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SCSL-04-15-T  
(27682-27688)

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**THE SPECIAL COURT FOR SIERRA LEONE**

**BEFORE:**

Hon. Justice Bankole Thompson, Presiding  
Hon. Justice Benjamin Itoe  
Hon. Justice Pierre Boutet

Acting

Registrar: Mr. Herman von Hebel

Date filed: 23<sup>rd</sup> April 2007

<b>SPECIAL COURT FOR SIERRA LEONE</b>	
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<b>COURT MANAGEMENT</b>	
23 APR 2007	
NAME	Adura Nsiima K.
SIGN	Nsiima
TIME	14:55

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL-04-15-T

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**DEFENCE REPLY TO PROSECUTION RESPONSE  
TO DEFENCE MOTION TO REQUEST THE TRIAL CHAMBER TO  
PERMIT INSPECTION OF WITNESS STATEMENTS (RULE 66(A)(iii))  
AND/OR ORDER DISCLOSURE PURSUANT TO RULE 68**

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**Defence Counsel for Issa Sesay**  
Wayne Jordash  
Sareta Ashraph

**Defence Counsel for Morris Kallon**  
Shekou Touray  
Charles Taku  
Melron Nicol-Wilson

**Court Appointed  
Counsel for Augustine Gbao**  
Andreas O'Shea  
John Cammegh

### **Introduction**

1. On 30<sup>th</sup> March 2007 the Defence filed a Motion to Request the Trial Chamber to Permit Inspection of Witness Statements (Rule 66(A)(iii)) and/or Order Disclosure Pursuant to Rule 68"<sup>1</sup> ("The Motion"). On the 16<sup>th</sup> April 2007 the Prosecution filed its Response to the Motion ("The Response").<sup>2</sup> The Defence herewith files its Reply.

### **Request to inspect**

2. The Prosecution's Response, which alleges that the Defence has not made a request to inspect the statements of DIS-126 and DIS-258, cannot be criticised for its technical accuracy. It is correct that the Defence has not used the words "inspect" in its four attempts to engage with the Prosecution concerning a complex and delicate issue of mutual concern relating to finely balanced fair trial rights and the truth finding process. It is undoubtedly correct that the Defence instead used the words "exchange" and "disclose" rather than "inspect".
3. The Defence assumed (wrongly) that the Prosecution would be able to see past the dry formality of the terminology and take steps to achieve a result, namely to accept possession of the statements and thereafter to provide the Defence with some possibility to view them. The Defence is grateful that the Prosecution was eventually able to advance a solution to ensure the integrity of the process notwithstanding the failure of the Defence to use the word "inspect". Notwithstanding, it is unclear why the Prosecution was able to notify the Defence, on the 3<sup>rd</sup> April 2007, of the existence of the statements (after the Defence had filed a Motion on the 30<sup>th</sup> March 2007 seeking an Order to that effect) but was unable to take any similar steps when the issue was raised one month earlier on the 1<sup>st</sup> March 2007.

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<sup>1</sup> *Prosecutor v. Sesay*, SCSL-04-15-T-748.

<sup>2</sup> *Prosecutor v. Sesay*, SCSL-04-15-T-749, "Prosecution Response to Sesay Defence Motion to Request the Trial Chamber to Permit Inspection of Witness Statements (Rule 66(A)(iii)) and/or Order Disclosure Pursuant to Rule 68".

**Rule 68**

4. The Prosecution asserts that the Defence request for disclosure of the witness statements (DIS-258 and DIS-126) pursuant to Rule 68 is moot “as the Prosecution has already made available to the First Accused an opportunity to inspect the documents”.<sup>3</sup> This is incorrect. Whilst it is correct that Counsel for the First Accused was permitted on the 17<sup>th</sup> April 2007 to inspect the documents, it is submitted that the Prosecution has erred in law by failing to disclose the statements of DIS-258 pursuant to Rule 68. The demonstrable failure raises issues of real concern.
  
5. In the first instance it must be noted that the Defence is not suggesting that the Prosecution use Defence statements, which are not in the Prosecution’s possession, to determine whether the Prosecution has Rule 68 material which it ought to disclose.<sup>4</sup> This absurd proposition was not advanced by the Defence.
  
6. Notwithstanding that the Prosecution has failed to review the statements in its possession relating to witness DIS-258. The Defence contends that the statements contain evidence which any reasonable prosecutor – properly directing himself – would have appreciated was material which suggested the innocence of the First Accused and affected the credibility of the Prosecution evidence.

**Prima facie proof**

7. It is accepted that if the Prosecution asserts that it has fulfilled its Rule 68 obligation the onus is on the Defence to produce prima facie proof tending to show that evidence is exculpatory and is in the Prosecutor’s possession. It is submitted that ample proof exists that the Prosecution has failed to disclose Rule 68 material contained within the statements produced by DIS-258.

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<sup>3</sup> Paragraph 15 of the Response.

<sup>4</sup> Paragraph 15 of the Response.

**Rule 68 material****16<sup>th</sup> May 2000 statement**

8. The Prosecution is in possession of a statement arising from interviews with DIS-258 on the 16<sup>th</sup> May 2000 which inter alia notes:

Between [sic] end of April and early May 2000 there was a radio broadcast from [sic] B.B.C news saying that chairman Foday Sankoh was under house arrest by UNAMSIL. On the following days, after this news broadcast I received a message from Brigadier Morris Kallon saying that UNAMSIL have forcibly disarmed five combatants at Makoth Camp and he sent his security Commander Augustine Gbao to find out what happened and that Augustine Gbao returned to say that UNAMSIL officers did not allow him to enter the camp and as a result he went to investigate and plead with the UNAMSIL that [sic] official launching of disarmament will start in 3 days. According to him the response was not favourable from UNAMSIL and he had to engage the UNAMSIL in serious confrontation- no casualty was reported. I passed the message to Chairman Foday Saybana Sankoh, who gave instruction to Brigadier Issa Sesay the Field Commander to find out and solve the problem.

Brigadier Issa Sesay on the instruction of Chairman Foday Sankoh moved from Kono to Makeni for discussion with the Kenyan UNAMSIL Commander – according to the message received from Brigadier Issa Sesay. Immediately he wanted to approach the Camp he was ordered not to go closer and the UNAMSIL officers had received instructions from their HC not to let them into their camp. He alighted from his vehicle and walked toward the camp when the UNAMSIL officers opened fire on Brigadier Issa Sesay killing two of his bodyguards.

**16<sup>th</sup> December 2006 statement**

9. The Prosecution is in possession of a statement arising from interviews with DIS-258 on the 16<sup>th</sup> December 2006 which inter alia notes:

[witness] states that Sam Bockarie ordered that none of his forces from Kailahun were to enter Freetown and (witness) believes that virtually none of them would have gone into Freetown during the [6<sup>th</sup> January 1999] invasion.

10. The Defence submits that the foregoing evidence is manifestly exculpatory. It is deeply concerning that the Prosecution, who variously alleges that Mr. Sesay was responsible for leading pre-planned and unprovoked attacks upon UNAMSIL in May 2000 and was in a joint criminal enterprise with Alex Tamba Brima and Sam Bockarie to attack Freetown during the 6<sup>th</sup> January

1999 invasion, should not appreciate this obvious conclusion. This would appear to suggest that the Prosecution does not properly understand their Rule 68 obligations or have not fulfilled them with due diligence.

11. This failure gives rise to substantial concern that the Prosecution is in possession of other material which would prove the innocence of the First Accused and/or affect the credibility of the case against him. The Motion is therefore a long way from being moot. The Defence seeks an order that the Prosecution disclose the material forthwith pursuant to Rule 68 and review all the material in their possession afresh and with due regard to a reasonable and lawful interpretation of their Rule 68 obligations. The Defence also seeks an order that a representative from the Prosecution sign a report certifying that a full search of all Rule 68 material within the possession of the Prosecution or within the Prosecution's knowledge has been conducted and that all such material has been disclosed to the Defence.<sup>5</sup>

#### **Defence Legal Obligation to Disclose**

12. The Defence does not need to be reminded by the Prosecution of the need to comply with a protective measures Order. The Prosecution's approach<sup>6</sup> smacks of double standards. On the one hand they have unilaterally decided to allow the Defence the opportunity to inspect the statements of DIS-126 and DIS-258, presumably on an interest of justice basis. The Defence is grateful for the sensible approach adopted by the Prosecution. The Defence will adopt an equally sensible approach, based upon the interests of justice, in the event that a similar request (for disclosure, exchange or inspection) is received. The Defence reminds the Prosecution that *all* accused are entitled to a fair hearing pursuant to Article 17(2) and this minimum guarantee remains unqualified by protective measures.

#### **Request**

13. The Defence requests that an Order that:


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<sup>5</sup> *Prosecutor v. Krnojelac*, IT-97-25, "Decision on Motion by Prosecution to Modify Order of Compliance with Rule 68", 1 November 1999.

<sup>6</sup> See Para. 18 of the Response.

- (a) the Prosecution disclose the statements of DIS-258;
- (b) the Prosecution conduct a wholesale Rule 68 review of the evidence in their possession or within their knowledge with due regard to the object and purpose of its obligations;
- (c) a representative from the Prosecution sign a report certifying that a full search of all Rule 68 material within the possession of the Prosecution or within the Prosecution's knowledge has been conducted and that all such material has been disclosed to the Defence; and
- (d) the Prosecution inform the Defence expeditiously of statements emanating from Defence witnesses.

Dated



PP Wayne Jordash  
PS Sareta Ashraph

**Book of Authorities**

*Prosecutor v. Sesay*, SCSL-04-15-T-748, "Defence Motion to Request the Trial Chamber to Permit Inspection of Witness Statements (Rule 66(A)(iii)) and/or Order Disclosure Pursuant to Rule 68," 30 March 2007.

*Prosecutor v. Sesay*, SCSL-04-15-T-749, "Prosecution Response to Sesay Defence Motion to Request the Trial Chamber to Permit Inspection of Witness Statements (Rule 66(A)(iii)) and/or Order Disclosure Pursuant to Rule 68," 16 April 2007.

*Prosecutor v. Krnojelac*, IT-97-25, "Decision on Motion by Prosecution to Modify Order of Compliance with Rule 68", 1 November 1999.