1286) SCSL-04-15-A (3642-3667) 3642

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice Renate Winter, Presiding Judge
Justice Jon M. Kamanda
Justice George Gelaga King
Justice Emmanuel Ayoola
Justice Shireen Avis Fisher

Acting Registrar: Binta Mansaray

Date: 16 June 2009

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-A)

DECISION ON SESAY DEFENCE MOTION REQUESTING THE APPEALS CHAMBER TO ORDER THE PROSECUTION TO DISCLOSE RULE 68 MATERIAL

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THE APPEALS CHAMBER ("Appeals Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Justice Renate Winter, Presiding Judge, Justice Jon M. Kamanda, Justice George Gelaga King, Justice Emmanuel Ayoola and Justice Shireen Avis Fisher;

SEIZED of appeals from the Judgment rendered by Trial Chamber I ("Trial Chamber") on 2 March 2009, in the case of *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*,[1] Case No. SCSL -04-15-T ("*RUF* Trial Judgment" or "Trial Judgment");

SEIZED of the Sesay Defenee "Motion Requesting the Appeals Chamber to Order the Prosecution to Disclose Rule 68 Material", dated 7 May 2009 ("Motion");

CONSIDERING the "Prosecution Response to Sesay Motion Requesting the Appeals Chamber to Order the Prosecution to Disclose Rule 68 Material", dated 8 May 2009 ("Response"), as corrected[2] and the "Reply to the Prosecution Response to Sesay Motion Requesting the Appeals Chamber to Order the Prosecution to Disclose Rue 68 Material" dated 13 May 2009;

HEREBY DECIDES the Appeal based on the written submission of the Parties.

I. BACKGROUND

1. By a motion dated 7 May 2009, the Sesay Defence sought the following remedy[3]:

   (i) an immediate independent review of the material in the Prosecution's possession;

   (ii) an order that the Prosecution disclose all material falling within the categories outlined in the motion, including all witness statements provided by Prosecution witnesses that testified in *Sesay et. al*; whether as part of the investigation into *Sesay et. al*, or otherwise.

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[1] *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, *("Sesay et al" or "RUF* Trial*").*

[2] Corrigendum to Proseeution Response to Sesay Motion Requesting the Appeals Chamber to Order the Prosecution to Diselose Rule 68 Material, 11 May 2009, ("Corrigendum").

[3] Motion, para. 14.

The application was brought on the footing that the Prosecution had failed to disclose Rule 68 material in its possession to the Defence.

2. Sesay and two other accused persons were members of the Revolutionary United Front ("RUF") charged before the Special Court with crimes against humanity in 8 counts, war crimes in 8 counts, and other serious violations of international humanitarian law in 2 counts. He was found guilty of acts of terrorism, collective punishments, extermination, murder as crime against humanity, violence to life, health and physical or mental well-being of persons in particular murder and mutilation, rape, sexual slavery, other inhumane acts namely: forced marriage and physical violence, outrages upon personal dignity, conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, enslavement, pillage and intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission.[4]

3. Sesay has appealed from the decision by a notice of appeal filed on 28 April 2009. The appeal is still pending before the Appeals Chamber. Nothing in this decision is to be taken as deciding any issue in the appeal on its merits.

II. SUBMISSIONS OF THE PARTIES

A. APPLICATION

4. The Sesay Defence allege the Prosecution's misconception and ongoing breach of Rule 68 and argue that the "Prosecution purports to not understand what constitutes Rule 68 material". The main ground for the application is that although through the course of the Prosecution's case in *Prosecutor v. Taylor*,[5] there was an abundance of documents disclosed to the Taylor defence, a number of which were disclosed to the Sesay Defence pursuant to Rule 68, several other documents that were clearly Rule 68 material were not disclosed to the Sesay Defence. The case of the Sesay Defence, as put in the motion[6], is that "the Prosecution have in their possession a multitude of documents emanating from the

[4] *RUF* Trial Judgment, pages 677-680.
[5] *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, *("Taylor")*.
[6] Motion, para. 8.

Prosecution's investigation in *Sesay et al* and *Taylor* that constitute Rule 68 material which could assist Sesay with his appeal as proof of his innocence, as mitigation against findings of his guilt, or otherwise as affecting the eredibility of Proseeution evidence."

5. Reliance was placed on: (i) a document described as Exhibit D-63 and (ii) interviews of witnesses that testified for the Proseeution in *Taylor* as instances of the Prosecution's breach of duty of disclosure in regard to Rule 68 materials.

1. Exhibit D - 63

6. The Sesay Defence argued that Exhibit D-63 was not disclosed to the Defence pursuant to Rule 68 and was not disclosed until requested by the Defence with the Prosecution asserting that Exhibit D-63 does not constitute Rule 68 material.[7] The Prosecution for its part stated[8] that "Exhibit D-63 was produced by TF1-060 to the Defence on 25 September 2008 in connection with the *Taylor* trial, and tendered in evidence in the *Taylor* case in its present form by the Taylor Defence through TF1 -060".

7. The case built around Exhibit D-63 by the Sesay defenee is that Sesay was convicted of unlawful killings in the Tongo Fields, including Cyborg Pit (under Counts 3-5), the enslavement of an unknown number of eivilians in connection with diamond mining at Cyborg Pit (under Counts 1 and 13) and that the Trial Chamber also found as charged in Count 12 that over a hundred child soldiers in groups of 15 guarded Cyborg Pit and killed miners at Cyborg Pit, whereas nowhere in Exhibit D-63 which was a series of six typed reports, stated by the Sesay Defence as "spanning August through November 1997",[9] and as concerning the activities of the RUF and AFRC in the Tongo Fields area, was it stated that any civilian was intentionally killed in connection with mining at Cyborg Pit, or that any eivilian was subjeeted to forced mining; or that child soldiers guarded Cyborg Pit and killed miners there.

8. Flowing from these facts, the Sesay Defence submitted[10] that these omissions undermined the Prosecution case, accepted by the Trial Chamber, of the brutal capture and enslavement of hundreds of civilians at the mining Pits and that by reason of these

[7] Motion, para. 4.
[8] Response, para. 16.
[9] Motion, para. 6.
[10] Motion, para. 7.

omissions Exhibit D-63 falls squarely within the Proseeution's Rule 68 obligations as: (i) suggesting Sesay's innocence; or (ii) tending to mitigate the Trial Chamber's finding of his guilt; or (iii) affecting the credibility of, *inter alia,* TFI-035, TFI-041, TFI-045, TFI-060 himself, TFI-122, TFI-367 and TFI-371 in that they testified in varying degrees to forced diamond mining in the Tongo Fields area during the junta period.

9. The Sesay Defence invited the Appeals Chamber to hold that the fact that Exhibit D -63 was not disclosed was a "worrying example" of thc Prosecution's failure to interpret its obligations fairly or reasonably thereby increasing the risk of unsafe convictions.

2. Interviews of witnesses that testified for the Prosecution in *Taylor*

10. The Sesay Defence[11] while acknowledging that the Prosecution had, in compliance with its Rule 68 obligations provided the Defence with closed session transcripts from *Taylor* to which it would otherwise not have had access, complained that the Prosecution has not provided the Defence with copies of recordings (e.g. witness statements) of interviews of Prosecution witnesses prior to their testimony in *Taylor* and has failed to confirm that such witnesses were in fact interviewed.

11. They submitted[12] that the assertion by the Prosecution that it had eomplied with its Rule 68 obligations could not have been true because:

1. TFI-060 in *Taylor* had testified that "the only people that died at Cyborg Pit were miners that were present at the pit when sands collapsed on them" in direet contradiction to the evidence in *Sesay et al* upon which the Trial Chamber convictions were supported, that miners were killed at Cyborg Pit by being fired upon;
2. TFI-077 had, in direet contradiction to the Trial Chamber's finding that he was captured on 16 December 1998 (which led to Sesay's eonvietion for planning enslavement in Tombodu for portion of 1999), testified in *Taylor* that he was first captured on 16 December 1999 and then subsequently brought to Tombodu to engage in forced mining;

[11] Motion, paras 9 and 10.
[12] Motion, paras 11-13.

3. TFI-568 who testified in *Taylor* but not in *Sesay* when cross-examined on a recording of an interview he had with the Prosecution, testified that the only time he was certain that he knew there was force in Kono District in connection with mining was in 1998; that he was uncertain whether there was force in 1999 but was certain there was no force in 2000, thus contradicting the Trial Chamber's findings, showing that there was no force used in diamond mining after Sesay took over the mining operations in 2000 and casting doubt on the Trial Chamber's findings that force was used in mining in 1999.

The Sesay Defence reasoned, it would appear, that these facts testified to by the witnesses were exculpatory and if contained in interviews with the Prosecution would have been exculpatory material within the Rule 68 obligations of the Prosecution.

B. Response

12. In regard to Exhibit D-63, the Prosecution asserts[13] that it was provided to the Sesay Defence at their request. The Prosecution submitted[14] that Exhibit D-63 does not contain any evidence which tends to suggest the innocence or mitigate the guilt of the Accused or affect the credibility of any of the Prosecution witnesses mentioned by the Sesay Defence.

13. The Prosecution refers to passages in Exhibit D-63 submitting that, rather than being exculpatory they were accusatory such as, reference in Exhibit D-63 to child soldiers carrying out killing of miners and the references to the need for male civilians "to be used as labourers for their diamond mining" and "civilians needed for certain domestic work."

14. In regard to witnesses TFI-060, TFI-077 and TF1-568 the Prosecution submits that it is untrue[15] that the Prosecution is in possession of exculpatory material from the interviews of those witnesses before their testimony in *Taylor*, which has not been disclosed to the Defence. The Prosecution asserted[16] that the additional statements (i.e. additional to witness statements in relation to *Sesay et al* already disclosed) of TF1-060 and TF1-077 relating to

[13] Response, para. 16.
[14] Response, paras 16-20.
[15] Response, para. 11.
[16] Response, para. 14.

Taylor were not disclosed to the Defence because they were deemed not to contain Rule 68 material.

15. The Prosecution submitted[17] that Rule 68 does not translate into a right for the Defence to receive all of the Prosecution's evidence that could be useful in the defence against charges in the indictment and that it had acted in good faith at all times.

16. Finally, the Prosecution submitted[18] that: the defence has provided no basis for the remedies requested; there are no grounds for ordering an independent review of the material in the Prosecution's possession, particularly at this appeals stage; the specific material requested by the Defence has already been provided; and even where a breach of Rule 68 is proved, the Chamber should examine whether the Defence has suffered prejudiced in determining the appropriate remedy.

C. Reply

17. The Sesay Defence reply was in substance a repetition of the submission earlier made.

III. APPLICABLE LAW

18. Rule 68B of the Rules of Procedure and Evidence ("Rules") provides that:

> 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 prosecution evidence. The Prosecutor shall be under continuing obligation to disclose any such exculpatory material.

19. Rule 68 does not impose a general obligation on the Prosecutor to disclose to the Defence the existence of *all* evidence known to the Prosecutor but existence of evidence:

(i) known to the Prosecutor, and

[17] Response, para. 8.
[18] Response, para. 24.

(ii) which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

20. The guiding principles in relation to the meaning, scope and application of Rule 68 seem now well settled and need no further discussion. Such of them as may be relevant to this case can be briefly stated. The determination as to what material meets Rule 68 disclosure requirements falls within the Prosecutor's discretion.[19] The Prosecutor's duty under Rule 68 is a continuing obligation which extends to the post-trial stage, including appeals.[20] Considering that it can be assumed that the Prosecution shall fulfil its duties in good faith, an order addressed to the Prosecution for general compliance with its obligation laid down in Rule 68 of the Rules should only be contemplated where the Defence can satisfy the Chamber that the Prosecution has failed to discharge its obligations under Rule 68.[21] Where the Prosecution has made a statement according to which it is aware of its continuing obligation under Rule 68 to disclose exculpatory evidence, the Appeals Chamber must assume that the Prosecution is acting in good faith unless there is evidence to the contrary. The Prosecution may be relieved of its Rule 68 obligation if the existence of the relevant exculpatory evidence is known by the Defence and if this evidence is reasonably accessible.[22] The obligation lies with the Defence to establish to the satisfaction of the Chamber that there is undisclosed material within the scope of Rule 68 in the possession of the Prosecution.

IV. DELIBERATIONS

21. The obligation that lies with the defence can be narrowed down to an obligation of *prima facie* proof that undisclosed material that are exculpatory in terms of Rule 68 are in existence, known to and in possession of the Prosecutor.

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[19] *Prosecutor v. Blaskic*, IT-95-14-A, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Judgment, 29 July 2004, para. 264, ("*Blaskic* Appeals Judgment").
[20] *Prosecutor v. Blaskic*, IT-95-14-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Decision on Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings, 26 September 2000, para. 42, ("*Blaskic* Decision of 26 September 2000").
[21] *Ibid*, para. 45.
[22] *Ibid*, para. 38; See also *Prosecutor v. Brdjanin*, IT-99-36-A, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, ("*Brdjanin* Decision of 7 December 2004").

22. The question in this case is whether the Sesay Defence has discharged that obligation. Proof that Rule 68 material exists is central to the discharge of the obligation. To discharge that burden it is not enough for the Defence to assert that some material are in the possession and control of the Prosecution, it must also be shown that such material are exculpatory.

23. In this case, it is evident that the Sesay Defence sought to prove both the existence and exculpatory nature of the material that they want disclosed from inferences they suggest the Appeals Chamber should draw, as they claim, from (i) the omission to record certain incidents in Exhibit D-63 and (ii) the evidence of certain witnesses which they elaim contradicted the findings made by the Trial Chamber in *Sesay et al.*

24. In regard to Exhibit D-63, it is common ground that the exhibit had already been disclosed and is already available to the Sesay Defence. Any fresh request that it be disclosed will, evidently, be redundant.

25. In regard to the testimony of Witnesses TF1-060, TF1-O77 and TF1 568 the only relevance of these, having regard to the remedy sought, is whether their testimony led to a reasonable inference that OTHER Rule 68 material are being withheld by the Prosecution.

26. In this motion the Sesay Defence have striven hard to demonstrate that the evidence given by these witnesses in *Taylor* on certain facts contradicted the findings of the Trial Chamber in *Sesay et. al* on those facts or tended to show that the findings are ineorrect.

27. Since the Sesay Defence motion had proeeeded on the footing that Exhibit D-63 and the testimony of Witnesses TF1-060, TF1-077 and TF1-568 in *Taylor* are exculpatory in regard to Sesay, the Sesay Defenee have striven hard to show that they are Rule 68 material while the Prosecution has also argued strongly that they are not.

28. The arguments of the Sesay Defence and of the Proseeution in regard to exhibit D-63 have already been noted.[23] Both parties agree that the Sesay Defenee rely on what the

[23] *Supra*, paras 6-9, 12, 13.

document omitted to say as constituting its exculpatory character.[24] The Prosecution, however argues that omission of the mention of killings, forced mining or the presence of child soldiers at Cyborg Pit does not thereby make Exhibit D-63 exculpatory material.

29. It is proper to note that a document may not be exculpatory on the face of it but may become exculpatory when cousidered in the context of surrounding circumstances or facts. The Prosecution may need in such cases to look beyond the face of the material in determining whether it is Rule 68 material. Where, for instance, a report is presented as a full aecount of an event by a person who has responsibility so to do, an omission may be interpreted as indicating that what was omitted did not take plaee, so as to affect the credibility of the Prosecution evidence in regard to that incident in terms of Rule 68. Much would depend on the evidence, if any, as to the character of the report and the status of the maker. In *Krstić*,[25] the Appeals Chamber of the *ICTY* rejected the argument that for a document to fall within Rule 68, it must be exculpatory "on its face". In that case, the *ICTY* Appeals Chamber said, and it is not difficult to agree with the opinion, that:

> The disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal, and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached. The Appeals Chamber is conscious that a broader interpretation of the obligation to disclose evidence may well increase the burden on the Prosecution, both in terms of the volume of material to be disclosed, and in terms of the effort expended in determining whether material is exculpatory. Given the fundamental importance of disclosing exculpatory evidenee, however, it would be against the interests of a fair trial to limit the Rule's scope for application in the manner suggested by the Prosecution.[26]

30. Whether Exhibit D-63 tends to be exculpatory material or not, it has already beeu disclosed and it is not wise to speculate what use the Sesay Defence will make of it. In the circumstances, it may not be prudent at this stage to make any judicial pronouncement that may be misinterpreted as determining whether or not it is in fact exculpatory material in advance of its evaluation, should the occasion arise in the course of the appeal, along with other evidence in the case, which may include evidence as to the circumstanees in which the reports were made, their status and the extent to whieh they were expeeted to be detailed and eomprehensive. Whether a material is exculpatory in faet is for the Chamber to decide while

[24] Motion, para. 6; Response, para. 18.
[25] *Prosecutor v. Krstić*, IT-98-33-A, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Judgment, 19 April 2004, para. 179, ("*Kristic* Appeals Judgment").
[26] *Ibid*, at para. 180.

the obligation of the Prosecution is limited to determining whether or not the material in any way tends to suggest the innoeence *etc* of the accused.

31. As the Sesay Defencc obscrved in footnote 10 to the Motion some further enquiry in regard to the Exhibit is still needed to ascertain some facts relating to the reports. Where further facts need to be known to determine whether or not material in any way tends to be exculpatory, a conclusion that such material may tend to be exculpatory cannot be reasonably made without knowledgc of such further facts.

32. Assuming that the transcript of evidence in *Taylor* may have supplied the missing details, as a result of which, perhaps, the Prosecution, probably, did make the disclosure at the request of the Sesay Defence, while not admitting that the exhibit is a Rule 68 material, the fact remains that the missing facts and the report were adduced in evidence during the *Taylor* trial at an open session and are by that reason "open source material" which in the context of electronic facilities available to monitor the *Taylor* proceedings may be regardcd not to be subject to the Rule 68 obligations of the Prosecution.

33. In these circumstances, the conclusion that the Sesay Defence invited the Appeals Chamber to draw from Exhibit D-63 as example of the failure of the Prosecution's failure to interpret its obligation fairly or reasonably, cannot be drawn. It is useful to note that in this motion Exhibit D-63 is not the targeted material, because it had been disclosed, but the targeted material are other material "falling within the categories outlined in this motion."[27]

34. The other segment of the argument of the Sesay Defencc based on interviews of witnesses that testified for the Proseeution has been earlier noted.[28]

35. The submission that the evidence of TF1-060 in *Taylor* was to the effect that the only people that died at Cyborg Pit were miners that were present at the Pit when the sands collapscd on them was apparently a wrong paraphrasing of the evidence which was a description of death caused by the dangerous condition of the pit *as distinguished from* death caused by aets of persons.[29] It cannot be said that there had been a contradiction when the testimony is about the *causes* of death in two or more separate ineidents. Besides, now

[27] Motion, para. 15.
[28] *Supra*, paras 10, 11.
[29] See Motion, footnote 12, extract from *Taylor*, Transcript, TF1-060, 29 September 2008, pp. 17538-40.

that the transcripts in *Taylor* and in *Sesay et al* are documents available to the Defence, it is difficult to see to what use the disclosure of witness statements of the witnesses who gave the pieees of evidence upon which the Trial Chamber relied would have been put so as to earry the case further than the transcripts would, if properly utilized.

36. In regard to TF1-077, the issue made of his evidence by the Sesay Defence is that he gave the date of his abduetion in Koidu both in *Sesay et al* and in *Taylor* as occurring in December 1999 while the Trial Chamber, apparently preferring the evidence of TF1-199 reasoned that "TF1-077 testifies that this incident occurred in Deeember 1999 during the recapture of Koidu...The Chamber is satisfied that TF1-077 is mistaken about the year, sinee the recapture of Koidu by the RUF occurred in December 1998."[30]

37. From all showing, the transeripts would show that TF1-077 has been consistent in respeet of the date of his abduction but not about the aseertainable fact by reference to which he had wanted the year of the ineident to be ascertained. The only evidence that the Trial Chamber had before it through the testimony of TF1-077 about ascertainable fact was that he was eaptured *during the recapture of Koidu* whieh the Trial Chamber found could not have been in 1999 since the recapture was in December 1998. Had the witness statement of TF1-077, contained the date of his abduetion as December 1999 without more, it would have been Rule 68 material as evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of Sesay in regard to an offenee committed outside the period for whieh Sesay could have been responsible for the offence. The Proseeution asserted, and it has not been denied by the Sesay Defence, that the witness statement of TF1-077 relating to the *RUF* trial was disclosed to the Defence long ago.[31]

38. Although it may not be diffieult to agree with the Sesay Defence that should a reeording of an interview of TF1-077 be to the effect that he was captured in December 1999 instead of December 1998, such material would be a Rule 68 material subject to disclosure by the Prosecution for the purpose of *Sesay et al* there would however be some difficulty of internal contradiction if the same statement as to the date had also had appended to it an independent faet by which the date could be ascertained such as would eonfirm the date as December 2008. Thus, the Trial Chamber would be correct in using reference to the reeapture of Koidu (undisputedly found to be in 1998) as determining the

[30] *RUF* Trial Judgment, footnote 2404, para. 1251.

year of the capture of TF1-077 as the basis of its finding that it could not have been in Deeember 1999 that the witness was captured. If the argument is to be understood as suggesting that if there was a witness statement in *Taylor* sueh should also have been diselosed to the Sesay Defenee, nothing has been shown by the Sesay Defenee that sueh statement is a Rule 68 material, even if it had in it a different fact (such as "after the Lomé Aeeord") from which the year eould be ascertained or if, subsequently in the course of oral testimony in *Taylor* the witness had chosen to give a different fact (such as "after the Lomé Accord") by reference to whieh the year could be ascertained. There is nothing that tends to be exculpatory when a witness gives conflicting evidenee or makes conflicting statements in regard to an issue to such extent that the evidence is of such a character that could neither be relied on as being in favour of the Prosecution nor as tending to affect the credibility of Prosecution evidence.

39. In regard to the witness statement of TF1-568 who did not testify in the *RUF* trial but had testified in open session in *Taylor*, the Prosecution stated that pursuant to Rule 68 the interview notes of the witness has been disclosed to the Sesay Defence since 27 June 2007. This has not been challenged by the Sesay Defence.

V. CONCLUSION

40. It is evident thar the relief sought by the Motion has been too vague and lacking in specificity to justify a summary rejection of the motion. A situation in which the Appeals Chamber is left to speculate what the targeted material consists of is unacceptable. Far from being specific the Sesay Defence, after stating that "the Prosecution have in their possession a multitude of documents emanating from the Prosecution's investigations in *Sesay et al* and *Taylor* that constitute Rule 68 material which could assist Sesay with his appeal",[32] proceeded to seek that "the Prosecution be ordered to disclose all material falling within the categories outlined in this motion."[33] It is evident that the Sesay Defence is on a fishing expedition to which a Chamber should not lend its assistance.

41. Be that as it may, it is also clear that the Sesay Defence have failed to establish any of the grounds on which a remedy sought could be granted. The material and submission

[31] Response, para. 14.
[32] Motion, para. 8.
[33] Motion, para. 15.

before the Appeals Chamber have not shown that the Prosecution appears incapable or unwilling to act reasonably and fairly as concerns Rule 68 obligations. Rather, the material placed before the Appeals Chamber is ample enough to show the contrary. The allegation of bad faith has been made by the Sesay Defence without any particulars and without even attempting to substantiate it. That the Prosecution exercises a discretion which may be erroneous or with which the other party may not agree does not lead, reasonably, to an inference of bad faith.

42. In this case there is a total failure of proof that the Prosecution has abused its judgment in its initial decision as regards whether particular material is exculpatory or not.

43. Rule 68 obligations are prescribed for the purpose of ensuring fair hearing. Where a failure to observe the obligations of Rule 68 has occurred the Chamber will be entitled not to visit the failure with any consequence where it is capable of being remedied, unless, irreversibly, it is capable of leading to or has led to a breach of fair hearing. In this regard it is fitting to recall and agree with the opinion expressed by the *ICTY* in *Blaskic* that "the Prosecution may still be relieved of the obligation under Rule 68, if the existence of the exculpatory evidence is known and the evidence is accessible to the appellant, as the appellant would not be prejudiced materially by this violation."[34] In this case even if there has been a breach of the Rule 68 obligation as alleged by the Sesay Defence, they have not occasioned any irreversible prejudice to the Sesay Defence. However, no such breach has been found.

VI. DISPOSITION

BASED ON THE FOREGOING REASONS, THE APPEALS CHAMBER

DISMISSES the Motion in its entirety.

[34] *Blaskic* Decision of 26 September 2000, para. 38.

Done this 16th day of June 2009 at Freetown, Sierra Leone.

Justice Renate Winter
Presiding

Justice Jon M. Kamanda

Justice George Gelaga King

Justice Emmanuel Ayoola

Justice Shireen Avis Fisher

[Seal of the Special Court for Sierra Leone]

SEPARATE CONCURRING OPINION OF JUSTICE GEORGE GELAGA KING ON SESAY DEFENCE MOTION REQUESTING THE APPEALS CHAMBER TO ORDER THE PROSECUTION TO DISCLOSE RULE 68 MATERIAL

I. INTRODUCTION

1. I concur with the Decision of my colleagues of the Appeals Chamber which dismisses in its entirety the Sesay Defence Motion requesting the Chamber to order the Prosecution to disclose Rule 68 Material.[35] I nonetheless wish to append this Separate Concurring Opinion to the Decision in order to stress my own legal reasoning supporting the dismissal of the Sesay Motion.

II. THE SESAY MOTION

2. Sesay alleges that the Prosecution failed to comply with its obligations to disclose pursuant to Rule 68 of the Rules[36] and requests the Appeals Chamber to undertake an immediate independent review of the material in the Prosecution's possession; to order the Prosecution to disclose evidence which it submits is subject to Rule 68; and that the Prosecution be sanctioned for its non-compliance with Rule 68 (the Motion).[37] He avers that the Prosecution "is acting in bad faith and /or has misdirected itself to such a degree that its overall approach to its Rule 68 obligation is called into question."[38] He argues in particular that documents arising in the *Prosecutor v. Taylor* case are exculpatory and subject to Rule 68 disclosure obligations, but they either were not disclosed or were not properly disclosed.[39] Sesay's argument is based principally on Exhibit D-63, and the out-of-court statements of three Prosecution Witnesses (TF1-060; TF1-077; TF1-058). He further alleges that the Prosecution has extensive additional, undisclosed Rule 68 material emanating from its investigations in *Sesay et al* and *Taylor*.[40]

3. In Response, the Prosecution argues that it has acted in good faith at all times in complying with its disclosure obligations and that there is no basis for the allegations concerning its incapacity or unwillingness to act reasonably and fairly with respect to its Rule 68 obligations.[41] It submits, in

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[35] *Prosecutor v. Sesay et al.*, SCSL-04-15-A Motion requesting that the Appeals Chamber Order the Prosecution to Disclose Rule 68 Material, , 7 May 2009. ("Motion.")
[36] Motion, para. 1.
[37] Motion, paras 14-16.
[38] Motion, para. 14.
[39] Motion, para. 3.
[40] Motion para. 8.
[41] *Prosecutor v. Sesay et al*, , SCSL-04-15-A, Prosecution Response to Sesay Motion Requesting The Appeals Chamber To Order The Prosecution To Disclose Rule 68 Material, 8 May 2009, para. 18, para. 2. ("Response")

particular that "Exhibit D-63 does not contain any [exculpatory] evidence,"[42] and that Sesay incorrectly "rel[ies] upon what the document *does not* state as being exculpatory."[43] Concerning the Sesay submissions about Witnesses TF1-060 and TF1-077, the Prosecution responds that the witnesses' statements related to the *RUF* trial were disclosed long ago to the Defence and additional statements related to the *Taylor* trial were not disclosed because the Prosecution determined they do not contain evidence subject to Rule 68.[44]

4. In reply, Sesay emphasises that in general, in any criminal trial, the defence "relies upon the *absence* of evidence to seek to disprove many of the charges"[45] and argues that the absence of mention in Exhibit D-63 of child soldiers or an organised system of forced mining at Cyborg Pit would appear to be highly probative of Sesay's defence.[46]

III. DISCUSSION

5. Rule 68 (B) of the Rules of Procedure and Evidence (Rules) states:

> 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 prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.

6. Jurisprudence from the Special Court's Trial Chambers and from other international criminal courts indicates that for the defendant to establish that the Prosecution breached its disclosure obligations under Rule 68, he must: i) specify the targeted evidentiary material; ii) produce *prima facie* evidence that the targeted evidentiary material is exculpatory in nature; iii) lead *prima facie* evidence that the material is in the Prosecution's custody and control; and iv) show that the Prosecution has in fact, failed to disclose the targeted exculpatory material.[47]

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[42] Response, para. 18.
[43] Response, para. 18
[44] Response, paras 13,14.
[45] *Prosecutor v. Sesay et al.*, SCSL-04-15-A, 8, Reply to the Prosecution Response to Sesay Motion Requesting The Appeals Chamber To Order The Prosecution To Disclose Rule 68 Material, SCSL-04-15-A, 8 May 2009. para. 9. ("Reply.")
[46] Reply, para. 8.
[47] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-363, Decision on Sesay Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and of the Office of the Prosecutor, 2 May 2005, para. 36; *Prosecutor v. Sesay et al.*, SCSL-04-15-T-436, Decision on Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005, para. 4; *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Confidential Defence Application for Disclosure of Documents in The Custody of The Prosecution Pursuant To Rule 66 And 68, 18 February 2009, para. 5. *See also Prosecutor v. Karemera et al*, ICTR-98-44-T, International Criminal Tribunal for Rwanda, Decision on Defence Motions for Disclosure of Information Obtained from Juvenal Uwilingiyimana. 27 April 2006, para. 9.

7. For the reasons stated below, I am of the opinion that in respect of the material specified in the Motion (*i.e.* Exhibit D-63 and out-of-court statements of the three Prosecution Witnesses), Sesay failed to make a *prima facie* case that the material is exculpatory in nature.

A. Exhibit D-63

8. Exhibit D-63 consists of six typed reports with handwritten notes thereon, signed and purportedly written by Witness TF1-060. The typed portions of the exhibit were written by the witness in his capacity as Secretary of the "Lower Bambara Caretaker Committee" in Kenema and describe various alleged transgressions against civilians, committed by the "Military Junta" in Tongo Field, including looting, killings, burning and rapes. The handwritten notes, allegedly written by the witness in anticipation of his testimony in the *Sesay et al.* trial, refer to the role of child combatants in killing civilians and civilians forced to mine.

9. Sesay alleges that the fact that the typed Reports of the exhibit do not mention that civilians were intentionally killed in connection with mining at Cyborg Pit, that child combatants were present at the mines, and that forced mining occurred, makes the exhibit exculpatory. The Prosecution contends that the Defence "rel[ies] upon what the document *does not* state as being exculpatory;"[48] whereas the omissions from the exhibit, regarding killings, forced mining or the presence of child soldiers, do not necessarily make it exculpatory. I accept this contention.

10. In my opinion, the submissions of Sesay which merely rely on the absence of statements related to forced mining or presence of child combatants in Tongo Field in the reports of Exhibit D-063 fall short of the requirement of a *prima facie* case on the exculpatory nature of the material. Indeed, nothing in Exhibit D-63 "tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence" as required by the provisions of Rule 68(B) of the Rules. While information that contradicts that provided by a Prosecution witness may be exculpatory within the meaning of Rule 68,[49] information that substantiates the Prosecution's case clearly fall outside the scope of this provision. In the instant case, Exhibit D-63 tends to prove the Prosecution's case, given that it describes a number of atrocities (killings, molestation, lootings, burnings and rapes) allegedly committed by Junta members against civilians in Tongo Field and

[48] Response, para. 18.

[49] *Prosecutor v. Karemera et al.*, International Criminal Tribunal for Rwanda, Decision On Defence Motions For Disclosure of Information Obtained From Juvénal Uwilingiyimana, Rules 66(B) And 68(A) of The Rules of Procedure and Evidence, 27 April 2006, para. 9; *Prosecutor v. Karemera et al*, ICTR-98-44-T, International Criminal Tribunal for Rwanda, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, paras. 12-13; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, International Criminal Tribunal for Rwanda, Decision on Motion for Disclosure Under Rule 68, 1 March 2004, fn. 5.

that the hand-written portions of the material do refer to the existence of forced mining and the presence of child combatants carrying out killings of civilians. On this ground alone, I consider that Sesay's Motion ought to be dismissed.

11. Notwithstanding the above, I opine that Sesay has not demonstrated that the Prosecution breached its disclosure obligation due to the fact that the Exhibit was tendered in evidence in open session and was easily accessible to the Defence. I note the dictum of the ICTY Appeals Chambers, which I accept and adopt, that

> [the duty of the Prosecution to disclose exculpatory material arising from related cases [....] is a continuous obligation without distinction as to the public or confidential character of the evidence concerned. [h]owever, [...] the Prosecution may be relieved of its Rule 68 obligation if the existence of the relevant exculpatory evidence is known to the Defence and if this evidence is reasonably accessible, i.e. available to the defence with the exercise of due diligence.[50]

12. In addition, despite its contention that the evidence was not subject to Rule 68 disclosure, the Prosecution disclosed the Exhibit to Sesay on 28 April 2009. The Appeals Chamber will presume that the Prosecution acted in good faith in the context of its Rule 68 obligation, unless proved otherwise by the Defence. In this respect, Sesay has not demonstrated that the late disclosure of Exhibit D-63 arose from bad faith. Moreover, having regard to the fact that Sesay has not specified the nature and extent of the prejudice caused by the Prosecution's delay in disclosing the Exhibit,[51] he is not entitled to the remedy sought.

B. Witness Statements for Prosecution Witnesses in *Prosecution v. Taylor*

13. As regards Prosecution witness TF1-060, Sesay has not demonstrated that the testimony of the witness in *Taylor* contains exculpatory information. In my view, the witness' statement that miners died at Cyborg Pit, Tongo Field when sand collapsed on them,[52] ought not to be construed to mean that "the *only people that died* at Cyborg Pit were miners that were present at the pit when sands collapsed on them,"[53] as submitted by Sesay. In fact, the witness also testified to a series of

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[50] *Prosecutor v. Brdjanin*, IT-99-36-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to The Registrar to Disclose Certain Materials, 7 December 2004, p. 3; *Niyitegeka v. Prosecutor*, ICTR-96-14-R, International Criminal Tribunal for Rwanda, Appeals Chamber, Decision On The Prosecutor's Motion To Move For Decision On Niyitegeka's Requests For Review Pursuant To Rules 120 And 121 and The Defence Extremely Urgent Motion Pursuant To (I) Rule 116 For Extension Of Time Limit (II) Rule 68 (A), (B) And (E) For Disclosure Of Exculpatory Evidence, 28 September 2005; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, International Criminal Tribunal for the former Yugoslavia, Decision on Appellant's Notice and Supplemental Notice on Prosecution's Non-Compliance with its Disclosure Obligation under Rule 68 of the Rules, 11 February 2004, para. 17.

[51] Motion, para. 16.

[52] *Taylor* Transcripts, TF1-060, p. 17538.

[53] Motion, para. 8. (Emphasis added).

killing of civilian miners,[54] and only after giving this evidence was the witness asked whether "mining [was] ever dangerous for the miners *aside from the killings* you've just spoken of? When the workers were working for the AFRC, was it ever dangerous?"[55] It is at this point that the witness responded that workers died from collapsing sand.[56]

14. Witness TF1-077 testified in *Sesay et al.* that he was captured in Koidu by the rebels on 16 December 1999 with 50 other civilians and brought to Tombodu to mine.[57] However, based on the testimony of TF1-199, who was also amongst the 50 civilians abducted in Koidu, Trial Chamber I found that the abductions, including that of Witness TF1-077, occurred on 16 December 1998, rather than 1999 and considered that TF1-077 was mistaken on the date.[58] In *Taylor*, TF1-077 again testified that he was captured from Koidu in December 1999.[59]

15. It is not contested that TF1-077's testimony in *Taylor* on 14 October 2008, corroborating his statement *in Sesay et al.* on the date of the abduction, challenges the Trial Chamber's finding on the matter. However, the significance of TF1-077's testimony in Taylor *vis-a- vis* the Trial Judgment only arose, and could thus only have become known to the Prosecution, after the written reasons for the Trial Judgment were filed on 2 March 2009. Before that point in time, TF1-077's testimony in *Taylor* simply constituted a reiteration of the witness' testimony in *Sesay et al.* Further, because the transcript of this testimony was public, the Prosecution was relieved of its Rule 68 obligations with respect to the transcript, as recognized by Sesay.[60] As regards Sesay's additional argument that he is entitled to Witness TF1-077's out-of-court statements to the Prosecution that contain exculpatory information,[61] I note the Prosecution's response that these out-of court statements were not disclosed to Sesay as they were deemed not to contain Rule 68 material. The Prosecution further stated that, "in light of the Motion [it] has reviewed again all statements and additional statements of TF1-060 and TF1-077 made before and after their testimony in the RUF case and remains of the

[54] *Taylor* Transcript, TF1-060, p. 17538.
[55] *Taylor* Transcript, TF1-060, p. 17538. (Emphasis added).
[56] *Taylor* Transcript, TF1-060, p. 17538.
[57] *Sesay et al.* Transcript, TF1-077, 20 July 2004, p. 77-78.
[58] *Sesay et al.* Trial Judgment, para. 1251 (stating: "TF1-077 testifies that this incident occurred in December 1999 during the recapture of Koidu ... The Chamber is satisfied that TF1-077 is mistaken since the recapture of Koidu by the RUF occurred in December 1998.")
[59] In view of the confusion of the witness's testimony regarding the date of his abduction, the Prosecution in Taylor asked TF1-077 if he had been abducted before or after a temporal benchmark — the Lomé Peace Agreement, signed in July 1999 — to ascertain which of the two dates was more probable. The witness responded that he was abducted after the Lomé Agreement, which is consistent with his testimony that he was abducted in December 1999 and inconsistent with the Trial Chamber's finding that he was abducted in December 1998. *Taylor*, Transcript, TF1-077, 14 October 2008, p. 18257-18258.
[60] Motion Annex B, Email from Sesay to Prosecution dated 23 April 2009 (stating "We appreciate that a number of [...] witnesses [that were called in both the Taylor and RUF cases for the Prosecution] testified in open session and therefore the transcripts of their testimony were not provided to the Sesay Defence under Rule 68.")
[61] Motion para. 12.

view that there are no undisclosed Rule 68 materials from these witnesses."[62] It is settled that whether material is subject to Rule 68 is determined, in the first instance, by the Prosecution.[63] In this respect, I endorse the relevant dicta of the ICTR and ICTY that there is a presumption that the Prosecution is acting in good faith *vis-à-vis* its R68 disclosure obligations.[64] Accordingly, unless proved otherwise by Sesay, I am of the opinion that the Prosecution's declaration regarding the absence of exculpatory information arising from TF1-077's out-of-court statement is made in good faith.

16. With respect to Prosecution Witness TF1-568, Sesay failed to demonstrate that the Prosecution did not fulfil its Rule 68 disclosure obligation. The transcripts of the witness' testimony in *Taylor* were disclosed to Sesay,[65] so were the out-of-court statements made by the witness on 17-18 June 2008.[66] Indeed, from Sesay's Reply to the Prosecution's Response, it appears that Sesay has abandoned that contention.

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[62] Response paras. 14-15.

[63] *See e.g., Prosecutor v. Kajelijeli,* ICTR-98-44A-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgment, 23 May 2005, para. 262; *Prosecutor v. Blaškić,* IT-95-14-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgment, 29 July 2004, para. 268; *Prosecutor v. Karemera et al.,* International Criminal Tribunal for Rwanda, ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 16;

[64] *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-a, Décision sur les Requêtes de Ferdinand Nahimana aux Fins de Divulgation D'éléments en Possession du Procureur et Nécessaires a la Défense de l'Appelant et aux Fins d'Assistance du Greffe pour Accomplir des Investigations Complémentaires en Phase d'Appel, 8 December 2006, para. 7; Kordic & Cerkez Appeals Judgment, para. 183 ; *Prosecutor v. Miroslav Bralo,* Case No. IT-95-17-A, Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 34.

[65] *See* Motion Annexe B, Email from the Prosecution to the Defence of 16 April 2009 (stating "Our records (here attached) shows that the following transcripts from the Taylor trial were already electronically sent to the Sesay Defence." Reference is made to TF1-568.),

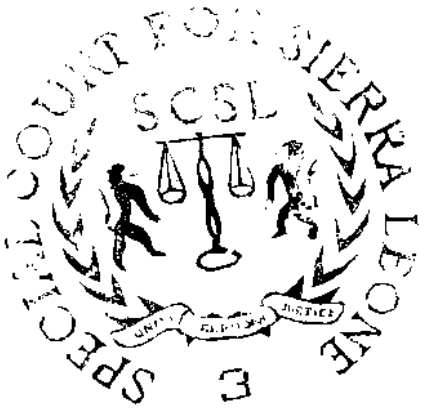
[66] *See* Annex to Prosecution Response regarding witness statements of TF1-568 dated 17-18 June 2009 received by Sesay on 27 January 2009.

IV. DISPOSITION

17. Based on the above considerations, I have come to the conclusion, as my colleagues of the Appeals Chamber, that Sesay's Motion is without merit and ought to be dismissed in its entirety.

Done this 16th day of June 2009 at Freetown, Sierra Leone.

Justice George Gelaga King



PARTIALLY DISSENTING OPINION OF HON. JUSTICE SHIREEN AVIS FISHER ON SESAY DEFENCE MOTION REQUESTING THE APPEALS CHAMBER TO ORDER THE PROSECUTION TO DISCLOSE RULE 68 MATERIAL

1. I join in the decision of the majority dismissing the Defence *Motion Requesting the Appeals chamber to Order the Prosecution to Disclose Rule 68 Material*, filed on 7 May 2009, and adopt their reasoning in all respects except as to any recorded statements made by thirty-five prosecution witnesses who testified both in the *Sesay et al.* and *Taylor* trials.

2. I concur with the dismissal of the motion as to any such recorded statements taken from thirty-three of those prosecution witnesses.

3. I respectfully dissent from the decision dismissing the statements of TF1-060 and TF1-077.

4. Rule 68(B) imposes on the Prosecutor the obligation to disclose exculpatory material to the defence. That obligation continues throughout the appeal stage.[67]

5. Jurisprudence from the Special Court's Trial Chambers, endorsed by both the majority and the concurring opinions, directs that a successful challenge to the prosecutor's decision not to disclose material under Rule 68(B) requires the defendant to: i) identify the targeted material; ii) establish that the Prosecutor has failed to disclose the targeted material which is in the Prosecutor's custody and control; and iii) make a *prima facie* showing that the targeted material is "exculpatory" as that term is defined by the rule.[68]

6. When viewed in light of the accepted requirements of Rule 68 (B), the only Rule under which the defence has proposed a prosecutorial obligation to disclose, the defence has made *no* showing that the allegedly undisclosed statements of thirty three Prosecution witnesses called in both trials are exculpatory, as that term is used in the Rule and as that Rule is applied by trial chambers of this Court. I therefore concur with the majority in dismissing the motion as to those statements.

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[67] *Prosecutor v. Brdjanin*, ICTY-99-36-A, Decision On Appellant's Motion For Disclosure Pursuant To Rule 68 And Motion For An Order To The Registrar To Disclose Certain Materials, 7 December 2004, p. 2.

[68] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-363, Decision on Sesay Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and of the Office of the Prosecutor, 2 May 2005, para. 36; *Prosecutor v. Sesay et al.*, SCSL-04-15-T-436, Decision on Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005, para. 4; *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Confidential Defence Application for Disclosure of Documents in The Custody of The Prosecution Pursuant To Rule 66 Aud 68, 18 February 2009, para. 5. *See also Prosecutor v. Blaškić*, ICTY-95-14-A, Appeal Judgment, 29 July 2004, para. 268; *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Defence Motions for Disclosure of Information Obtained from Juvenal Uwilingiyimana, 27 April 2006, para. 9.

7. "Exculpatory material" as used in the Rule has a speeial meaning, defined in the rule itself, which differs from and is broader than the ordinary meaning used in common speech.[69] In the special meaning which the Rule defines, exculpatory material is evidence which "in any way tends to suggest" innoccnee or mitigation of guilt; or whieh "may affect" the credibility of thc prosecution evidence.

8. In keeping with that special meaning, The ICTR Appeals Chamber in *Prosecutor v. Karemera et al.*[70] recently eited with approval the test for whether information is exculpatory formulated by the trial chamber in *Prosecutor v. Bagosora et al.* Using this test, determination that material is exculpatory depends upon "an evaluation of whether there is any possibility, in light of the submission of the partics, that the information could be relevant to the defence of the accused."[71] Applying that test, the Appeal Chamber concluded that the Trial Chamber in *Karemera et al.* erred in its finding that a piece of evidenee was not subjeet to Rule 68 disclosure because it contained both inculpatory and exculpatory material. The Appeal Chamber confirmed that the Rule is one "of disclosure rather than admissibility of evidence, [and] imposes a categorical obligation to disclose any document or witness statemcnt that contains exculpatory matcrial. Consequently, this obligation is *not* subject to a balancing test." (emphases added)

9. Witnesses TF1-060 and TF1-077 were each called by the prosecution in *Sesay et al.* to offer Prosecution evidence[72]. Both made statements to the Prosecutor in conneetion with that case and those statements were disclosed to the defence prior to the appearance of the witnesses at the *Sesay et al.* trial.[73] After the evidenee in the *Sesay et al.* trial was elosed, but before the judgment was delivered,[74] the Prosecutor acknowledges that he took an additional recorded statement from each witness in preparation for the *Taylor* trial[75]. The Prosecutor did not disclose these statements and continues to object to their diselosure on the grounds that they do not contain Rule 68(B) material.

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[69], The common meaning of 'Exculpate', is defined as 'to clear from alleged fault or guilt.' (from the Latin *exculpa..*'no fault') *Meriam Webster.com..*" Oxford English Dictionary defines 'exculpatc' to "show or declare to be not guilty of wrongdoing."The special meaning of exculpatory material, as defined within the Rule, does not imply that thc material must in itself exonerate.

[70] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion", 14 May 2008.

[71] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion", 14 May 2008, para. 12, *citing Prosecutor v. Bagosora et al.*, ICTY-98-41-T, Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution Pursuant to Rule 68(A), 8 March 2006. para. 5.

[72] TF1-060 testified on 29 April 2005 (*Prosecutor v. Sesay*, TF1-060, Transcripts, 29 April 2005, pp. 42-113). TF1-077 testified on 20-21 July 2004 (*Prosecutor v. Sesay*, TF1-077, Transcripts 20 July 2004 , pp. 76-86; Transcripts 21 July 2004, pp. 1-39).

[73] *Prosecutor v. Sesay et al*, , SCSL-04-15-A, Prosecution Response to Sesay Motion Requesting The Appeals Chamber To Order The Prosecution To Disclose Rule 68 Material, 8 May 2009, paras 13, 14 ("Prosecution Response").

[74] The Trial Judgment in *Prosecuto v. Sesay et. al* was filed on 2 March 2009.

[75] Prosecution Response, paras 13, 14.

Thereafter, but still before the *Sesay et al.* Trial Judgment was delivered[76], each of these witnesses testified in the *Taylor* trial in open court[77] and the defence has transcripts of their testimony. Their testimony in both trials covered some of the same subject matter.

10. The defence has made a showing, which is supported by the trial transcripts and Annex A of the Defence Motion, that there exists inconsistency between the trial testimony given by witness TF1-060 in *Sesay* and in *Taylor*. The inconsistency in the testimony is compounded by the inconsistency apparent in the evidence introduced through TF1-060, Exhibit 063, whieh was unavailable at the time the witness testified in the *Sesay et al.* trial and not revealed to the Prosecutor until September, 2008.[78] That document, compiled by the witness, contains information written by him at a time contemporaneous to events relevant to the charges in both *Sesay et al.* and *Taylor*, as well as notes written by TF1-060 subsequent to those events. The document is inconsistent on its face, as is the testimony adduced at the *Taylor* trial regarding that exhibit.[79] The document was disclosed to the Prosecution at or about the time that the witness gave the Prosecutor the statement which the defence now seeks.[80]

11. The defence has made a showing that the testimony of TF1-077 given in both trials is consistent regarding an important date, but deviates regarding the surrounding circumstances which would establish the validity of that date. Both the consistencies and deviations in the known testimony have relevance to a point raised on Appeal by the Defence. Thc date has significancc for the Prosecution's case.

12. It is unnecessary and premature, in my opinion, to anticipate the usc to which the defence may seek to put the material it is requesting, its ultimate admissibility, its weight or effect, or the success of any defence argument or theory that relies upon it. Rule 68 is purcly a rule of discovery. As the majority has stated, citing the ICTY Appeal Chamber in *Prosecutor v. Krstić*, "considerations of fairncss are the overriding factor in any determination of whether the governing Rule has been breached."[81]

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[76] The Trial Judgment in *Prosecuto v. Sesay et. al* was filed on 2 March 2009..
[77] TF1-060 testified on 29-30 Scptember 2008 (*Prosecutor v. Taylor*, TF1-060, Transcripts 29 September 2008, pp. , 17493-17550; Transcripts 30 September 2008, pp. 17552-17622); TF1-077 testified on 14 October 2008 ((*Prosecutor v. Taylor*, TF1-077, 14 Octobcr 2008, pp. 18232-18258).
[78] See *Prosecutor v. Taylor*, TF1-060, Transcripts 29 September 2008, p. 17492-17493 and Transcripts 30 September 2008, pp. 17571-17572).
[79] *Prosecutor v. Taylor*, TF1-060, Transcripts 30 September 2008. pp. 17559-17613.
[80] Exhibit D-063 was disclosed by the Prosecution on 26 Scptember 2008 (see, *Prosecutor v. Taylor*, Transcripts 29 September 2008, p. 17492).
[81] *Prosecutor v. Krstić*, IT-98-33-A, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Judgment, 19 April 2004, para. 179..

13. Employing the test approved by the ICTR Appeal Chamber only months ago, there clearly is "[a] possibility, in light of the submission of the parties, that the information could be relevant to the defence of the accused." Variations between the sworn testimony given by the same prosecution witness at different times and relevant to the same subject matter establishes, as a *prima facie* matter, that the requested material—a statement made by the witness regarding that subject matter at a time between the dates the testimonies were given—"may affect the credibility of the prosecution's evidence." This is sufficient in my view to require disclosure under Rule 68(B).

14. In my opinion, the Sesay defence has made a *prime facie* showing that the recorded interviews conducted by the Prosecution of witnesses TF1-060 and TF1-077 and made prior to their testimony given in *Prosecutor v Taylor* are exculpatory material as that term is defined by Rule 68 (B). I therefore dissent from the majority view that the defence motion be dismissed as to these two statements.

Delivered on 16th June 2009 in Freetown, Sierra Leone.

Hon. Justice Shireen Avis Fisher

[Seal of the Special Court for Sierra Leone]