[4] See transcripts Sesay et al 29 April 2004 Gifty C. Harding – SCSL – Trial Chamber I – page 61 lines 15 – 37.

13. The Prosecution notes further that in footnote 2 of the Motion, the Defence quotes a remark it made during the conference. This remark was not a quote from the transcript but "from memory". Further, in footnote 3, the Defence makes reference to a document which it says "is in Freetown and therefore not attached." The Defence also made an error as regards the date of the Pre-trial conference and the submissions of the Prosecution. It is glaringly clear from the said facts that the Defence prepared the said Motion without perusing the relevant and proper documents. The allegation made and the aspersion cast against the Prosecution were based on the flawed memory of Defence Counsel who obviously did not refresh the same.
14. As regards the letters exchanged between the Prosecution and the Defence, in paragraph 3 of the Motion the Defence states that it sent a letter to the Prosecution on 10th May 2004. The only letter received by the Prosecution from the Defence on this issue is dated 3rd May 2004. The Prosecution replied stating, inter alia, that it has complied, and is continuing to comply, with its disclosure obligations under Rules 66 and 68 and indicated that it is willing to grant the Defence access to any non-disclosed material in its possession in accordance with the provisions of Rule 66(A).

C. The Defence has failed to show "good cause" under Rule 66 (A) (ii).

15. In paragraph 7 of its Motion, the Defence requests that the Trial Chamber order the Prosecution to allow access to the evidence in line with its "explicit guarantee." It argued that at the Pre-trial conference the Prosecution brought all arguments regarding the interpretation of Rule 66(A)(ii) to a close by making the purported guarantee. The Defence further submits in paragraph 13 of the Motion that in the event the Trial Chamber is minded not to grant the request for an order, the Defence would seek an order that the Prosecution provide a schedule, with summaries, of statements in its possession which it does not seek to rely upon. It reiterates its submission that the Defence cannot show "good cause (or even "materiality")" without knowing what material exists.

16. As the records clearly show the Prosecution made no guarantee at the Pre-trial conference and as a result the Defence cannot request the Chamber to make an order based on a guarantee which was never given.
17. The Prosecution submits that Rule 66(A)(ii) applies to two sets of witnesses, namely, additional witnesses whom the Prosecutor intends to call to testify at the trial and those the Prosecution does not intend to call at the trial. As regards the former, the witnesses the Prosecutor intends to call to testify, the Prosecution submits that it has disclosed the statements of witnesses it intends to call and will continue to disclose to the Defence copies of any new or supplemental statements of these witnesses if the need arises.
18. As regards the witnesses the Prosecutor does not intend to call to testify at the trial, the rule states that this can only be done upon the Defence showing good cause. The Prosecution submits that Defence Motion does not show any good cause why the Trial Chamber should make such an order for copies of the statement of the witnesses the Prosecutor does not intend to call to be made available to it. In the absence of the Defence satisfying the prerequisite of "good cause", the Prosecution submits that its application must fail.
19. Further, as regards Rule 66(A) (ii), the Prosecution submits that the Defence request must be for a specific material or materials. In its request made under Rule 66(A)(ii), the Defence did not request any specific material. It makes a number of blanket requests in the Defence Motion without specifying any material. The Prosecution submits that the Defence is seeking to embark on a "fishing expedition" into the Prosecution's records.

D. The Defence must prima facie establish materiality under Rule 66(A)(iii).

20. In paragraph 17 of the Defence Motion, the Defence gives notice to the Prosecution of a request to permit the defence to inspect any books, documents, photographs and tangible objects in their custody or control material to the Defence. It then proceeds to enumerate 12 very broad and general requests for "all books, documents, photographs and tangible objects."

21. The Prosecution notes that in *Celebici*[5] the ICTY Trial Chamber established, with relation to the extent of the Prosecution's disclosure obligations under Rule 66(B) of the ICTY Rules, that "Rule 66(B) imposes on the Prosecutor the responsibility of making the initial determination of materiality of evidence within its possession and if disputed, requires the Defence to specifically identify evidence material to the preparation of the Defence that is being withheld by the Prosecutor." The Prosecution submits that same applies under our rules.
22. The Prosecution submits that it has disclosed materials within its possession to the Defence. Based on the Defence Motion, the Defence clearly disputes the Prosecution's determination. The Prosecution submits that the burden shifts to the Defence to "specifically identify evidence material to the preparation of the Defence that is being withheld by the Prosecutor." In *Prosecutor v. Ndayambaje*[6] the Trial Chamber found that the Defence must prima facie establish materiality.
23. The Defence in their Motion merely give notice to the Prosecution and state that the general materials listed in its Motion are "material" to the defence. It does not in its Motion show how the same is material to the defence other than just assert the same. The Prosecution submits that this is wholly insufficient and urges the Chamber to refuse the Defence request.
24. In addition to materiality, the Prosecution submits that the Defence must specify the items required and not simply embark on a "fishing expedition." In *Celebici*, the ICTY Trial Chamber denied the Defence motion for discovery under Rule 66(B), since it found 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."[7]
25. In *Kajelijeli*, the ICTR reiterated the requirement that the Defence identify the requested items as 'material' to its case, and show that these items are in the

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[5] *Prosecutor v. Delalic*, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996, concluding paragraph.
[6] *Prosecutor v. Ndayambaje*, ICTR-96-8-T, Decision on the Defence Motion for Disclosure, 25 September 2001, para. 11.
[7] para. 10.

possession of the Prosecution.[8] Similarly, in *Celebici*,[9] the Chamber pointed out that "the Defence has noted its desire to have access to all documents and other objects with the Prosecution's custody and control having to do with the accused or *Celebici* camp on the basis that they are all material to its preparation. In its response to the Motion, the Prosecution indicated that it has fully complied with the provisions of Rule 66 and intends to continue to do so. The 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."

26. The Prosecution submits that the Defence has not only failed to satisfy the materiality requirement, it has also failed to specify the items requested.

E. The Prosecution has complied and will continue to comply with its Rule 68 obligations

27. In paragraph 11 of the Defence Motion, the Defence states that it does not accept that the Prosecution has served all the evidence in its possession which ought properly to fall within the ambit of Rule 68. It states that the investigations conducted thus far on its behalf suggests that "there are not an inconsiderable number of witnesses whose evidence would be wholly exculpatory" of the Accused. The Defence does not provide the Chambers with the findings of its investigations or any evidence to support its assertion.

28. The Defence further argues that the failure by the Prosecution to respond to the request to facilitate arrangements to allow the Defence access has done little to provide reassurance to the Defence. It then invites the Chamber to exercise a supervisory role in relation to Rule 68 disclosure and requests the Chamber to order the Prosecution comply with its obligations under Rule 68. It also request

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[8] *Prosecutor v. Kajelijeli* ICTR-98-44A-T, Decision on Defence Motion seeking to interview Prosecutor's witnesses or alternatively to be provided with a Bill of Particulars" 12 March 2001 para 11. Further, the ICTR Appeals Chamber in *Akayesu* emphasized that decisions on whether certain items should be disclosed, should be made by the Trial Chamber on a case by case basis.

[9] In *Prosecutor v. Delalic et al*, Decision on Motion by the Accused Zejnil Delalic for the Disclosure of Evidence" 26 September 1996 para 10.

the Chamber to order the Prosecution to file a report signed by a member of its team certifying that a full search has been conducted throughout the materials in the possession or within the knowledge of the Prosecution and that the Prosecution is aware of the continuing nature of its Rule 68 obligations.

29. The Prosecution submits that Defence request is unsubstantiated and based entire on suppositions, speculations and suspicions. With respect, this Honourable Chamber does not decide matters on this basis. In *Prosecutor v Blaskic*[10] the ICTY Trial Chamber commenting on the scope of the Prosecutor's obligation to disclose exculpatory evidence stated that

> "(I)f the Prosecution fulfils 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."

30. The Prosecution submits that the Defence have not specified the evidence requested, they have produced no evidence to show that the Prosecution has any exculpatory evidence[11] and have failed to show *prima facie* evidence to indicate that the evidence is exculpatory. Consequently, the Prosecution urges the Chamber to dismiss the Defence Motion.

31. Further, in *Blaskic*[12] the Chamber further held that the Prosecutor's obligation is in part and of necessity tinged with subjectivity and as a result it would presume that the Office of the Prosecutor acted in good faith. The Prosecution urges the Chamber to exercise a similar presumption and until the same is rebutted, if at all, not to grant the Defence Motion.

32. As regards the Defence request that the Chamber orders the Prosecution to file a report signed by a member of its team certifying that a full search has been

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[10] *The Prosecutor v Blaskic*, "Decision on the Defence Motion for 'Sanctions for the Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence' 29 April 1998 para 14.

[11] In *Prosecutor v. Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admission of Guilt of Witnesses Y, Z, and AA, 8 June 2000, the ICTR Trial Chamber held that the obligation on the Prosecutor under Rule 68 will be effective only when it is shown that the Prosecutor is in actual custody, possession or has control of the said evidence.

[12] Para 21.

conducted, the Prosecution submitted that this order was made by the Judge following the "number of problems in trials recently with its compliance with the obligations imposed by Rule 68 of the Rules." The Prosecution submits that there has been no problem or violation of its Rule 68 obligations. Even if there had been problems in relation to the same, the Prosecution urges that Chamber to follow the Decision in *Prosecutor v Blaskic*[13] in which it was held that a "sanctions approach" to non-compliance by the Prosecutor was not appropriate.

III. CONCLUSION

33. The Prosecution submits that under the rules it has an obligation to provide the Defence with the statements of all the witnesses it intends to call to testify and a continuing obligation to disclose exculpatory evidence under rule 68. The Defence is now requesting the Prosecution to provide it with a schedule, with summaries, of statements in its possession which it does not seek to rely upon. The Prosecution submits that there must be equality between the parties in the preparation for and conduct of trial and that granting the Defence request will impose a disproportionate and inequitable burden on the Prosecution. It further argues that the same is a clear ploy by the Defence to delay the commencement of the proceedings.
34. For the foregoing reasons the Prosecution humbly urges the Trial Chamber to dismiss the Defence Motion in its entirety.

Freetown, 8 June 2004

For the Prosecution,

Luc Cote
Chief of Prosecution

Robert Petit
Senior Trial Counsel

[13] *The Prosecutor v Blaskic*, "Decision on the Defence Motion for Sanctions for the Prosecutor's Continuing Violations of Rule 68" 28 September 1998 para 13.

Prosecution's Index of Authorites

1. *Prosecutor v. Delalic*, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996.

2. *Prosecutor v. Ndayambaje*, ICTR-96-8-T, Decision on the Defence Motion for Disclosure, 25 September 2001.

3. *Prosecutor v Blaskic*, "Decision on the Defence Motion for 'Sanctions for the Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence' 29 April 1998.

4. *Prosecutor v. Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admission of Guilt of Witnesses Y, Z, and AA, 8 June 2000.

5. *Prosecutor v Blaskic*, "Decision on the Defence Motion for Sanctions for the Prosecutor's Continuing Violations of Rule 68" 28 September 1998.

6. *Prosecutor v. Kajelijeli* ICTR-98-44A-T, Decision on Defence Motion seeking to interview Prosecutor's witnesses or alternatively to be provided with a Bill of Particulars" 12 March 2001

7. Prosecution reply to Defence letter dated 19 May 2004.

8. Transcripts, Sesay et al, 29 April 2004 Gifty C. Harding – SCSL – Trial Chamber I – pages 59 -61

ANNEX 1

Prosecutor v. Delalic, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996.

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IN THE TRIAL CHAMBER

Before: Judge Gabrielle Kirk McDonald, Presiding

Judge Ninian Stephen

Judge Lal C. Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 26 September 1996

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON THE MOTION BY THE ACCUSED ZEJNIL DELALIC FOR THE DISCLOSURE OF EVIDENCE

The Office of the Prosecutor:

Mr. Eric Ostberg Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Residovic, for Zejnil Delalic

Mr. Branislav Tapuskovic, for Zdravko Mucic

Mr. Salih Karabdic, for Hazim Delic

Mr. Mustafa Brakovic, for Esad Landzo

I. INTRODUCTION

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Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 ("the International Tribunal") is a Motion for the Disclosure of Evidence ("the Motion") filed on behalf of the accused Zejnil Delalic on 10 June 1996, together with an oral request by counsel for the accused for a determination of the parameters of Sub-rule 66(B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). The Motion was responded to by the Office of the Prosecutor ("the Prosecution") on 28 June 1996. The parties presented oral arguments with regard to the Motion on 23 July 1996.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and the oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. The Pleadings

1. The request for guidelines from the Trial Chamber for the application of Rule 66 is a recurring one. The issue first arose during the status conference of 29 May 1996, during which counsel for Zejnil Delalic orally invoked Sub-rule 66(B) with a request that the Prosecution submit to the Defence all of the documents in its possession. Counsel for Zejnil Delalic at that time also acknowledged her responsibility to allow the Prosecution to review the evidence that the Defence intends to use at trial as required by Sub-rule 67(C). On 10 June 1996, counsel for Zejnil Delalic filed a written submission reiterating her request to be permitted to inspect all books, documents, statements and other tangible objects in the Prosecution's custody and control. The Prosecution responded on 28 June 1996 noting that, other than a specific request that had already been addressed by the Trial Chamber[1], counsel for Zejnil Delalic had not specified any evidence material to the preparation of the Defence that had not been supplied by the Prosecution. The Prosecution also noted that the accused was given a copy of the material which accompanied the request for confirmation of the indictment at the time of his initial appearance and, within three days, at the request of the accused, the Registrar translated all the supporting material into the language of the accused. The accused also received from the Prosecution a copy of the video-tape of his interview with its investigators and the transcript of the interview in Serbo-Croatian. An English transcript was to be completed on 28 June 1996. At a status conference held on 23 July 1996, the parties indicated that although they had engaged in extensive discussions about this and other pre-trial matters since the last status conference, questions remained regarding the limitation of evidence material to the preparation of the Defence and by whom the determination of materiality is to be made.

2. During a status conference held on 24 July 1996 with the Hazim Delic and Esad Landzo, Zejnil Delalic's co-accuseds, a similar issue arose. Counsel for Landzo and the Prosecution stated their different interpretations of Sub-rule 66(A) and indicated a desire to have judicial guidance with regard to Sub-rule 66(B). It has become clear to the Trial Chamber that, because of the opposing positions regarding the meaning of these Sub-rules, there is a general need for their interpretation.

B. Analysis

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3. This Decision is concerned with Rule 66, which is entitled *Disclosure by the Prosecutor.* It provides:

> (A) The Prosecutor shall make available to the defence, as soon as practicable after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused or from prosecution witnesses.
>
> (B) The Prosecutor shall on request, subject to Sub-rule (C), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.
>
> (C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose pursuant to Sub-rule (B). When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

A request by the Defence pursuant to Sub-rule 66(B) triggers Sub-rule (C) of Rule 67, which is entitled *Reciprocal Disclosure*:

> (C) If the defence makes a request pursuant to Sub-rule 66(B), the Prosecutor shall be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial.

4. On 24 July 1996, the Prosecution indicated that it does not read Sub-rule 66(A) as requiring the disclosure of every statement obtained from every person regardless of whether or not that person will be a witness. Instead, it construes Sub-rule 66(A) as requiring it to turn over all supporting material as well as prior statements of only those witnesses that the Prosecution intend[s] to call at trial. This interpretation is correct. Sub-rule 66(A) requires the disclosure of three types of material. The first, "copies of supporting material which accompanied the indictment", is very clear and does not leave room for debate. This proviso includes all of the supporting material, including any witness statements, that was given to the confirming Judge. The second type of material is "all prior statements obtained by the Prosecutor from the accused". This part of the Rule requires the Prosecution to disclose all statements of the accused that it has in its possession. This is a continuing obligation. The final component of this Sub-rule provides that the Prosecution must reveal to the Defence "all prior statements obtained by the Prosecutor . . . from prosecution witnesses." Accordingly, once the Prosecution makes a determination that it intends to call an individual as a witness at trial, it is obliged to disclose. "as soon as practicable", any statement taken prior to the time that the witness testifies at trial. This obligation on the Prosecution is also continuing and, as the Prosecution decides on each witness, it must disclose the prior statements of that witness. In summary, Sub-rule 66(A) requires the Prosecution to disclose to the Defence all supporting material that accompanied the indictment at confirmation, all prior statements obtained by the Prosecution from the accused, and all prior statements

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obtained by the Prosecution from those whom it intends to present at trial.

5. The Defence contends that there is confusion surrounding the meaning of Sub-rule 66(B), which provides that the Prosecution must, on the Defence's request, allow the Defence access to "any books, documents, photographs and tangible objects in his custody or control" that fit into three categories: (1) those that are material to the preparation of the defence; (2) those that are intended for use by the Prosecution as evidence at trial; and (3) those that were obtained from or belonged to the accused. At the status conference on 23 July 1996, the Trial Chamber indicated - with the parties' implicit agreement - that the Prosecution clearly has the responsibility to turn over for inspection all evidence in the third category. In regard to the second category, the Prosecution indicated that it was in the process of providing the Defence with material that it intends for use at trial, and agreed that this is a continuing obligation. Thus, the remaining dispute is concerned with, as it was framed at the status conference, the range of evidence that is "material to the preparation of the defence".

6. The Rules provide no guidance regarding the process of determining the materiality of evidence. However, Sub-rule 66(B) is substantially similar to Rule 16(a)(1)(C) of the United States' Federal Rules of Criminal Procedure, which provides:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belonged to the defendant.

Accordingly, interpretations of the United States rule as well as a review of its application will provide some guidance in analysing Sub-rule 66(A).

7. The significant jurisprudence in the United States federal courts on the scope of "materiality" demonstrates that it is generally accepted that to be material, the requested information must have "more than . . . [an] abstract logical relationship to the issues." *See, e.g. United States v. Ross*, 511 F.2d 757, 762 (U.S. Ct. App. 5th Cir.), *cert. denied* 423 U.S. 836 (U.S. Supreme Court 1975). The requested evidence must be "significantly helpful to an understanding of important inculpatory or exculpatory evidence"; it is material if there "is a strong indication that . . . it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.'" *United States v. Jackson,* 850 F. Supp. 1481, 1503 (U.S. Dist. Ct. D. Kan. 1994), *quoting United States v. Lloyd,* 992 F.2d 348, 351 (U.S. Ct. App. D.C. Cir. 1993). In the British system, the test of materiality was adopted by the Court of Appeal in *R v. Keane*, 99 CR. App. R.1, which similarly defines disclosable matter as

that which can be seen on a sensible appraisal by the prosecution;

(1) to be relevant or possibly relevant to an issue in the case;

(2) to raise or possibly raise a new issue whose existence is not

apparent from the evidence the prosecution proposes to use;

(3) to hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (1) or (2).

8. The Advisory Committee notes to the United States rule which reflect the discussion of the drafters of the rule are also instructive. The notes indicate that the first category - items "material to the preparation of the defence" - creates a residual classification that requires a preliminary showing of materiality. However, the Committee noted that some items are nearly always material without a special showing:

> [L]imiting the rule to situations in which the defendant can show that the evidence is material seems unwise. . . . For this reason subdivision (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant.

Advisory Committee's Notes on United States Fed. Rule Crim. Proc. 16, 18 U.S.C.A. p. 762. As with the United States rule, it is obvious that the Prosecution has the role of giving the evidence that falls within the second and third categories of Sub-rule 66(B) to the Defence on request. There is little room for speculation regarding that which the Prosecution intends to use at trial and that which was taken from the accused. As outlined above, however, this responsibility is not clearly delineated for those items deemed material to the preparation of the Defence, thus raising the issue of on whom the responsibility rests for making the determination of materiality. A United States District Court Judge stated the issue before this Trial Chamber quite appropriately: aptly framed the issue as follows:

> The phrase "material to the preparation of the defendant's defense" is one that causes practical problems on both sides of the discovery equation. On the one hand, a defendant's counsel cannot know in most cases the precise nature of all the documents that should be available, but the defence counsel is going to be hard pressed to specifically argue materiality of individual documents. On the other hand, it is equally clear that the discovery rules do not require "open file" discovery with the defendant being allowed to browse at will through the prosecution files. [citation omitted] Moreover, a good deal of inculpatory evidence will have already been turned over as evidence that the government will be using in its case-in-chief. The problem here is to define "materiality" in such a way that it does not merely duplicate other discovery information definitions. Rule 16(a)(1)(C) was not intended to impose a completely redundant discovery obligation.

United States v. Liquid Sugars, Inc. & Mooney, 158 F.R.D. 466 (U.S. Dist. Ct. E.D. Cal. 1994).

9. As articulated in the British rule (*see* ¶7 *supra*), as a threshold matter, the Prosecution is initially the party responsible for deciding what evidence it has in its possession that may be material to the preparation of the Defence, by virtue of the simple fact that it is the party with possession of the evidence. If the Defence believes that the Prosecution has withheld evidence material to its preparation, it can challenge the Prosecution by reasserting its right to the evidence. At that point, there are three alternatives for the Prosecution. The Prosecution can: (1) hand over the requested evidence; (2) deny that it has the requested evidence in its possession; or (3) admit that it has the evidence but refuse to allow the Defence to inspect it. Only if there is a dispute as to materiality should the Trial Chamber become involved and act as a referee between the parties in order to make this determination. When presenting this issue to the Trial Chamber, the Defence should be guided by the above definitions of materiality. The Defence, however, may not rely on conclusory allegations or a general description of the information, but must make a prima facie showing of materiality and that the requested evidence is in the custody or control of the Prosecution. *See United States v. Mandel,* 914 F.2d 1215, 1219 (9th Cir. 1990).

10. In this case, the Defence has noted its desire to have access to *all* documents and other objects within the Prosecution's custody and control having to do with the accused or Celebici camp on the basis that

they are all material to its preparation. In its response to the Motion, the Prosecution indicated that it has fully complied with the provisions of Rule 66 and intends to continue to do so. The 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.

11. The principles set out in this Decision shall apply to all disclosure to be made in this matter in respect of all four accused.

In conclusion, Rule 66(A) requires the Prosecution to provide the Defence with all material, including statements of all witnesses, that accompanied the Indictment when submitted to the confirming judge and all prior statements of the accused. Rule 66(B) imposes on the Prosecutor the responsibility of making the initial determination of materiality of evidence within its possession and if disputed, requires the Defence to specifically identify evidence material to the preparation of the Defence that is being withheld by the Prosecutor.

III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the Motion filed by the Defence and

PURSUANT TO RULE 54,

HEREBY DENIES THE MOTION for discovery under Sub-rule 66(B).

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

Gabrielle
Kirk
McDonald

Presiding
Judge

Dated this twenty-sixth day of September 1996

At The Hague

The Netherlands

[Seal of the Tribunal]

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1. The Defence requested from the Prosecution a copy of the interview of a co-accused, Zdravko Mucic. The Prosecution asked for a delay in the production, which the Defence refused. The dispute was then brought before the Trial Chamber, which granted a fourteen-day delay.

ANNEX 2

Prosecutor v. Ndayambaje, ICTR-96-8-T, Decision on the Defence Motion for Disclosure, 25 September 2001.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

OR: ENG

TRIAL CHAMBER II

Before:
Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registry: Adama Dieng

Date: 25 September 2001

The PROSECUTOR
v.
Élie NDAYAMBAJE

Case No. ICTR-96-8-T

DECISION ON THE DEFENCE MOTION FOR DISCLOSURE
Rules 66, 70(A) and 73 of the Rules

The Office of the Prosecutor:
Silvana Arbia
Japhet Mono
Jonathan Moses
Gregory Townsend
Adesola Adeboyejo
Manuel Bouwknecht

Counsel for Ndayambaje:
Pierre Boulé
Isabelle Lavoie

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II, composed of the Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson (the "Chamber");

BEING SEIZED of:

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(i) The "Requête en extrême urgence aux fins de communication des preuves" (the "Motion") filed by Counsel for Élie Ndayambaje on 19 April 2001;

(ii) The "Prosecutor's Response to Defence Request for further Disclosure" (the "Response") filed on 26 April 2001;

CONSIDERING that the Parties were informed that the Motion would be decided solely upon on the basis of their written briefs, pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal (the "Rules");

CONSIDERING that:

(i) In the Motion, the Defence requests disclosure of numerous documents and other materials;

(ii) According to the Response, the Prosecutor and Counsel for the Accused have entered into agreement as to most of the items requested for in the Defence Motion;

(iii) The requests for disclosure pertaining to these items are therefore moot;

(iv) In a letter dated 13 June 2001, a copy of which was provided to the Prosecutor, the Defence informed the Chamber that only Items a) i), c) (in part), d) and f) of their Motion remain in dispute;

CONSIDERING the relevant provisions of the Statute of the Tribunal (the "Statute") and the Rules, specifically Article 20 of the Statute and Rules 66(A)(i), 66(A)(ii), 66(B), 68, 70(A), and 73 of the Rules;

HAVING DELIBERATED,

a) Request for Item a) i) of the Motion: the full statements of specific witnesses, excerpts of which are included in the supporting material provided to the Accused

1. Pursuant to Rule 66 and 68 of the Rules, the Defence requests disclosure of the full statements of Prosecution witnesses FF, GK, GY, HE, LJ, LM, QH, QM, UA, ZB, ZC and ZD.

2. The Chamber recalls that Rule 66(A)(i) of the Rules provides for the compulsory disclosure to the Defence of supporting material to the Indictment, whereas Rule 66(A)(ii) provides for the compulsory disclosure of the statements of all witnesses whom the Prosecutor intends to call to testify at trial.

3. The Prosecutor submits that excerpts of the statements of the witnesses referred to by the Defence were part of the supporting material to the Accused's Indictment and that they have timely disclosed these excerpts among the other supporting material to the Accused. The Defence does not contest the Prosecutor's submission that they thus timely complied with Rule 66(A)(i) of the Rules.

4. The Prosecutor further submits that they do not intend to call those witnesses at trial. The Chamber agrees that only in such a case would they have had to provide the Defence with those witnesses' full statements, pursuant to Rule 66(A)(ii) of the Rules. Since the Defence does not contest the Prosecutor's submission, the Chamber dismisses the request for disclosure under Rule 66(A)(ii) of the Rules.

5. It is established in the jurisprudence of the Tribunal as well as in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (the "ICTY") that, pursuant to Rule 68 of the Rules, the Prosecutor is only to disclose any exculpatory material that is in her possession. It is also established that the Defence is to justify such request by *prima facie* establishing the exculpatory nature of the material requested (*See*, notably, *The Prosecutor v. Blaskić*, "Decision on the Production of Discovery Materials", Case No. IT-95-14-PT, 27 January 1997 (the "Blaskic Decision of 27 January 1997") at paras. 49-50, *The Prosecutor v. Delalic et al.*, "Decision on the Request by the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information", Case No. IT-96-21-T, 24 June 1997, at paras 12-14; *See* also, *The Prosecutor v. Nyiramasuhuko et al.*, "Decision on the Defence Motion for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and All Other Documents or Information Pertaining to the Judicial Proceedings in their Respect", Case No. ICTR-97-21-T, 18 September 2001, at paras. 14-17). There seems to be no dispute that the statements requested are in the possession of the Prosecutor, since the latter provided excerpts thereof in support of the Indictment. The Chamber however notes that, as the Prosecutor submits, no *prima facie* showing is made by the Defence in respect of the possible exculpatory nature of the statements requested. The Defence Motion is therefore dismissed under Rule 68 of the Rules.

b) Request for Item c): copies of 1,200 pages of the Belgian file

6. It follows from the Defence submissions that the Prosecutor allowed them to inspect the so-called 'Belgian file', compiled by the Belgian authorities in respect of the judicial proceedings against several individuals, including the Accused. This file comprises approximately 23,000 pages. The Defence is now requesting copies of 1,200 pages which they deem necessary for their preparation. The Prosecutor refuses to provide these copies.

7. The Chamber considers that the principle of a limited right for the Defence to receive copies of material which they deem to be material to the preparation of the defence upon inspection of the said material pursuant to Rule 66(B) of the Rules, is now firmly established in its jurisprudence (*See*, in this respect, *The Prosecutor v. Nsabimana and Nteziryayo*, Case No. ICTR-97-29-T, "Decision on the Defence Motions for Disclosure of Copies of the Prosecutor's Exhibits", 18 September 2001, wherein the Chamber, after an analysis of its jurisprudence, held: (1) that "[t]he Prosecution (...) has a limited obligation to provide the Defence with copies of items inspected pursuant to Rule 66(B) of the Rules" (at para. 14); (2) that "[a] request for copies of such items is to be addressed to the Prosecution, notably at the time of inspection or thereafter upon selection of specific materials which, in whole or in part, appear necessary for the defence of the accused" (at para. 13); and, (3) that: "[s]hould the Prosecution have been unable, despite its best efforts, to provide copies of all these items, the Defence may make copies of the remaining items").

8. The Chamber notes that the Defence requests copies of only 1,200 out of 23,000 pages, even though they acknowledge having not yet completed inspection of this voluminous file. Considering that the material requested obviously might be of interest to the Accused since he was one of the individuals concerned by the judicial proceedings in Belgium prior to his transfer to the Tribunal, the Chamber grants the Defence request, subject to the modalities stated above.

c) Request for Item d): the statements of Jean Kambanda pertaining to paragraph 6.36 of the Accused's Indictment

9. The Prosecutor submits that the items requested do not fall under Rule 66(A)(ii) of the Rules, since Jean Kambanda will not be called by her to testify at the Accused's trial. She further submits that she has no such obligation of disclosure pursuant to Rule 68 of the Rules, since the Defence makes no *prima facie* showing that these items might be exculpatory. The Chamber accepts the Prosecutor's submission

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that the Defence request is not warranted under Rules 66(A)(ii) and 68 of the Rules.

10. Rule 66(B) of the Rules however provides for the inspection of any books, documents, photographs and tangible objects in the Prosecutor's custody or control which fall into one of the three following categories: (1) those that are material to the preparation of the Defence, (2) those that are intended for use by the Prosecutor as evidence at trial, or (3) those that were obtained from or belonged to the accused. The Prosecutor is clearly under the obligation to permit the Defence inspection of all evidence in the second and third categories (*See*, in this respect, *The Prosecutor v. Delalic et al.*, Case No. IT-96-21, "Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence", ICTY Trial Chamber, 26 September 1996, at para. 5).

11. The Defence asserts that the statements of Jean Kambanda fall within the first category of items, namely, evidence that is material to their preparation. The Chamber recalls that "Rule 66(B) imposes on the Prosecutor the responsibility of making the initial determination of materiality of evidence within its possession and if disputed, requires the Defence to specifically identify evidence material to the preparation of the Defence that is being withheld by the Prosecutor" (*See*, the Delalic Decision of 26 September 1996, at para 11). In addition, the Chamber recalls that "[t]he appropriate legal procedure for the Defence to gain access to [Jean Kambanda's] statements is, pursuant to Rule 66(B), to request to the Prosecutor to permit the inspection. Resorting to the Chamber is permissible only if the request to the Prosecutor is unsuccessful" (*See*, *The Prosecutor v. Bagambiki*, "Decision on Bagambiki's Motion for Disclosure of the Guilty Pleas of Detained Witnesses and Statements by Jean Kambanda", Trial Chamber III, Case No. ICTR-99-46-T, 1 December 2000). The Prosecutor having denied to the Defence access to these statements, the Defence is now required to *prima facie* establish, as it moves the Trial Chamber, that their request is justified under Rule 66(B) of the Rules and, specifically, to satisfy the Chamber that the requested items are material to their preparation.

12. The Defence is not explicit in this regard. They however refer to the Accused's Indictment, where mention is made of the former Prime Minister of the 1994 Interim Rwandan Government, at paragraph 6.36. This paragraph reads:

> "In June 1994, while the massacres were continuing in the region, Jean Kambanda visited Muganza *commune* and met with Elie Ndayambaje, among others. By his presence and by not denouncing the massacres he observed, Jean Kambanda confirmed in the eyes of the people that the killings were condoned by the Government."

The Trial Chamber finds that such mention *prima facie* establishes the materiality, to the Defence of the Accused, of the passages of the statements of Jean Kambanda pertaining to this paragraph of the Accused's Indictment. The Chamber accordingly grants the Defence request for inspection of the said passages.

d) Request for Item f): the *questionnaires* of the Prosecutor

13. The Defence submit that they need disclosure of the *questionnaires* listing the questions asked to the Prosecutor's witnesses during their interview, since the said questions do not appear in the written statements of said witnesses as collected by the investigators and translated by the interpreters.

14. The Prosecutor submits that the questionnaires are covered by Rule 70(A) of the Rules, according to which "internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions".

15. The Chamber recalls that the ICTY Trial Chamber seized of the Blaskić Case held that "the notes of the investigators (...) must fall within the scope of Sub-rule 70(A) and not be subject of any disclosure or exchange" (*See*, the Blaskic Decision of 27 January 1997, at para. 40).

16. The Chamber notes that specific questions asked to particular prosecution witnesses at the time of collection of their statement, if any, should the concerned investigators have written them down and kept record thereof, would constitute notes of investigators falling under Rule 70(A) of the Rules. The Defence request is accordingly dismissed.

FOR THE ABOVE REASONS, THE TRIBUNAL

I. GRANTS, in part, the Defence Motion for Disclosure;

II. ORDERS the Prosecutor to provide the Defence for Ndayambaje within ten [10] days from the date of the instant Decision with the requested copies of 1200 pages of the Belgian files, subject to the modalities referred-to at para. 7 of this Decision;

III. ORDERS the Prosecutor to allow the Defence to inspect the statements of Jean Kambanda pertaining to paragraph 6.36 of the Accused's Indictment;

IV. DISMISSES all other Defence requests.

Arusha, 24 September 2001

William H. Sekule	Winston C. Matanzima Maqutu	Arlette Ramaroson
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

ANNEX 3

Prosecutor v Blaskic, "Decision on the Defence Motion for 'Sanctions for the Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence' 29 April 1998.

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IN THE TRIAL CHAMBER

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 Nobilo
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:

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> "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 Hadzihasanovic 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,

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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

ANNEX 4

Prosecutor v. Bagilishema, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admission of Guilt of Witnesses Y, Z, and AA, 8 June 2000.

6547

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER I

OR: ENG

Before:
Judge Erik Møse, Presiding
Judge Asoka de Z. Gunawardana
Judge Mehmet Güney

Decision of: 8 June 2000

THE PROSECUTOR
VERSUS
IGNACE BAGILISHEMA

Case No. ICTR-95-1A-T

DECISION ON THE REQUEST OF THE DEFENCE FOR AN ORDER FOR DISCLOSURE BY THE PROSECUTOR OF THE ADMISSIONS OF GUILT OF WITNESSES Y, Z, AND AA

The Office of the Prosecutor:

Ms Anywar Adong
Mr. Charles Adeogun Phillips
Mr. Wallace Kapaya

Counsel for the accused:

Mr. François Roux
Mr. Maroufa Diabira

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber I, composed of Judge Erik Møse, Presiding, Judge Asoka de Z. Gunawardana and Judge Mehmet Güney;

BEING SEIZED of a motion filed by the Defence on 20 April 2000, requesting that the Trial Chamber order the Prosecutor to disclose the admissions of guilt of witnesses Y, Z and AA, all of whom have

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testified in the present case;

HAVING RECEIVED on 10 May 2000 the response of the Prosecutor to the said motion;

HAVING HEARD the parties on 25 May 2000;

The Submissions of Parties

1. In the said motion of 20 April 2000, and supplemented by oral submissions during the hearing of 25 May 2000, the Defence is requesting the Chamber to order the Prosecutor to disclose to the Defence the confessions of three witnesses, Y, Z and AA, who testified for the Prosecution in this case. During their respective testimonies, each of these witnesses stated that they had confessed to the Rwandan authorities about their participation in events in Rwanda. According to the Defence, prior to the admission of guilt, Witness AA had written a letter to the State Prosecutor of Kibuye in which he directly implicated the accused Ignace Bagilishema.

2. Although the witnesses testified that they had put their admissions of guilt in writing, the Prosecutor did not present any such written confessions as evidence during their testimonies. The Defence contends that the Prosecutor must, obviously, either be in possession of the confessions, or must be in a position to obtain them. Reference is made to the Rwandan Organic Law of 30 August 1996, according to which confessions shall be recorded and signed by the person concerned (Article 6 (d)). Consequently, the Defence seeks an order, pursuant to Rule 68 of the Rules of Procedure and Evidence (the "Rules"), from the Chamber for the disclosure by the Prosecutor of such written confessions. The Defence deems such confessions to be necessary for the manifestation of the truth and for evaluating the credibility of the witnesses.

3. The Prosecutor in response argues that the motion should be dismissed. She is not in possession of the above written confessions. It is for the Defence to use the resources available to it to conduct its investigations. The Defence has failed to show how these confessions may suggest the innocence or mitigate the guilt of the accused. Moreover, the Prosecutor, by reference to transcripts of the testimonies of these witnesses, stated that the confessions of the witnesses were not exculpatory of the accused, and were merely limited to their personal involvement in the Rwandan massacres of 1994.

The Chamber

4. The legal basis of the Defence request is Rule 68 of the Rules:

" 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. "

5. This Rule carries two main elements. Firstly, the evidence must be known to the Prosecutor, and, secondly, it must in some way be exculpatory. The Chamber will first establish the meaning of the term 'known' ('dont il a connaissance').

6. The disclosure obligation under Rule 68 relates to "the existence of evidence known" to the Prosecutor. A literal interpretation might suggest that mere knowledge of exculpatory evidence in the hands of a third party would suffice to engage the responsibility of the Prosecutor under that provision. However, to adopt such a meaning, would, in the extreme, allow for countless motions to be filed with the sole intention of engaging the Prosecutor into investigations and disclosure of issues which the

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moving party considered were 'known' to the Prosecutor. This would not be in conformity with Article 15 of the Statute. Under that provision, the Prosecutor is responsible for investigations. She shall act independently and not receive instructions from any source.

7. The Chamber is inclined to equate 'known' to 'custody and control' or 'possession'. This wording is used in Rules 66 (B) and 67 (C) of the Rules, which pertain to the inspection by one party of documents, books, photographs and tangible objects of the other party. Thus the obligation on the Prosecutor to disclose possible exculpatory evidence would be effective only when the Prosecutor is in actual custody, possession, or has control of the said evidence. The Prosecutor cannot disclose that which she does not have.

8. This approach was favoured by the International Criminal Tribunal for the Former Yugoslavia, in its Decision on the Production of Discovery Materials in the case "The Prosecutor v. Thomir Blaškic" (Case No. IT-95-14-T), rendered on 27 January 1997, see in particular paragraphs 47 and 50.

9. In the present case, the Prosecutor has stated categorically that she is not in possession of the written confessions of witnesses Y, Z and AA, and the Defence has brought no evidence to the contrary. Thus the Chamber must dismiss the Rule 68 motion of the Defence.

Rule 98 Request by the Trial Chamber

10. Under Rule 98 the Chamber may, propriu motu, order either party to produce additional evidence. Having considered the facts and circumstances of this case, the Chamber is of the view that, for a better determination of the matters before it, the Prosecution is ordered to produce the written confessions of Prosecution witnesses Y, Z and AA. The Chamber is of the view that the said written confessions could be material in evaluating the credibility of the said Prosecution witnesses.

11. The Chamber hereby decides that the Prosecution should take the necessary steps to obtain the written confessions of witnesses Y, Z and AA. The Prosecution is directed to take such steps by 23 June 2000, and to forward the said written confessions to the Chamber.

FOR ALL THE ABOVE REASONS,

THE TRIBUNAL

DISMISSES the Rule 68 motion of the Defence for disclosure by the Prosecutor of the admissions of guilt of witnesses Y, Z, and AA.

ORDERS the Prosecutor, pursuant to Rule 98, to take the necessary steps, by 23 June 2000, to obtain the written confessions of witnesses Y, Z and AA, and to forward them to this Trial Chamber.

Signed in Arusha on 8 June 2000.

Erik Møse	Asoka de Z. Gunawardana	Mehmet Güney
Presiding Judge	Judge	Judge

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(Seal of the Tribunal)

ANNEX 5

Prosecutor v Blaskic, "Decision on the Defence Motion for Sanctions for the Prosecutor's Continuing Violations of Rule 68" 28 September 1998.

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IN THE TRIAL CHAMBER

Before: Judge Claude Jorda, Presiding

Judge Fouad Riad

Judge Mohamed Shahabuddeen

Registrar: Mr. Jean-Jacques Heintz, Deputy Registrar

Order of: 28 September 1998

THE PROSECUTOR

v.

TIHOMIR BLASKIC

DECISION ON THE DEFENCE MOTION FOR SANCTIONS FOR THE PROSECUTOR'S CONTINUING VIOLATION OF RULE 68

The Office of the Prosecutor:

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

Defence Counsel:

Mr. Anto Nobilo
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,

PURSUANT to Rules 54 and 68 of the Rules of Procedure and Evidence (hereinafter "the Rules");

NOTING the Defence Motion for sanctions for the Prosecutor's continuing violation of Rule 68, filed under seal on 10 July 1998, and the supporting material attached thereto (hereinafter "the Motion");

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NOTING the supplemental filing to the Defence Motion for sanctions for the Prosecutor's continuing violation of Rule 68, filed on 28 July 1998 (hereinafter "the Supplement");

NOTING the Prosecutor's confidential response to the Defence Motion and Supplement, dated 4 August 1998;

NOTING the Prosecutor Motion for seven days' advance disclosure of the name of the defence witnesses and defence witness statements, dated 9 July 1998 (hereinafter "the Prosecutor Motion of 9 July 1998");

NOTING the status conferences, held 24 August 1998 and 23 September 1998, at which the Trial Chamber heard the oral arguments of the parties;

CONSIDERING that the Prosecutor made several proposals designed to relieve the possible prejudice suffered by the Defence, as submitted in the Defence Motion;

CONSIDERING that, at the status conference of 24 August 1998, the Defence, while repeating its allegations, was not responsive to the proposals of the Prosecutor or to those of the Trial Chamber, but requested that the Prosecutor Motion of 9 July 1998 be dismissed as compensation;

CONSIDERING that the Trial Chamber deems that the possible violation by one party of its disclosure obligations in no way relieves the other party of its own disclosure obligations;

CONSIDERING that, at the status conference of 23 September 1998, the Defence again charged that the Prosecution had failed to comply with its obligations under Rule 68 of the Rules, *inter alia* that it did not disclose an exhibit, which it had obtained as part of another case pending before the Tribunal;

CONSIDERING, however, that, on that point, the Defence did not intend to seize the Trial Chamber as the matter stood;

CONSIDERING that, in general, the Trial Chamber deems that the possible violations of Rule 68 are governed less by a system of "sanctions" than by the Judges' definitive evaluation of the evidence presented by either of the parties, and the possibility which the opposing party will have had to contest it;

FOR THE FOREGOING REASONS

REJECTS the Defence Motion.

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

Done this twenty-eighth day of September 1998,

At The Hague

The Netherlands.

(Signed)

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Claude Jorda

Presiding Judge Trial Chamber I

[Seal of the Tribunal]

ANNEX 6

Prosecutor v. Kajelijeli ICTR-98-44A-T, Decision on Defence Motion seeking to interview Prosecutor's witnesses or alternatively to be provided with a Bill of Particulars" 12 March 2001

6556

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule
Designated by the Trial Chamber pursuant to Rule 73 of the Rules

Registry: John Kiyeyeu

Date: 12 March 2001

Juvénal KAJELIJELI
Case No. ICTR-98-44A-T

DECISION ON DEFENSE MOTION SEEKING TO INTERVIEW PROSECUTOR'S WITNESSES OR ALTERNATIVELY TO BE PROVIDED WITH A BILL OF PARTICULARS

The Office of the Prosecutor:
Ken Fleming
Ifeoma Ojemeni
Melinda Pollard

Counsel for the Accused:
Lennox Hinds

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The "Tribunal"),

JUDGE WILLIAM H. SEKULE, sitting as a single judge designated by the Trial Chamber to review this motion, pursuant to Rule 73 of the Rules of Procedure and Evidence (the "Rules"), on the basis of the written briefs filed by the Parties;

BEING SEIZED of the Defense's "Urgent Motion to Interview the Prosecutor's Witnesses or in the Alternative for Prosecutor to Provide a Bill of Particulars, pursuant to Rule 66(A) and 66(B) of the Rules, Dated 21 February 2001", (the "Motion") filed on 23 February 2001;

CONSIDERING the "Prosecutor's Response to Urgent Motion Dated February 21, 2001, by the Accused Juvénal Kajelijeli," (the "Prosecutor's Response") filed on 28 February 2001;

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CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules, particularly Rules 66(A) and 66(B) of the Rules.

SUBMISSIONS OF THE PARTIES

1. In its Motion, the Defense requests to interview the Prosecutor's witnesses, prior to trial. Alternatively, the Defense requests that the Prosecutor provide, pursuant to Rules 66(A) and (B) of the Rules, a Bill of Particulars with respect to the specified witness statements, as enumerated in the Motion. The Defense requests that the Prosecutor provides the relevant dates and times when certain witness witnessed the Accused at a determined place and a detailed account of particular instances where the witness placed the Accused at those determined places. Additionally, the Defense requests that the Prosecutor provides copies of the witness' interviews either in the form of original tape recording in Kinyarwanda or in the native language of the witness, and/ or transcripts of the tape recordings in the original language of the witness.

2. As regards the Defense's request for the provision of the Bill of Particulars, the Prosecutor submits that this request is provided for under American law in order to provide the Defense with more factual details with respect to the Indictment. This request is not used for evidentiary discovery, as provided for in the Bill of Particulars, as requested in the Motion and, in any case, this is not a practice provided for in the Statute, the Rules or the jurisprudence of the Tribunal.

3. The Prosecutor submits that the Defense's attempt to bring the request under Rule 66(A) and 66(B) of the Rules is an abuse of process. She further submits that the statements of the respective witnesses contain ample information that will enable the Defense to prepare its case and further facts that go into issues of evidence can be obtained when cross-examining witnesses at trial.

4. As regards the Defense request to interview the Prosecution witnesses, the Prosecutor recalls the Chamber's Order in the "Decision on the Prosecutor's Motion for Protective Measures for Witnesses," dated 7 July 2000. The Prosecutor, on this basis, submits that a request to interview Prosecution witnesses can only be granted if the Chamber is satisfied that such a request is reasonable, and also if the witness consents to the interview. The Prosecutor submits that such a request, in the present case, should not be granted in order to avoid harassment and intimidation of witnesses, and to guarantee the safety of the witnesses, prior to trial. However, the Prosecutor submits that if the request is granted, the interviews should be convened within the period of the disclosure of the un-redacted statements of the witnesses, in conformity with the said Order for Protective Measures for witnesses, which states that "[...] the Prosecutor disclose to the Defense the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness."

5. The Prosecutor concludes that the Motion should be dismissed as lacking merit and as being unfounded in law.

AFTER HAVING DELIBERATED

As regards the Defense Request to Interview Prosecution Witnesses or in the Alternative its Request for a Bill of Particulars

6. The Chamber notes that the Defense does not mention any provisions under the Statute nor the Rules on which it bases its request to interview witnesses prior to testimony at trial. It contends that its alternative request for a Bill of Particulars is based on Rules 66(A) and 66(B) of the Rules.

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Rule 66: Disclosure of materials by the Prosecutor

Subject to the Provisions of Rules 53 and 69;

(A) The Prosecutor shall disclose to the Defense:

(i) Within 30 days of the initial appearance of the accused copies of the supporting material, which accompanied the indictment when confirmation was sought, as well as all prior statements obtained by the Prosecutor from the accused.

(ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defense within a prescribed time

(B) At the request of the defense, the Prosecutor shall, subject to Sub-Rule (C), permit the defense to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defense, or are intended for use by the Prosecutor as evidence at trial or were obtained or belonged to the accused.

7. Neither Rules 66(A) or 66(B) of the Rules or any other provisions of the Statute provide for the Defense to interview witnesses prior to testimony at trial nor do they provide for a Bill of Particulars, as requested.

8. The Chamber recalls the provisions of Rule 89 of the Rules, specifically Sub-Rule (A), which provides that the rules of evidence set forth in Section 3 the Rules, shall govern the proceedings before the Chambers, and that the Chamber shall not be bound by national Rules of evidence. Sub-Rule (B) states that, in cases not otherwise provided for in Section 3 of the Rules, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

9. In the instant case, upon a careful consideration of the Parties' submissions, the Chamber notes that the practice and the Rules of the Tribunal do not provide for the interviewing of witnesses prior to testimony at trial, nor do they provide for the kind of discovery, by way of a Bill of Particulars, as requested for in the Motion. The Chamber is, therefore, of the view that there is no basis under the Statute, the Rules and the practice obtaining in the Tribunal to interview witnesses before they testify at trial or to provide a Bill of Particulars, as requested for in the Motion.

10. Furthermore, the Chamber considers that the particulars requested for can be raised, by the Defense, at trial in the course of the cross-examination of the witnesses. Moreover, the Chamber recalls the Decision of Trial Chamber I of the International Criminal Tribunal for the Former Yugoslavia rendered on 26 February 1999 in *Prosecutor v. Kordic and Cerkez,* which stated that, "[...] the obligation to provide prior witness statements, pursuant to Rule 66(A)(ii) of the Rules is intended to assist the Defense in its understanding of the case against the Accused in accordance with his rights under Article 21 of the Statute," (which is Article 20 of the Statute of the Tribunal). In this regard, the Chamber considers that the statements of the respective witnesses, provided to the Defense pursuant to Rule 66(A)(ii) of the Rules would contain ample information to enable the Defense to prepare its defense.

As Regards the Defense Request for Disclosure

11. The Chamber notes that, in addition to the witness statements disclosed pursuant to Rule 66(A)

(ii) of the Rules, the Defense requests for copies of the witness interviews, either in the form of original tape recordings, and/ or transcripts of the tape recordings. The Prosecutor has not responded to this request. The Chamber considers this request to be one falling under Rule 66(B) of the Rules, under which, subject to Rule 66(C) and Rule 70 of the Rules, the Defense, upon inspecting books, documents, photographs and tangible objects in the custody or control of the Prosecutor, and after it has shown that the said items are material to its defense or if the Prosecutor intends to use the said items at trial, the Prosecutor shall disclose the said items to the Defense. The Chamber further notes that, pursuant to Rule 66(B) of the Rules, if the said items were obtained or belonged to the Accused and the Prosecutor does not intend to use them for the prosecution of its case, then the said items could be returned to the Accused..

12. The Chamber is, therefore, of the view that if the Defense seeks disclosure of the said items and the items are indeed in the custody or control of the Prosecutor, the Defense could pursue the matter under the provisions of Rule 66(B) of the Rules.

13. Furthermore, the Chamber, mindful of the provisions of Rule 3(A) of the Rules, that the official languages of the Tribunal are English and French and Rule 3(B) that the Accused shall have the right to use his own language, considers that, if the said items are to be disclosed, then they could be disclosed to the Defense, in Kinyarwanda or the native language of the witness in addition to the official languages of the Tribunal, as requested for by the Defense if they were recorded in those languages.

ACCORDINGLY, THE TRIBUNAL

INVITES the Defense to seek for copies of the witness interviews, either in the form of original tape recordings, and/ or transcripts of the tape recordings pursuant to Rule 66(B) of the Rules, that is, if they wish to pursue this matter and the said items are in the control or custody of the Prosecutor.

DENIES the Motion in all other respects.

Arusha, 12 March 2001

William H. Sekule
Judge

(Seal of the Tribunal)

ANNEX 7

Prosecution reply to Defence letter dated 19 May 2004.

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN • SIERRA LEONE
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19 May 2004

Dear Mr. Jordash,

In reply to your letter of 3rd May, which was received on 5th May, I indeed recall the concern you expressed during the Pre-Trial Conference of 29 April 2004. However, my response was, and still remains, that the Prosecution has complied, and is continuing to comply, with its disclosure obligations under Rules 66 and 68, and that it is willing to grant the Defence access to any non-disclosed material in its possession, in accordance with the provisions of Rule 66(A).

Hence, upon demonstrating that any statements that were made by witnesses the Prosecution does not intend to call to trial, are material to the preparation of the Defence, the Prosecution will comply with its obligation under Rule 66(A)(ii), and allow the Defence access to these statements. Furthermore, the Defence is free to apply to the Chamber and, in accordance with Rule 66(A)(i), request that it orders the Prosecution to disclose statements of witnesses the Prosecution does not intend to call to trial.

Sincerely,

Robert Petit
Senior Trial Attorney
Office of The Prosecutor

ANNEX 8

Transcripts, Sesay et al, 29 April 2004 Gifty C. Harding – SCSL – Trial Chamber I – pages 59 -61

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO.: SCSL-2004 – 15-PT
CHAMBER I

THE PROSECUTOR
OF COURT
v.
ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

29 APRIL 2004
1015H
PRE-TRIAL CONFERENCE

Before the Judges:
Bankole Thompson, Presiding
Mutanga Itoe
Pierre Boutet

For the Registry:
Mr. Geoff Walker

For the Prosecution:
Mr. Robert Petit
Mr. Luc Cote
Ms. Boi-Tia Stevens

For the Accused Issa Hassan Sesay:
Mr. Wayne Jordashl

For the Accused Morris Kallon:
Mr. Shekou Touray
Mr. Melron Nicol-Wilson

For the Accused Augustine Gbao:
Mr. Andreas O'shea

Court Reporters:
Mr. Momodou Jallow
Ms. Susan Humphries
Ms. Gifty C. Harding

can address ourselves whether we require them or not.

MR. PRESIDENT:

Well, let me just say quickly before I let my brother judges have their -- make their contributions, that the -- you are inviting the Chamber to embark on an interpretation of this rule before the ink is hardly dry on it. But let me venture to say that in my own immediate ordinary reading -- and this is subject to change -- is that the concept of good cause is elastic. Why did you have to limit it to "good cause in relation to"? You started by qualifying it. And the expression here, "Upon good cause being shown," does not seem to admit of that qualification. And so if you ask me what is good cause, I will not even be able to tell you yet, because you are making your case as to show good cause why you want the documents, and you are saying that unless you have knowledge of the contents of the statements you cannot show good cause. But why are you putting yourself in that jurisprudential bind? Good cause may relate to that you need the statement because of some particular points that you can make which conduce to the interest of justice. I'm just giving you my own ordinary kind of response.

MR. JORDASH:

Whatever the definition of good cause --

MR. PRESIDENT:

Yes, right.

MR. JORDASH:

-- and I don't want to restrict it.

MR. PRESIDENT:

Why do you want to limit it?

MR. JORDASH:

I don't. What I --

MR. PRESIDENT:

We didn't qualify it. We didn't say, good cause in relation to the documents that are being sought, we said upon good cause being shown. And if the intention behind that was to leave it as an elastic concept you can take it as far as you want to, depending upon the particular facts in each motion

MR. JORDASH:

The difficulty is we can't ask for something if we don't know what it is.

MR. PRESIDENT:

Well, I don't know about that. I am not sure whether you are the one -- you should be limiting it to that.

MR. JORDASH:

We can't ask for something we don't even know exists.

MR. PRESIDENT:

Well, but it says, "Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional witnesses -- Prosecution witnesses that the

Prosecution does not intend to call, be made available to the Defence within a prescribed time."

But there is already a provision which tells you that they have disclosed all these statements.

MR. JORDASH:

They may have. What I'm getting at is -- they may have additional witnesses that they do not intend to call. We don't know who the Prosecution have been talking to; we don't know if they have them what the evidence is going to say. I raise this because I have difficulty envisaging our –

MR. PRESIDENT:

In other words, you are saying that knowledge of the existence of these documents is a condition listed that will trigger off the application of the Rule?

MR. JORDASH:

Your Honour, puts it better than I.

MR. PRESIDENT:

Yeah. How does the Prosecution see the observation of counsel?

MR. CÔTE:

Yes, first of all, I think it's a bit premature. Like -- the Rule that the last plenary adopted is reflecting the Rule that was in ICTR and it was basically used by the Defence to try to get copies of witnesses that were used in other cases.

I think that this is one part that that Rule is covering. As a matter of fact, the Defence was requesting in one case to get the testimony of the prime minister even if he was not going to be called. And these are the type of things where the Defence would have to show, "why would I ask Prosecution to give you that?" "How is it related to this case?" And I think that this is one thing that, of course, the Defence will be aware of is that they are following the other cases that are going around.

Now, what my colleague is requesting is for us to produce what this Court here has been asking us to produce, which is the witness list, with summaries of every witness that we have since we started, which I think is a very serious thing to ask and it's a very serious task to do.

There is -- and I would completely disagree with that; they are not exactly showing good cause about what do they look for *(sic)*.

The other thing is that everything that is exculpatory, we have an obligation to disclose and it was disclosed. The third part of it is that there is also provision for the Defence to ask to inspect our documents and everything in our possession following Rule 66*(A)* which I think provided for -- if they look at things that they want there, then they would have to come and show good cause why we should need -- why we should be ordered to give them a copy.

MR. PRESIDENT:

How do you respond to that?

MR. JORDASH:

If I understand what my learned friend just said, we are entitled to inspect the documents in their possession --

MR. PRESIDENT:

Yes.

MR. JORDASH:

-- then we should show good cause. If that's the Prosecution's interpretation, then I'm happy at that -- to leave it at that. All I want to do is to have access to what the Prosecution have *(inaudible)* make a decision as to whether it might assist Mr. Sesay.

MR. PRESIDENT:

The difficulty, of course, Counsel, is that we are at a loss to be able to sort of agree with your position, although it sounds very attractive without some concrete situation. I mean, now, being asked to interpret the rule without a practical problem that you are coming with, I think when you come with a practical concrete case, then the Court may be able to apply its mind as to how the Rule should be interpreted in the interest of protecting the Defence, but at the same time, not encroaching upon the Prosecution's prerogative. And that is why my immediate response to the term good cause, did not seem as qualified as you were trying to do.

MR. JORDASH:

What we are trying to do is finding out what information they have. They can say, well, we can look at this, what they have.

MR. PRESIDENT:

Quite right. Quite right, yes. Anything else?

I hear Mr. Gbao has something to say. Professor O'shea, I hear you have something to say or your client has something to say. What is the -- we had a note come up here. It's -- I think you have something to say on behalf of your client, is it?

JUDGE BOUTET:

You had indicated earlier this morning that you want to speak about -- I don't even know what it was -- but about the issue at the end of the session. So --

MR. O'SHEA:

Yes, I would speak, yes.

JUDGE BOUTET:

It doesn't mean that you have to speak. We are just reminding you that you had indicated you may have had something.

MR. PRESIDENT:

We did -- we did -- my brother Judge is right, we did reserve to you some time that you said you wanted to make an oral application.

MR. O'SHEA:

Yes.

Your Honours, I appreciate what Your Honours said about written motions. My only concern is that here we are at a very critical juncture because I think for the next few days you are going to tell us a trial date and as things stand at the moment, the protective measures order reads that the unredacted witness statements will be disclosed to the Defence 42 days before the beginning of the testimony of a witness.

Now, we've had some discussion already this morning about the logistics of this trial, and Your Honours have put on the table the possibility of sessions being run with alternate trials which seems to me as a very sensible one in the context of what we are dealing with at the moment with one trial chamber and the possibility of a second one.

Now, even if we do not adopt that system, in my submission, we would need trial sessions as opposed to one long session because it is going to be a long trial and one of us, Your Honours or us, is going to give in at some stage and demand time off.

So given that it is likely that we are going to have trial sessions and especially those trial sessions are going to be of relatively short duration -- and when I say relatively short I mean one or two months as opposed to six months -- it seems to me -- I mean, it's my submission that there is some practical sense in considering to amend the order on protective measures in the following way: that instead of saying 42 days before the beginning of the testimony of a witness, 42 days before the beginning of the trial session in which that witness is going to appear.

Now, the reason I say that is because from the Defence's perspective, and I'm not going back to the Court's order here but I'm just indicating that we indicated from the very beginning that we have difficulty with the issue of rolling disclosure in that it's quite difficult for us to be conducting investigations and at the same time dealing with witnesses who are currently in court. There may be even so far as the investigator is concerned, there may be circumstances where we need the investigator in court to help us with certain aspects of the testimony. I don't know. Those situations do arise.

It would help -- the suggestion that I'm making would help to remedy to some extent the Achilles heel,