

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

SEIZED of the Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials pursuant to Rule 68 filed on 5 May 2004 on behalf of Allieu Kondewa (“Motion”) pursuant to Rule 68 of the Rules of Procedure and Evidence of the Special Court (“Rules”);

NOTING the Response¹ by the Prosecution to the Motion (“Response”), filed on 17 May 2004 and the Defence Reply² thereto (“Reply”), filed on 24 May, 2004;

NOTING the Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure of 23 May 2003 in the case against Sam Hinga Norman, the Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, of 16 October 2003 in the case against Moinina Fofana and the Ruling on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and urgent Request for Interim Measures until Appropriate Protective Measures are in Place of 10 October 2003 in the case against Allieu Kondewa (“Protective Measures Decision”);³

NOTING ALSO the Decision on Prosecution Motion for Modification of Protective Measures for Witnesses of 8 June 2004 in this case;⁴

NOTING THE SUBMISSIONS OF THE PARTIES

¹ Prosecution Response to Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials pursuant to Rule 68.

² Reply to the Prosecution’s Response to Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials pursuant to Rule 68.

³ *Prosecutor v. Samuel Hinga Norman*, SCSL-03-08-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 23 May 2003; *Prosecutor v. Moinina Fofana*, SCSL-03-11-PD, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure, 16 October 2003; *Prosecutor v. Allieu Kondewa*, SCSL-03-12-PT, Ruling on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and urgent Request for Interim Measures until Appropriate Protective Measures are in Place, 10 October 2003.

⁴ *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, SCSL-04-14-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004.

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The Motion:

1. In its Motion the Defence for Allieu Kondewa seeks the disclosure of exculpatory evidence from the Prosecution pursuant to Rule 68 of the Rules.

2. The Defence submits that although the Accused received disclosure materials among them exculpatory evidence from the Prosecutor’s Office since his initial appearance on 2 July 2003 and as recently as 30 April 2004, these materials are so heavily redacted that they cannot be used by the Defence for the purpose of investigation and case preparation and therefore do not satisfy the requirements of Rule 68 of the Rules.⁵

3. The Defence further states that the late and piecemeal disclosure of witness statements infringes the statutory rights of the Accused under Article 17(4)(b) of the Statute of the Special Court. The Defence avers that it has information that the Prosecution is in possession of additional materials of which disclosure is required by Rule 68 of the Rules.⁶

4. It is further submitted that under Rule 68(B) of the Rules, the Prosecution is obliged to make a statement “disclosing to the defence the existence of evidence known to Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of Prosecutor evidence” and is “under continuing obligation” to disclose such exculpatory material. According to the Defence, the Prosecution, however, has never made statements concerning any exculpatory materials. In the view of the Defence, following a decision of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in the *Blaskic* case⁷, the Prosecution has to fulfil this obligation and only after that the Defence has to make a *prima facie* showing of exculpatory evidence; that even though the Prosecution has not complied with this obligation the Defence makes a *prima facie* showing by identifying the source and nature of this exculpatory evidence, namely redacted witness statements.⁸

⁵ Motion, para. 2.

⁶ *Id.*, para. 4-5.

⁷ *Prosecutor v Tihomir Blaskic*, IT-95-14, Decision on the Motion for Sanctions for Prosecutor’s Repeated Violations of Rule 68 of the Rules of Procedure and Evidence, 29 April 1998, para. 14.

⁸ Motion, para. 8.

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5. Finally, the Defence submits that the Prosecution's Motion for Protective Measures of 2 July 2003⁹ was made pursuant to Rules 53, 54, 69, 73 and 75 of the Rules and, therefore, does not exclude the Prosecutor's obligation to comply with Rule 68(B) of the Rules.¹⁰

6. Based on the foregoing, the Defence seeks the following relief or declaration:

- a.) "That Prosecutor's conduct complained of above is in violation of Rule 68(B) of Rules,
- b.) An order compelling the Prosecutor to say whether it has such exculpatory/mitigating materials in its possession,
- c.) An order compelling the Prosecutor to make a statement under Rule 68(B) of the Rules disclosing to the defence the existence of evidence known to Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of Prosecutor evidence,
- d.) An order compelling the Prosecutor to provide un-redacted copies of witness statements which contain exculpatory evidence."¹¹

The Response:

7. In its aforementioned Response, the Prosecution contends that the requirement to "make a statement" regarding the disclosure of exculpatory or mitigating evidence under Rule 68 of the Rules within 30 days of the initial appearance of the accused, has been adopted only at the 5th Plenary Meeting of the Special Court, between 11 and 14 March 2004. The Prosecution, however, declares that it disclosed the existence of evidence as provided for in the old Rule 68 of the Rules, and has therefore met its obligation.¹² The Prosecution states that material has been disclosed on a continuous basis since 30 July 2003 in accord with Rules 66 and Rule 68 of the Rules.¹³

8. The Prosecution submits that a distinction has to be made between witnesses the Prosecution intends to call and those whom it does not intend to call. Regarding the witnesses it intends to call, a disclosure of unredacted witness statements would mean a breach of its obligations of the Protective

⁹ *Prosecutor v Allieu Kondewa*, SCSL-2003-12, Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and Urgent Request for Interim Measures until Appropriate Protective Measures are in Place", 2 July 2003.

¹⁰ Motion, para. 12.

¹¹ *Id.*, p. 4.

¹² Response, para. 3-4.

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Measures Decisions. Therefore, the Rules on Disclosure in Rule 68 of the Rules should not be read “in a vacuum”, but together with the relevant Rules providing for Protective Measures for Victims and Witnesses. It is submitted that the Prosecution has not violated its obligation, but has complied with the requirement of Rule 68 of the Rules.¹⁴

9. The Prosecution further asserts that the Accused has been put on notice of and provided, to the extent possible without revealing the identity of Prosecution’s witnesses, the exculpatory evidence contained in the witness statements; and that disclosure of un-redacted witness will be made in accordance with the Court’s orders regarding such disclosure.¹⁵

10. According to the Prosecution, it is in the process of disclosing unredacted witness statements of witnesses it does not intend to call.¹⁶

11. Regarding the Defence allegation that the Prosecution is withholding additional exculpatory evidence in its possession, the Prosecution stresses that there is no such material. It avers that it has acted in good faith assessing whether evidence is exculpatory and that the Defence has failed to present a *prima facie* case of the existence of such evidence and of the fact that it is in the custody of the Prosecution.¹⁷

The Reply:

12. The Defence reiterates that the Prosecution failed to comply with the requirements of Rule 68 of the Rules, in its old version, as the statements / summaries received by the Defence were so badly redacted that it cannot be said that the Prosecution had disclosed the evidence to the Accused.¹⁸

13. The Defence further submits that witnesses giving testimony, which is solely exculpatory or mitigating, could not be in any way “...in danger or at risk” as required by Rule 69(A) of the Rules for witness protection.¹⁹

¹³ *Id.*, para. 6.
¹⁴ *Id.*, paras 11-12.
¹⁵ *Id.*, para. 17.
¹⁶ *Id.*, para 20.
¹⁷ *Id.*, para. 23.
¹⁸ Reply, para 6.
¹⁹ *Id.*, para. 10.

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14. It is also the Defence submission that the new provisions of Rule 68 of the Rules are a novelty as it requires periodic statements of the Prosecution regarding exculpatory evidence without specifying the nature or contents of such statements and therefore the Trial Chamber should make a pronouncement on the issue.²⁰

15. Finally, the Defence submits that the Prosecution will continue piecemeal disclosure of exculpatory or mitigating statements and summaries of witnesses the Prosecution does not intend to use or call, unless compelled by the Trial Chamber to act according to Rule 68 of the Rules.²¹

AND HAVING DELIBERATED THUS:

I. Introduction

16. This is a Defence Motion on behalf of the Accused Allieu Kondewa to compel the production of exculpatory witness statements, witness summaries and materials. It is predicated upon the information and belief that the Prosecutor is in possession of additional materials whose disclosure is required by Rule 68 of the Rules.²²

II. Orders Requested

17. The Motion seeks the following relief or declaration:

1. That the Prosecution's conduct complained of is in violation of Rule 68(D).
2. An Order compelling the Prosecutor to say whether he has such exculpatory/mitigation materials in his possession.
3. An Order compelling the Prosecutor to make a statement(s) under Rule 68(B) disclosing to the defence the existence of evidence known to the Prosecutor which in any way leads to support the innocence or mitigate the guilt of the accused or may affect the credibility of Prosecutor's evidence.
4. An Order compelling the Prosecutor to provide unredacted copies of witness statements which contain exculpatory evidence.

²⁰ *Id.*, para. 13.

²¹ *Id.*, para. 14.

²² Motion, para. 5.

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III. *Legal Basis For The Motion*

18. The Defence Motion is filed pursuant to Rule 68 of the Rules which is in these terms:

- (A) The Prosecutor shall, within 14 days of receipt of the Defence Core Statement, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which may be relevant to issues raised in the Defence Case Statement.
- (B) 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 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.

IV. *Proper Interpretation of Rule 68*

19. The issues presented by the instant Motion revolve primarily around the current interpretation to be given to Rule 68 of the Rules. In effect, to enable the Trial Chamber determine the merits of the Motion in terms of its substantive contentions, it is important to settle, authoritatively and conclusively, the correct construction of Rule 68 in the light of the basic canons of statutory interpretation. In addressing this aspect, the Chamber wishes to observe, by way of first principles, that no rule, however formulated, should be applied in a way that contradicts its purpose. A kindred notion here is that 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 canon of statutory interpretation is that a statute is to be interpreted in accordance with the legislative intent. Restating the law on statutory interpretation, the Trial Chamber of the ICTY in the case of *Prosecutor v. Delalic* 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 natural 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.”²³

20. The Chamber accepts and adopts this view of the basic approach to statutory interpretation and now proceeds to ascertain the true meaning of Rule 68 of the Rules as presently formulated not according to what is just and expedient but consistent with the plain and unambiguous connotation of the rule. And in embarking upon this exercise, the Chamber here recalls, first, the legislative history of Rule 68 of the Rules.

21. As to the legislative history of Rule 68 of the Rules, the Trial Chamber’s recollection is as follows:

(i) That when the Court was established, the Rule was in these terms:

The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of the prosecution evidence.

(ii) At the Court’s Third Plenary Meeting held in London in March 2003, the Rule was amended to read:

(A) The Prosecutor shall, within 14 days of receipt of the Defence Case Statements, disclose to the defence the existence of evidence known to the Prosecutor which may be relevant to issues raised in the Defence Case Statement.

(B) The Prosecution shall, within 30 days of the initial appearance of the accused disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

The Prosecution shall be under a continuing obligation to disclose any such exculpatory material.

²³ *Prosecutor v. Delacic et al.*, IT-96-21, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo,

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(iii) At the Court's March 2004 Plenary Meeting held in Freetown, the Rule was again amended, this time at the instance of the Defence, to read thus:

- (A) The Prosecution shall, within 14 days of receipt of the Defence Case Statement, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which may be relevant to issues raised in the Defence Statement.
- (B) 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 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.

22. In the Chamber's view, the foregoing profile of the legislative history of Rule 68 of the Rules shows not only that it has had a chequered history since it first came into force but also has engendered much legal controversy between the Prosecution and the Defence as to its proper legal interpretation. What, then, is the true meaning of Rule 68 of the Rules? In determining this issue, three time frames are relevant. The first relates to that of the establishment of the Court when, according to its founding instruments, the Court was enjoined to apply the Rules of Procedure and Evidence applicable in the International Criminal Tribunal for Rwanda ("ICTR") *mutatis mutandis*.²⁴ Recalling the first principles of statutory interpretation as restated in paragraph 19 of this Decision, and giving effect to the plain and literal meaning canon of interpretation, the Chamber holds that during the first time frame, Rule 68 of the Rules imposed on the Prosecution the legal obligation to disclose "as soon as practicable", to the defence evidence of the generic type, to wit, exculpatory evidence, but of any of these three species - (a) exculpatory evidence that in anyway tends to suggest the innocence of the accused, (b) exculpatory evidence that in any way tends to mitigate the guilt of the accused, and (c) exculpatory evidence that may affect the credibility of prosecution evidence.

23. It is absolutely clear from the original version of Rule 68 of the Rules that there was a legal obligation on the Prosecutor to disclose, as soon as was practicable, exculpatory evidence of the kind

ICTY, 1 May 1999, para. 17.

²⁴ Article 14(1) of the Statute of the Special Court reads as follows:

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.

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specified in the Rule. What was a matter of legal controversy was whether the Prosecutor's obligation was of a continuing nature. But the Prosecution has always acknowledged this to be a continuing obligation. Further, applying the golden rule of interpretation to Rule 68 of the Rules as formulated during the second time frame, the Chamber is of the view that the legislative intent behind Rule 68(B) of the Rules was to put the legal obligation on the Prosecutor for disclosure of exculpatory material within a prescribed time frame and distinct from the open-ended "as soon as practicable" time frame of the Rule prior to March 2003. Hence, the limitation period of disclosure of the three (3) species of exculpatory material to that of "within 30 days of the initial appearance of the accused" but this time, evidently, making it clear that the obligation was a continuing one.²⁵ Hence further, the necessity, in the Chamber's opinion, of the most recent amendment to the rule which clearly puts beyond doubt the issue of the continuing nature of the Prosecutor's obligation to disclose exculpatory material under Rule 68(B) by re-enacting that provision as a qualifying clause to the new sub-rule (B).

24. Still guided by the "plain meaning rule" and the doctrine that the law is what it says it is, the Chamber holds the view that under Rule 68 of the Rules, whether in its original form or its twice amended form, exculpatory evidence is simply evidence favourable to the accused; and that the burden is on the Defence to make a *prima facie* showing of the exculpatory character of the evidence sought from the Prosecution.²⁶ And so, the threshold issue for the Chamber's determination is whether the Defence herein has advanced sufficient proof of a *prima facie* nature to show that the material sought from the Prosecutor is exculpatory in nature. And in addressing this question, it is necessary for the Chamber to recall here the Rule 66 perspective or context of the Prosecutor's general obligation to disclose evidence in his possession. In the *Blaskic* Decision, the Trial Chamber reasoned that evidence "which is material for the preparation of the Defence" necessarily includes evidence "which in any way tends to suggest the innocence or mitigate the guilt of the accused."²⁷ On the strength of this reasoning, it stands to reason that material of an exculpatory nature will always be material for the preparation of the Defence.²⁸ This Chamber adopts this reasoning and takes the view

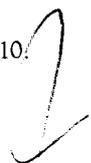
²⁵ *Prosecutor v. Norman*, SCSL03-08-PT, Scheduling Order, 11 April 2003; *id.*, Decision on the Prosecution Motion to Allow Disclosure to the Registry and to Keep Disclosed Materials Under Seal Until Appropriate Protective Measures are in Place, 17 April 2003, paras 5-6 and 11.

²⁶ *Prosecutor v. Delalic et al.*, IT-96-21, Decision On the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information; 24 June 1997, ("Delalic Decision") para. 13; see also *Prosecutor v. Thomir Blaskic*, IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997 ("Blaskic Decision"), para. 50, where Trial Chamber I decided that the defence "must submit to the Trial Chamber all *prima facie* proof tendering to make it likely that the evidence is exculpatory and is in the Prosecutor's possession."

²⁷ *Id.*, para. 50.

²⁸ *Id.*





that any request by the Defence for exculpatory material alleged to be in the Prosecutor's possession, custody or control must be specific as to such material.

25. The key question now for this Chamber is - Has the Defence made a *prima facie* showing of the exculpatory material sought from the Prosecution? Further, in resolving this key 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.

26. The Chamber has carefully examined each alleged violation put forward by the Defence in the instant Motion as set out at paragraphs 1-12 of this Motion alongside the Relief or declaration sought or particularised at page 4 of the said Motion. The Chamber finds that nowhere in the said Motion does the request for disclosure of the targeted exculpatory evidence or material clearly specify the material so desired. It leaves a vast penumbra of uncertainty as to which exculpatory material is being sought. It invites the Chamber to speculate on the issue. In such matters, it is not sufficient merely to allege non-compliance, on the part of the Prosecution, with its disclosure obligation or merely to restate the law on the subject in the form of submissions. It is essential to set out with much particularity what the information is about or what precisely it is, and the extent to which it is exculpatory, for example, whether it is material establishing the defence of alibi. It is not sufficient to say that they are "redacted witness statements of an exculpatory nature". The Chamber, therefore, takes the view and rules that "in the absence of specific identification of the material evidence that the Defence alleges the Prosecution has withheld, it is inappropriate for the Trial Chamber to intervene at this time."²⁹

27. Finally, the Trial Chamber is convinced that the Defence has failed to indicate with any degree of specificity the targeted exculpatory material in respect of which the Prosecutor bears an obligation to disclose under Rule 68 of the Rules. Therefore, the Defence has failed to satisfy the overriding test in applications of this nature, to wit to establish by *prima facie* showing that the material sought from the Prosecution under Rule 68 of the Rules is in actual fact exculpatory in character.

DISPOSITION

²⁹ *Delalic* Decision, para. 10.

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Predicated upon the foregoing considerations and pursuant to Rule 68, the Chamber hereby DENIES, and accordingly DISMISSES the instant Motion for Exculpatory Material under Rule 68.

Done at Freetown this 8th day of July 2004

Pierre Boutet

Judge Pierre Boutet

[Signature]

Judge Benjamin Mutanga Itoe
Presiding Judge,
Trial Chamber

[Signature]

Judge Bankole Thompson

