SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

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| **Before:** | Hon. Judge Benjamin Mutanga Itoe, Presiding Judge<br>Hon. Judge Bankole Thompson<br>Hon. Judge Pierre Boutet |
| **Registrar:** | Robin Vincent |
| **Date:** | 9 July 2004 |

PROSECUTOR **Against** **Issa Hassan Sesay**
**Morris Kallon**
**Augustine Gbao**
(Case No.SCSL-2004-15-T)

# SESAY – DECISION ON DEFENCE MOTION FOR DISCLOSURE PURSUANT TO RULES 66 AND 68 OF THE RULES

Office of the Prosecutor:
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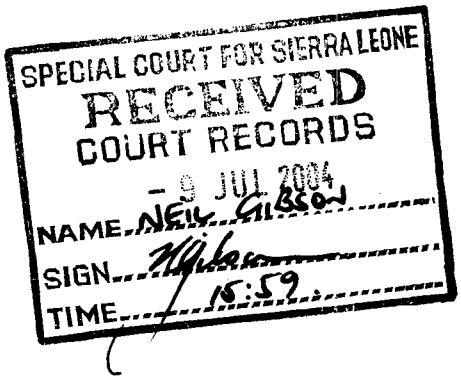


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**THE TRIAL CHAMBER** ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson and Hon. Judge Pierre Boutet;

**SEIZED** of the Motion for Disclosure pursuant to Rule 66 and Rule 68 ("Motion"), filed on 28 May 2004, on behalf of Issa Hassan Sesay ("Accused"),

**NOTING** the Prosecution Response to the Defence's Motion for Disclosure Pursuant to Rule 66 and Rule 68 ("Response"), filed on 9 June 2004 by the Office of the Prosecutor ("Prosecution") and the Defence Reply thereto, filed on 14 June 2004 ("Reply");

**NOTING** the Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004 ("Order to File Disclosure Materials");

**NOTING** the Pre-Trial Conference of 29 April 2004; and the oral submissions of the parties about disclosure of exculpatory material by the Prosecution made on 6 July 2004;

**CONSIDERING** that the Defence did not raise pertinent disclosure issues at the Status Conference that was held on 23 June 2004;

**CONSIDERING** the oral submissions of the Parties made in Court on 6 July 2004;

**NOTING** the Order to Prosecution to Produce Witness List and Witness Summaries of 7 July 2004;

**CONSIDERING** the Rules of Procedure and Evidence ("Rules");

**NOW CONSIDERS** the matter on the basis of the written submissions of the Parties pursuant to the provisions of Rule 73(A) of the Rules;

## I. SUBMISSIONS OF THE PARTIES

### *A) The Motion*

1. The Defence submits that the Prosecution has not fulfilled its unequivocal commitment made during the Pre-Trial Conference of 6 May 2004,[1] to give the Defence access to the evidence which it had in its possession and which it did not seek to rely upon pursuant to Rule 66(A) (ii) of the Rules.[2] It argued that the Prosecution had brought all arguments about the interpretation of Rule 66(A)(ii) of the Rules to a close by making the purported guarantee and as a result, the Defence abandoned its request for a schedule of the evidence.[3]

2. It further submits that the interests of justice and of the Accused are not served by a number of issues namely, the discord in the Prosecution team about a clear interpretation of Rule 66 of the Rules;[4] the failure of the Prosecution to identify and distinguish which material it was serving pursuant to Rules 66 and 68 of the Rules;[5] and the Prosecution's refusal to even admit to having material in their possession which they were not seeking to rely upon in the trial.[6]

3. The Defence concedes that the obligation to show good cause in Rule 66(A) (ii) of the Rules is incumbent on the Defence. However, it submits that it cannot show good cause when it does not know what materials the Prosecution has in its possession.[7]

4. The Defence further gives notice to the Prosecution, pursuant to Rule 66(A)(iii) of the Rules, that it is seeking to inspect any books, documents, photographs and tangible objects of the following categories, *inter alia:*, the role of Economic Community of West African States ("ECOWAS") in the disarmament of the RUF (Revolutionary United Front), AFRC (Armed Forces Ruling Council) and CDF (Civil Defence Force), pursuant to the peace agreement; the role played by Charles Taylor in the conflict; the alleged training of

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[1] Worthy of note is the fact that a Pre-Trial Conference and not a Status Conference was held on 29 April 2004. The Status Conference was held on 23 June 2004.

[2] Motion, paras 1, 4, 6.
[3] *Id.*, para. 8.
[4] *Id.*, para. 7(i).
[5] *Id.*, para. 7(ii).
[6] *Id.*, para. 7(iii).

the RUF command structure in Libya; clarification of the role played by the Accused in the release of United Nations Assistance Mission in Sierra Leone("UNAMSIL") troops at the time of the conflict.

5. The Defence negates the assertion that the Prosecution has disclosed all the evidence which falls within the ambit of Rule 68 of the Rules. It avers that it has ascertained, through its own investigation, that there are several Prosecution witnesses whose evidence is wholly exculpatory of the Accused. It further submits that the Prosecution has only served exculpatory evidence contained within statements which are principally incriminatory in their nature. The Defence submits that the duty of the Prosecution to disclose exculpatory evidence is of great importance and that such a duty under Rule 68 of the Rules continues until the date when the Trial Chamber delivers its judgement.[8]

6. The Defence submits in particular that the material it seeks at minimum in paragraph 16 of the Motion and especially in paragraph 16(1), concerns *inter alia*, "evidence which relates to inducements made to witnesses to facilitate their 'cooperation' in giving evidence." It further submits that with regard to the interviews of the so called 'insiders', those conducting the interviews appear to offer rewards for continued cooperation. Thus, the Defence seeks all the details of offers made and rewards, including relocation packages, amnesties and monies given or due.[9]

*B) The Response*

7. The Prosecution refutes the Defence's assertion that it has not complied with the unequivocal commitment that was offered at the Pre-Trial Conference of 6 May 2004, to allow the Defence access to material which the Prosecution does not want to use at trial pursuant to Rule 66(A) (ii) of the Rules.

8. The Prosecution submits that assertions and insinuations by the Defence that the Prosecution has been untruthful and unfair, are not grounded on facts and calls on the Chamber to take note of the fact that such unfounded statements by the Defence have

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[7] *Id.*, para. 10.
[8] *Prosecutor v. Blaskic*, Case No. IT-95-14, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings, 26 September 2000, paras 47-50.
[9] Motion, para. 16.

received unfavourable consideration by this Court in the past.[10] The Prosecution submits that the Defence erred when it asserted that the Prosecution made an unequivocal commitment to disclose evidence at the Pre-trial Conference of 6 May 2004, because the Pre-trial Conference was indeed held on 29 April 2004. It further adds that the Defence prepared the Motion without perusing the relevant documents.

9. The Prosecution submits that the Defence has failed to show 'good cause' under Rule 66(A)(ii) of the Rules. It submits that Rule 66(A)(ii) of the Rules applies to two sets of witnesses: additional witnesses whom the Prosecutor intends to call to testify at the trial and those the Prosecution does not intend to call at trial. With regard to the witnesses it intends to call, the Prosecution asserts that it has disclosed their statements, and will continue to disclose to the Defence, copies of any new supplemental statements of these witnesses if the need arises.[11] With regard to the witnesses the Prosecution does not intend to call to testify at trial, the Rule states that disclosure can only be made upon the Defence showing good cause. It is the Prosecution's submission that the Defence application must fail, in the absence of the Defence satisfying the prerequisite of "good cause".[12] The Prosecution further submits that the Defence's request must be for a specific material or materials with regard to Rule 66(A)(ii) of the Rules. It further asserts that the Defence did not request any specific material but made generic requests which the Prosecution considers as tantamount to a 'fishing expedition' into the Prosecution's records.[13]

10. The Prosecution proffers that there are three parts to Rule 66(A) of the Rules, and the statement made regarding access to materials was clearly in reference to Rule 66(A)(iii) of the Rules and not 66(A)(i) or (ii) as mentioned by the Defence. The Prosecution adds that such access could only be granted pursuant to an application by the Defence.[14] The Prosecution submits that to satisfy its obligations of disclosure to the Defence under Rule 66(A)(iii) of the Rules, the Defence must *prima facie* establish that such evidence is material to its case. The Prosecution submits that it has disclosed to the Defence all materials in its possession and asserts that the onus is on the Defence to specifically

[10] Response, paras 4-5.
[11] *Id.*, para. 17.
[12] *Id.*, para. 18.
[13] *Id.*, para. 19.
[14] *Id.*, para. 12.

identify evidence material to the preparation of the Defence case that is being withheld by the Prosecutor.

11. With regard to Rule 68 of the Rules, the Prosecution avers that the Defence:

(i) have not specified the evidence requested;

(ii) have produced no evidence to substantiate their claim that the Prosecution is in possession of exculpatory evidence; and

(iii) have failed to show *prima facie* evidence to indicate that the evidence is exculpatory.

Consequently, the Prosecution submits that the Defence request is a clear ploy to delay the commencement of the trial and urges the Chamber to dismiss the Defence motion.

### *C) The Reply*

12. The Defence submits that it cannot identify documents, photographs and tangible objects which it would wish to obtain if the Prosecution persists on their current position and refuse to state what they have in their possession pursuant to Rule 66(A) (iii) of the Rules.[15] The Defence further submits that they are not seeking a 'sanctions approach' to non-compliance as alleged by the Prosecution, but are concerned that there have been clear violations by the Prosecution and these concerns have not been allayed by the Prosecution's response.[16]

## II. DELIBERATION

### *A) Introduction*

13. This is a motion on behalf of the Accused Issa Hassan Sessay to compel the production by the Prosecution of witness statements, other materials and exculpatory evidence, pursuant to Rule 66 and 68 of the Rules. The Motion and the Response raise questions about the

[15] Reply, para. 10.
[16] *Id.*, paras 11-13.

interpretation and application of Rules 66A (ii) and (iii), as well as Rule 68 of the Rules, since the Defence is seeking relief from the Chamber for alleged breaches by the Prosecution of the aforementioned Rules.

*B) Relief requested*

14. As a result of what the Defence alleges are breaches of disclosure rules by the Prosecution, the Defence seeks the following relief from the Chamber:

(i) That the Trial Chamber orders the Prosecution to allow the Defence access to the evidence it does not seek to rely upon;

(ii) In the alternative, it seeks an order that the Prosecution provides a schedule (with summaries) of statements in its possession which it does not seek to rely upon at trial;

(iii) That the Trial Chamber should order the Prosecution to comply with its obligation to disclose exculpatory evidence pursuant to Rule 68 of the Rules.

(iv) That the Trial Chamber orders the Prosecution to disclose the items listed in paragraph 17 of the Motion, pursuant to Rule 66(A)(iii) of the Rules.[17]

*C) Rules of Interpretation*

15. The Defence Motion is predicated on issues that revolve around the interpretation of Rule 66(A)(ii), Rule 66(A)(iii) and Rule 68 of the Rules. In order for the Trial Chamber to assess the merits of the Motion in terms of its substantive arguments, it is imperative to determine the correct construction of the aforementioned Rules in the light of the basic rules of statutory interpretation.

16. The Chamber observes by way of first principles of interpretation, that no rule, however formulated, should be applied in a way that contradicts its purpose. As stated in the case of *Prosecutor v. Kondewa,*[18] "a statute or rule must not be interpreted so as to produce an absurdity. In effect, it is rudimentary law that a statute or rule must be interpreted in the light of its purpose. Another basic law of statutory interpretation is that a statute is to be

[17] Motion, para. 18.

interpreted in accordance with the legislative intent." In this regard, this Trial Chamber, in the case of *Prosecutor v. Brima*, held took the following stand:

> [W]e would like to recall in order to emphasize, that in interpreting statutory or regulatory instruments, due regard should primarily be paid to their ordinary and natural meaning so as to avoid... importing extraneous interpretations to statutory provisions or regulations which are... clear...[19]

17. The Trial Chamber of the International Criminal Tribunal for former Yugoslavia ("ICTY") in the case of *Prosecutor v. Delalic*,[20] in this respect, also had this to say:

> The fundamental rule for the construction of the provision of a statute, to which all others are subordinate, is that a statute is to be expounded according to the intent of the law maker. In an effort to discover the intention of the law maker many rules to aid interpretation have been formulated. Of the many rules, one of the most familiar and commonly used is the literal or golden rule of construction. By this rule, the interpreter is expected to rely on the words in the statute, and to give such words their plain import in the order in which they are placed. The rationale is that the law maker should be taken to mean what is plainly expressed. The underlying principle which is also consistent with common sense is that the meaning and intention of a statutory provision shall be discerned from the plain and unambiguous expression used therein rather than from any notions which may be entertained as just and expedient.

18. Consistent with its previous decision, the Chamber accepts and adopts this view of the basic approach to statutory interpretation and now proceeds to ascertain the meaning of Rules 66 and 68 of the Rules as presently formulated, not according to what is just and expedient, but what is consistent with the plain and unambiguous connotation of the rule.[21]

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[18] *Prosecutor v. Kondewa*, Case No. SCSL-04-14-T, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Material Pursuant to Rule 68, 8 July 2004, ("*Kondewa* Decision") para. 19.

[19] *Prosecutor v. Brima*, Case No. SCSL-04-16-PT, Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel, 6 May 2004, para. 90.

[20] *Prosecutor v. Delalic et a.l*, Case No. IT-96-21, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo, 1 May 1999.

[21] *Kondewa* Decision, supra note 18, para. 20.

*D) Interpretation of Rule 66(A)(ii)*

19. An examination of the submissions of both parties elicit that they are diametrically opposed in their interpretation of whether an unequivocal commitment was made during the Pre-Trial Conference by the Prosecution to allow the Defence access to materials the Prosecution did not want to use at trial pursuant to Rule 66(A)(ii) of the Rules, and the Defence's stance that it relied on the guarantee to its detriment. To resolve this variance, the Chamber is constrained, in light of the above, to examine and to determine the proper interpretation of Rule 66(A)(ii) of the Rules.

20. Rule 66(A)(ii) of the Rules stipulates that, subject to the provisions of Rules 50, 53, 69 and 75 of the Rules, the Prosecutor shall:

> Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence within a prescribed time.

21. From an ordinary and plain reading of Rule 66(A)(ii) of the Rules, it is clear that it imposes a reciprocal obligation; one on the Prosecution and the other on the Defence. The first part of the Rule places the onus of showing good cause on the Prosecution, in a case where it intends to call additional witnesses to testify at the trial. There is no contention here, as the Prosecution states that it has made such disclosures and pledged to continue disclosure of supplemental copies to the Defence should the need arise. The second part of the Rule places the burden on the Defence to show good cause why the evidence of witnesses whom the Prosecution does not want to call to testify at trial should be disclosed to the Defence. The Defence acknowledges in its motion that "it is obvious from a reading of Rule 66(A)(ii) of the Rules that the obligation is on the Defence to show good cause", although it asserts that it cannot show such good cause "without knowing what material exists in the possession of the Prosecution." Despite this admission by the

Defence, it still seeks to rely on what it describes as guarantee by the Prosecution to allow the Defence access to materials pertaining to Rule 66(A)(ii) of the Rules, which guarantee is contested by the Prosecution.

22. The obligation in Rule 66(A)(ii) of the Rules should be resolved by a clear interpretation of the Rules. The Chamber takes cognisance of the Prosecution's statement that it has disclosed to the Defence the statements of the witnesses it intends to call to testify at trial and observes that the Defence has made some sweeping requests for disclosure by the Prosecution of material under Rule 66(A)(ii) of the Rules, without specifying any evidence that could guide the Chamber in deciding whether or not the Prosecution is in possession of additional witness statements it does not intend to call to testify. Furthermore, the Defence has not adduced any evidence to show good cause why such materials, if they exist, should be disclosed to it.

*B) Interpretation of Rule 66(A) (iii)*

23. In its submission, the Defence has given notice pursuant to Rule 66(A)(iii) of the Rules that it is seeking *inter alia*, the inspection of all books, documents, photographs and tangible objects of some categories like the role of ECOWAS in the disarmament of the RUF, AFRC and CDF, pursuant to the peace agreement; the role played by Charles Taylor in the conflict; the alleged training of the RUF command structure in Libya; clarification of the role played by the Accused in the release of UNAMSIL troops at the time of the conflict. In their response, the Prosecution asserts that it has disclosed to the Defence, all materials in their possession and contends that the burden shifts to the Defence to specifically identify evidence material to the preparation of the Defence case that is being withheld by the Prosecutor. This assertion is disputed by the Defence.

24. The Prosecution submits that the Defence must *prima facie* establish materiality under Rule 66(A)(iii) of the Rules and that it must also specify the required items and not simply embark on generalities. The Prosecution further urges the Chamber to dismiss the Defence's request, because it merely gives notice to the Prosecution and states that the general materials listed in the Motion are material to the Defence without adducing any evidence to that effect.

25. Rule 66(A)(iii) of the Rules provides:

> At the request of the Defence, subject to Sub-Rule (B), 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, upon a showing by the Defence of categories of, or specific, books, documents, photographs and tangible objects which the Defence considers to be material to the preparation of a defence, or to inspect any books, documents, photographs and tangible objects in his custody or control which are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the Accused.

26. In the *Celibici* case,[22] the Trial Chamber of the ICTY acknowledged that the Rules provide no guidelines regarding the process of determining the materiality of evidence. However, recourse to national jurisdictions has elucidated what parameters should be taken into consideration in determining the materiality of evidence.[23]

27. In this regard, the Chamber finds instructive the reasoning of the U.S. Supreme Court in the case of *United States v. Mandel*, where it was held that 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 rights to the evidence. At that point there are three alternatives for the Prosecution: (i) hand over the requested evidence; (ii) deny that it has the requested evidence in its possession; (iii) admit that it has the evidence but refuse to allow the Defence to inspect it. It is only if there is a dispute as to materiality that the

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[22] *Prosecutor v. Delalic et al.*, Case No. IT-96-21, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996 ("*Celibici* Decision").

[23] *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), quoted in the *Celibici* Decision, *id*: it was held that 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.'" 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." Jurisprudence from the British system establishes that the test of materiality was adopted by the Court of Appeals 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).

Trial Chamber would become involved and act as a referee between the parties in order to make this determination. We therefore emphasize that 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 unspecified and unsubstantiated 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.[24]

28. In this regard, case law from the ICTY and International Criminal Tribunal for Rwanda ("ICTR") has articulated the requirements for disclosure under Rule 66(A)(iii). Instructively, in the *Celibici* Decision, the Trial Chamber of the ICTY concluded with regard to the extent of the Prosecution's disclosure obligations under the ICTY Rules that "Rule 66(B) imposes on the Prosecution 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."[25] The same interpretation was adopted in the case of *Prosecutor v. Ndayambaje*,[26] where the Trial Chamber of the ICTR found that the Defence must, *prima facie*, establish materiality.

29. Consistent with our recent decision in the *Kondewa case*,[27] it is the Chamber's view that the materials requested by the Defence are in general, germane to the conflict that unraveled in Sierra Leone, but not specific to the alleged criminal responsibility of the Accused in particular.

30. The Chamber finds that the Defence has not shown how the evidence it requests, namely the role of ECOWAS in the disarmament of the RUF, AFRC and CDF, pursuant to the peace agreement; the role played by Charles Taylor in the conflict; the alleged training of the RUF command structure in Libya; clarification of the role played by the Accused in the release of UNAMSIL troops at the time of the conflict, will be material to its case.

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[24] *See United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990); quoted in the *Celibici* Decision, *supra* note 22, para. 9.

[25] *Celibici* Decision, *supra* note 22, para. 11.

[26] *Prosecutor v. Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Defence Motion for Disclosure, 25 September 2001, para. 11 ("*Ndayambaje* Decision").

[27] *Kondewa* Decision, *supra* note 18.

*E) Interpretation of Rule 68*

31. The Defence contests the submission that the Prosecution does not have in its possession evidence which is wholly or principally exculpatory of the Accused. It has asserted that pursuant to its own investigation, it ascertained a considerable number of witnesses whose evidence would be wholly or partially exculpatory of the Accused. The Prosecution submits that the Defence has not provided the Chamber with the findings of its investigation or any evidence to support its assertion and in consequence the Defence request must be dismissed by the Trial Chamber.

32. Rule 68(B) of the Rules stipulates:

> The Prosecutor shall, within 30 days of the initial appearance of the Accused, make a statement under this Rule disclosing 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 the Prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.

33. A review of the ICTY and the ICTR jurisprudence elicits that in the case of *Prosecutor v. Bagilishema*,[28] the Trial Chamber found that Rule 68 has two main elements. Firstly, the evidence is known to the Prosecutor, which can be interpreted as the evidence is in the 'custody and control' or 'possession' of the Prosecution; and secondly, it must in some way be exculpatory, suggest the innocence or mitigate the guilt of the Accused. The Trial Chamber held that "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."[29] The Trial Chamber of the ICTR in *Prosecutor v. Kajelijeli*,[30] concurred with the above interpretation in the *Bagilishema* Decision, of Rule 68.[31] Furthermore, in the case of

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[28] *Prosecutor v. 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, 8 June 2000 ("*Bagilishema* Decision").
[29] *Id.*, paras 5-7.
[30] *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence, 5 July 2001.
[31] *Id.*, para. 13.

*Prosecutor v. Ndayambaje*[32], the ICTR Trial Chamber held that it is the established jurisprudence of the ICTY and ICTR 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 must justify such request by *prima facie* establishing the exculpatory nature of the material requested.[33]

34. It is evident that pursuant to Rule 26*bis* of the Rules, the proceedings of the Special Court are conducted with full respect for the rights of the Accused and due regard for the protection of victims and witnesses. Accordingly, the Chamber opines that it is incumbent on 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.[34]

35. The Defence submits in particular that the material it seeks at minimum concerning *inter alia*, "evidence which relates to inducements made to witnesses to facilitate their 'cooperation' in giving evidence", must exist and would fall within Rule 68. It further avers that the Prosecution does not confirm or deny whether this material has been disclosed to the Defence. In the absence of some level of specificity on the part of the Prosecution, albeit that it is acting *bona fide*, the Defence submits that it has no other recourse, but to seek relief from the Trial Chamber compelling the Prosecution to engage with the defence requests for disclosure of Rule 68 material.

36. With regard to the scope of the Prosecution's obligation to disclose exculpatory evidence to the Defence, the Trial Chamber of the ICTY in the case of *Prosecutor v. Blaskic*[35] reasoned:

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[32] *Ndayambaje* Decision, *supra* note 26, para. 11.

[33] See notably, *Kondewa* Decision, *supra* note 18; *Prosecutor v. Blaskic*, Case No. IT-95-14-PT, Decision on the Motion to Compel the Production of Discovery Materials, 27 January 1997; *Prosecutor v. Delalic et al.*, Case No. IT-96-21, Decision on the Request by the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information, 24 June 1997; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21, 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 Judicial Proceedings in Their Respect, 18 September 2001.

[34] *Prosecutor v. Blaskic*, Case No. IT-95-14, 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.

[35] *Prosecutor v. Blaskic*, *supra* note 33.

> If 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 Prosecution, 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.

37. The same Trial Chamber of the ICTY in another decision in the case of *Prosecutor v. Blaskic*, held that: 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 Chamber to presume that the Prosecutor has acted in good faith." [36]

38. The Defence asserts that the jurisprudence from the ICTY and ICTR clearly demonstrate at the very least, the desirability for the Prosecution to identify exculpatory material, pursuant to Rule 68. It asserts that although it is the Special Court's prerogative whether or not to follow *stare decisis* of other tribunals when the rights of an Accused to a fair trial are under consideration, nothing but inequity results from ignoring lessons learnt elsewhere.[37]

39. In the recent judgement rendered by the Appeals Chamber of the ICTY in the case of *Prosecutor v. Krstic*,[38] the Defence contended that the Prosecution violated its disclosure obligations under Rule 68 by, *inter alia*, by failing to disclose a number of witness statements containing exculpatory materials, and failing to disclose exculpatory materials amongst other evidence without identifying that material as exculpatory, and wanted a re-trial as a result. The Appeals Chamber proceeded to clarify the rules of disclosure under Rule 68 as follows:

> As a general proposition, where the Defence seeks a remedy for the Prosecution's breach of its disclosure obligations under Rule 68, the Defence must show (i) that the Prosecution has acted in violation of its obligations under Rule 68, and (ii) that the Defence's case suffered material prejudice as a result. In other words, if the Defence satisfies the Tribunal

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[36] *Prosecutor v. Blakic, supra* note 34, para. 21.

[37] This Chamber has already ascertained this prerogative in its decision in the case of *Prosecutor v. Kamara*, Case No. SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion on Defects in the Form of Indictment, paras 19-25.

[38] *Prosecutor v. Krstic*, IT-98–33-A, Appeals Chamber Judgement, 19 April 2004 ("Krstic Judgement").

> that there has been a failure by the Prosecution to comply with Rule 68, the Tribunal in addressing the aspect of appropriate remedies will examine whether or not the Defence has been prejudiced by that failure to comply before considering whether a remedy is appropriate.[39]

40. In the instant case however, the Defence simply claims that it has ascertained through its own investigation that there are several Prosecution witnesses whose evidence is wholly exculpatory of the Accused. The Chamber has taken note of the concession by the Defence that the Prosecution have indeed served exculpatory evidence on the Defence, albeit, contained in statements which are principally incriminatory in their nature.

41. The Appeals Chamber of the ICTY in the *Krstic* Judgement agreed with the Prosecution that "Rule 68 does not require the Prosecution to identify the material being disclosed to the Defence as exculpatory. The jurisprudence of the Tribunal shows that while some Trial Chambers have recognised that it would be fairer for the Prosecution to do so,[40] there is no *prima facie* requirement, absent an order of the Trial Chamber to that effect." [41]

42. In the case of *Prosecutor v. Jean Paul Akayesu*, the Appeals Chamber of the ICTR held that "an order staying proceedings on the ground of abuse of process[...] should never be made where there were other ways of achieving a fair hearing of the case, still less where there was no evidence of prejudice to the defendant."[42]

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[39] *Id.*, para. 153.

[40] *Prosecutor v. Krajisnik & Plavsic*, Case No. IT-00-39 & 40, Decision on Motion from Momcilo Krajisnik to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68, p. 2, 19 July 2001:

> "as a matter of practice and in order to secure a fair and expeditious trial, the Prosecution should normally indicate which material it is disclosing under the Rule and it is no answer to say that the Defence are in a better position to identify it.";

See also *Prosecutor v. Krnojelac*, Case No. IT-97-25, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, I November 1999, where Judge David Hunt, sitting as the ICTY Trial Chamber, ordered pursuant to Rule 68 of the Rules that the Prosecution to:

> "disclose to the Defence the existence of evidence known to it: (a) which in any way tends to suggest the innocence of, mitigate the guilt of, the Accused, or(b) which may affect the credibility of the prosecution evidence. The expression "evidence" is intended to include any material which may put the Accused on notice that material exists which may assist him in his defence, and it is not limited to material which is itself admissible in evidence."

[41] *Krstic* Judgement, *supra* note 38 para. 190.

[42] *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-A, Appeal Judgement, 1 June 2001, para. 340.

43. Relying persuasively on the aforementioned, the Trial Chamber considers that the key question to be answered here is whether the Defence has made a *prima facie* showing of exculpatory material sought from the Prosecution.[43] Furthermore, in resolving this important question, the Chamber must be satisfied that the request by the Defence has been specific as to the targeted material alleged to be in the Prosecutor's possession, control or custody.

44. This Chamber also notes that from 26 April 2004, when its Order to the Prosecution to File Disclosure Materials became effective, the Defence had sufficient time to analyse the material before 5 July 2004, when the trial started, and in any event, still has the opportunity to challenge the evidence during cross-examination.

**THE TRIAL CHAMBER ACCORDINGLY FINDS:**

45. Given the foregoing legal and jurisprudential analysis, the Trial Chamber, in light of the submissions made and the information available, finds that the Defence has not met the onus placed on it and that its request, pursuant to Rule 66(A)(ii) of the Rules, cannot therefore be legally sustained.

46. In addition, given the absence of a specific identification of material evidence that the Defence alleges the Prosecution has withheld, the Chamber is also left with no option but to dismiss the Defence request pursuant to Rule 66(A)(iii) of the Rules as it cannot be legally sustained.

47. In light of the above, the Trial Chamber is of the opinion that the burden of showing that there has been an abuse of the process related to the alleged non-disclosure of exculpatory evidence by the Prosecution rests with the Defence in a situation where it contests the Prosecution's submission that it has disclosed the relevant material, pursuant to Rule 68 of the Rules. The Defence has neither discharged that burden, nor have they shown that they have suffered prejudice from the alleged abuse of process by the Prosecution.

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[43] *Kondewa* Decision, *supra* note 18 , paras 24-25.

48. Consequently, the request by the Defence, pursuant to Rule 68 of the Rules, cannot be legally sustained and is accordingly dismissed.

FOR ALL THE ABOVE REASONS,

THE CHAMBER DISMISSES the Motion in its entirety.

Done at Freetown this 9th day of July, 2004

Hon. Judge Pierre Boutet | Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Trial Chamber | Hon. Judge Bankole Thompson

[Seal of the Special Court]