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SCSL-04-15-A
(461 – 466)

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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Hon. Justice Renate Winter, President,
Hon. Justice Jon Kamanda,
Hon. Justice George Gelaga King
Hon. Justice Emmanuel Ayoola, and
Hon. Justice Shireen Avis Fisher

Registrar: Mr. Herman Von Hebel

Date filed: 13th May 2009

THE PROSECUTOR

V.

ISSA HASSAN SESAY

Case No. SCSL-04-15-A

PUBLIC

Reply to Proseeution Response to
Motion Requesting the Appeals Chamber to
Order the Prosecution to Disclose Rule 68 Material

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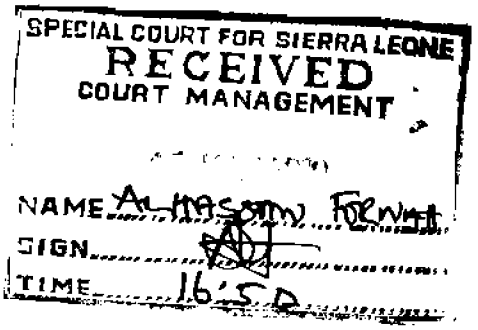

Introduction

1. The Sesay Defence replies to the "Prosecution Response"[1] to the Defence "Motion Requesting the Appeals Chamber to Order the Prosecution to Diselose Rule 68 Material."[2]

Reply

2. The Defence submits that the Prosecution's approach to its Rule 68 obligations throughout the RUF trial has been at best opaque and at worst deeply flawed. The Prosecution Response does not provide any reassurance concerning this approach. The following is *illustrative* of the Prosecution's approach since 2004 which departs significantly from that taken by Prosecutors at the ICTY and ICTR and is a source of considerable concern:
   (i) The Prosecution claims that its Rule 68 obligation does not include a duty to disclose actual exculpatory information/evidence but is limited to an obligation to only "make a statement ... disclosing to the defence the existence of evidence known to the Prosecutor";[3]
   (ii) The Proscecution asserts that assistance they have provided to witnesses enabling them to relocate (including assistance enabling permanent immigration changes) is not discloseable pursuant to Rule 68;[4] and
   (iii)On the 25th January 2008 the Prosecution misled the Trial Chamber in claiming not to be in possession of Rule 68 material relating to the alleged rape and killing of the wife of TF1-108. This evidence was belatedly disclosed on the 5th February 2008, after the Prosecution had relied upon it.[5]

3. These *examples* of the Prosecution's approach to its obligations do not suggest conduct – as suggested by the Prosecution – that might be characterised as "good faith at all times."[6] The wholesale attempt to narrow or reduce its Rule 68 obligations have not provided the reassurance that the Prosecution is approaching the matter fairly or with due regard to well-established precedent from the ICTY and ICTR. Even now it would appear that the

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[1] *Prosecutor* v. *Sesay*, SCSL-04-15-A-1270, "Proseeution Response to Sesay Motion Requesting the Appeals Chamber to Order the Prosecution to Diselose Rule 68 Material," 8 May 2009.
[2] *Prosecutor* v. *Sesay*, SCSL-04-15-A-1268, "Motion Requesting the Appeals Chamber to Order the Prosecution to Disclose Rule 68 Material," 7 May 2009.
[3] *Prosecutor* v. *Sesay*, SCSL-04-15-T-1021, "Proseeution Notiee of Appeal and Submissions Regarding 'Decision on the Sesay Defenee Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses,'" 3 Mareh 2008, paras. 29 and 39.
[4] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-T-281, "Prosecution Response to Sesay's "Motion Seeking Disclosure of the Relationship Between the United States of America's Government and/or Administration and/or Intelligence and/or Seeurity Services and the Investigation Department of the Office of the Prosecutor,'" 16 November 2004, paras. 23-26.
[5] *See*, *Prasecutor* v. *Sesay et al.*, SCSL-2004-15-T-968, "Defence Motion [for Various Relief Dated]," 6 February 2008; and the Prosecution's Response, *Prosecutor* v. *Sesay et al.*, SCSL-2004-15-T-978, 12 February 2008.
[6] *Prosecutor* v. *Sesay*, SCSL-04-15-A-1270, "Prosecutiou Response to Sesay Motion Requesting the Appeals Chamber to Order the Prosecotion to Disclose Rule 68 Material," 8 May 2009, para. 2.

Prosecution is prepared to rely upon isolated and anomalous pieces of interlocutory jurisprudence (suggesting that it does not have to disclose all material that could be "*useful* in the defence against charges"[7]) rather than acknowledge that it has a wide and intentionally onerous obligation to disclose material which not only suggests the innocence of the Accused but also material which *may* suggest innocence.[8] An acknowledgment and acceptanee of this obligation is long overdue.

Exhibit D-63

4. The Prosecution's approach to Exhibit D-63 is unfortunately consistent with this generally flawed approach. The Prosecution scrupulously avoids detailing how Exhibit D-63 was provided to the Taylor Defence.[9] Likely it was disclosed as Rule 68 material; obviously this was the eorrect designation. The case against Taylor concerning the mining at Tongo is inextricably linked to the case against Sesay et al. and there exists no *bona fide* reason why the Prosecution would choose to designate it as Rule 68 in one case and not the other. Only after thriee[10] asking for the exhibit was it provided to the Defence.

5. Notwithstanding, thc Prosecution continues to assert that Exhibit D-63 is not exculpatory. In asserting that Exhibit D-63 does not constitute Rule 68 material, the Prosecution relies solely upon the handwrittcn portions of the Exhibit. It should be noted that the Prosecution does not deny that the handwritten notcs are non-contemporaneous to the typed official reports[11] or that the handwritten notes contradict the typed official reports.[12]

6. By wilfully disregarding the typed official reports, the Prosecution mount their claim that (i) "Exhibit D-63 does not eontain any evidenee which *tends to* suggest the innocence or mitigate the guilt of the Accused, or affect the credibility of Prosecution Witnesses TF1-035, TF1-041, TF1-045, TF1-060, TF1-122, TF1-367 or TF1-371;" (ii) "[t]he Defenee relies upon what the document *does not* state as being exculpatory;" and (iii) "the omission of the mention of killings, forced mining or the presence of child soldiers at Cyborg Pit does not

[7] Response, para. 8 (emphasis in original), citing *Prosecutor* v. *Blagojevic et al.*, IT-02-60-PT, "Joint Decision on Motions Related to Production of Evidence," 12 December 2002, para. 26.
[8] *Prosecutor* v. *Krajisnik*, IT-00-39-T, "Deeision on Defence Motion on Rule 68 of the Rules of Procedure and Evidence with Confidential Annex," 2 June 2006, para. 9, as cited in Jurisprudence of the International Courts and the Europcan Court of Human Rights, Procedure and Evidence, Toehilovsky, 2008, pp. 121.
[9] At paragraph 16 of the Prosecution Response, the Prosecution indicate merely that Exhibit D-63 was "produced" to the Prosecution by TF1-060 and later tendered into evidence by the Taylor Defence.
[10] *See* Annex B of thc Motion and the emails from the Defence to the Prosecution dated the 15th, 23rd, and 24th April 2009. The Prosecution provided the Defence with a copy of Exhibit D-63 on the 28th April 2009.
[11] Motion, footnote 10. *See, e.g.*, 00101409 (handwritten) which mentions events on thc 1st, 8th, and 16th of September 1997. As 00101409 appears to have been written on the back of 00101408 (official typed report dated the 24th August 1997). This elearly places the handwritten portions of the Exhibit as being made at a time subsequent to when the official typed reports were made.
[12] *See, e.g.*, Motion, footnote 11.

thereby make Exhibit D-63 exculpatory material."[13] This is plainly a deeply flawed analysis of the issue.

7. The typed portions of the Exhibit were produced as official reports and purport to be a contemporaneous record of the events at Tongo Field. The Exhibit (both typed and handwritten portions) does not make any mention of the unlawful killing of 63 civilians at Cyborg Pit by AFRC/RUF fighters – a charge which was found proven against Sesay[14] – even though it mentions other crimes within the same period. The Prosecution's submission that this absence is not probative of the Accused's case – that these killings never occurred[15] – is plainly wrong.

8. Equally, that the contemporaneous typed reports (and handwritten portions) do not mention child soldiers at Cyborg Pit, or an organized system of forced mining at Cyborg Pit (or elsewhere), would appear to be highly probative – if not dispositive – of the convicted person's defence.[16] That the Prosecution fails to recognize that Exhibit D-63 affects the credibility of TF1-035, TF1-045, TF1-060, TF1-122, TF1-367, and TF1-371 is illustrative of a deeply flawed approach to Rule 68. Each of the witnesses – in partieular TF1-035, TF1-045, and TF1-060 – testified that there was forced mining in the Tongo Fields area. That the Exhibit speaks to mining unconnected to force is highly suggestive that there wasn't force or that, in the very least – comporting with TF1-035's testimony – that such foree was limited to three or four separate days (each of which was prior to the ninth day subsequent to the RUF and AFRC's entry into the Tongo Fields area).[17] In any event, plainly, the Exhibit plainly *may* support the Defenee case.

9. As the Prosecution must know, in general, the Defence in any criminal trial relies upon the *absence* of evidence to seek to disprove many of the eharges. The purportedly *bona fides* claim by the Prosecution that this is not the way in which charges are rebutted is further proof of the need for an independent review of evidence in the Prosecution's possession.

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[13] Prosecution Response, para. 18; second emphasis in the original.
[14] Judgment, Para. 2050.
[15] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-T-1221, "Sesay Defence Final Trial Brief," 7 August 2008, paras. 629-638.
[16] Conversely, that the official typed reports and handwritten portions of Exhibit D-63 do speak to other crimes does not necessarily mean that they are true. The Defence has previously submitted that TF1-060, the source of the exhibit, is prone to making broad, sweeping, and unverified allegations (see, Sesay Defence Closing Brief at paragraphs 616-618). As such, one eannot say for eertain whether everything in the typed reports is true (e.g., rapes). However, the omission in the official reports of a forced mining scheme, civilian deaths in eonnection with mining, and child soldiers are significant omissions tending to prove their absence.
[17] Transcript/TF1-035, 5 July 2005, pp. 100-104. The ninth day would have transpired by the time the first official typed report of Exhibit D-63 (00101408; dated 24th August 1997) was composed.

10. In its Response, the Prosecution confirmed that some of the witnesses that testified in both *Sesay et al.* and *Taylor* were interviewed subsequent to their testimony in *Sesay et al.* and prior to their testimony in *Taylor*. However the Response confirms that the Prosecution have provided only two "statements" (TF1-064 and TF1-330)[18] to the Defence; the remainder of the disclosure constitutes "interview notes" and "proofing notes" which are demonstrably different types of records and, at least in the case of proofing notes, arise from different processes. Further, the only witnesses for whom the Prosecution gave such confirmation were those witnesses that gave statements that, according to the Prosecution, contain exculpatory material.[19] There were eight such witnesses.[20] In other words, the Prosecution confirmed that thirty-five witnesses testified for the Prosecution in both *Sesay et al.* and *Taylor*[21] but have only confirmed that eight out of those thirty-five witnesses gave "statements," "interview notes," or "proofing notes" to the Prosecution subsequent to their testimony in *Sesay et al.* and prior to their testimony in *Taylor*.[22]

11. It is highly implausible that only eight of these thirty-five witnesses gave "statements," "interview notes," or "proofing notes" that contain any divergence from their "statements," "interview notes," or "proofing notes" made in anticipation of their evidence in *Sesay et al.* or that otherwise contain exculpatory material. This is significant as will be apparent from the below.

TF1-060 and TF1-077

12. In addition to the eight aforementioned witnesses, the Prosecution confirms – *for the first time in response to the Defence Motion* – that TF1-060 and TF1-077 were interviewed subsequent to their testimony in *Sesay et al.*[23] Putting aside the unneeessary opaqueness in their previous responses, the Prosecution still has not offered an explanation concerning how TF1-060 was led in direct examination on material of an exculpatory value (e.g., the only

[18] Prosecution Response, para. 6.
[19] Prosecution Response, paragraph 6.
[20] These are TF1-064, 114, 330, 334, 360, 362, 367, and 371. *See*, Prosecution Response, paragraph 6.
[21] *See*, Motion, Annex B, email from Prosecution to Defence dated 23rd April 2009.
[22] The Defence further notes that, with the exception of TF1-035, TF1-036, and TF1-108, the Response is silent as to whether the Prosecution disclosed "statements," "interview notes," or "proofing notes" from *Sesay et al.* witnesses that were interviewed in preparation for *Taylor* but were not called to testify in *Taylor*. *See*. e.g., Motion, Annex B, emails from Defence to Prosecution dated 23rd and 29th April and 5th May 2009. The Defence was first made aware that TF1-035, TF1-036, and TF1-108 were interviewed subsequent to their testimony in *Sesay et al.* by means of disclosure of Rule 68 emanating from those witnesses. *See* Prosecution Response Annex A at 286, 288, and 289.
The Prosecution also fails to confirm why the Exhibits referred to in the "Decision on Prosecution Motion for Admission of Certain Documents Seized from RUF Kono Office, Kono District," are not exculpatory. *See*, Motion, Annex B, emails from Defence to Prosecution dated 15th, 23rd, and 24th April 2009. This excepts Exhibit P.375 (*see*, Annex B, email from the Prosecution to the Defence dated 28th April 2009).
[23] *See*. Response, paragraphs 13 and 14.

deaths that oeeurred at Cyborg Pit were from sands collapsing on the miners[24]) but this material was not ineluded in a recorded "witness statement," "interview note," or "proofing note." This is powerful evidence and eonfirms the exculpatory value of Exhibit D-63. Equally absent is any explanation conceming TF1-077's statement and how he, in *Taylor*, confirmed that he was first captured in December 1999.[25] According to the Prosecution's present stance, this also was not previously recorded in any "statement," "interview note," or "proofing note" that eould be disclosed pursuant to Rule 68 – notwithstanding that Sesay was convicted of planning enslavement in Tombodn based on the Trial Chamber's finding that TF1-077 was captured in December 1998 (rather than December 1999) and forced to mine at Tombodu at some point in 1999.

13. The Defence submits that the above is consistent with the Prosecution's approach to Rule 68 material. Had the Prosecution consistently provided the Defenee with Rule 68 material (or at least provided detailed answers to Defence inquiries) the Defence would not have had to ask the Appeals Chamber for relief. Rather, the opaqueness of the Prosecution responses (e.g., "The Prosecution has been undertaking an on-going review of all materials arising from the Taylor trial including witness statements, transcripts, witness payments, documents and exhibits and the Proseeution has been complying with its Rule 68 obligations in this regard"[26]) coupled with the clearest errors of interpretation make this inevitable.

Conclusion

14. The Defenee submits that the Prosecution knows or should know their obligation under Rule 68 but is nonetheless not complying with it. The Defence submits that the interests of justice dictate that material in the Prosecution's possession be independently reviewed for potentially exeulpatory material.

15. The Defence reiterates its request that the Appeals Chamber sanction the Proseeution for their non-compliance with thcir Rule 68 obligations.

Dated 13th May 2009

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[24] *See*, Motion, footnote 21.
[25] *See*, Motion, paragraph 12.
[26] *See*, Motion, Annex B, emails from Prosecution to Defence dated 23rd April and 2nd May 2009. *See also*, email from the Prosecution to Defence dated 28th April 2009.