

TRIAL CHAMBER II (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”), composed of Judge Teresa Doherty, presiding, Judge Richard Lussick and Judge Julia Sebutinde;

SEISED of the Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rules 66 and/or 68, filed on 10th March 2005 on behalf of Brima, Kamara and Kanu (“Motion”);

NOTING the Prosecution Response to the Motion, filed on 6th April 2005 (“Response”), and the Joint Defence Reply, filed on 12th April 2005 (“Reply”);

NOTING ALSO the Prosecution Submissions in Response to Relief Requested by Defence in Their Reply Dated 12th April 2005, filed on 25th April 2005;

DECIDES AS FOLLOWS based solely on the written submissions of the parties pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Special Court (“Rules”);

I. SUBMISSIONS OF THE PARTIES

MOTION

1. The Motion seeks an order that the Prosecution release all original materials pertaining to the interviews of Prosecution witnesses, in particular the original witness statements, the original notes of the Prosecution investigators, and any other materials pertaining to initial witness interviews.
2. In support of its request, the Defence alleges that there are inconsistencies with respect to the testimony in chief by Witnesses TF1-024 and TF1-277 on 7 and 8 March 2005 on one hand and their pre-trial statements on the other hand.
3. The Defence contends that the disclosure it seeks forms part of the Prosecution’s disclosure obligation under Rules 66 and/or 68 of the Rules.¹
4. The Defence submits that in order to further verify the authenticity of the initial witness statements given to Prosecution Investigators, the original witness interviews and the Investigators’ notes pertaining to these witnesses ought to be disclosed to the Defence.

¹ The Defence relies on the ICTR case of *The Prosecutor v. Bagilishema*, ICTR-95-1A-T, Decision on the Request of the Defence for an Order for disclosure by the Prosecutor of the Admissions of guilt of Witnesses Y,Z and AA, of June 8, 2000; and the ICTY cases of *Prosecutor v. Blaskic*, Appeals Chamber Decision on the Appellant’s Motion for the production of Material, Suspension or extension of the Briefing Schedule, and additional filings, of September 26, 2000, para. 15-16; and *Prosecutor v. Kordic and Cerkez*, Order on Motion to Compel Compliance by Prosecution with Rule 66(A) and 68, February 26, 1999.

5. The Defence relies on a ruling by Trial Chamber I of the Special Court that the Prosecutor was obliged to disclose to the Defence “copies of all statements of all witnesses who they intend to call and which include new developments in the investigation in the form of “will-say” statements, interview notes, or in any other form”.

RESPONSE

6. In its Response, the Prosecution submits that witnesses TF1-024 and TF1-277 have already testified, been cross-examined and released by the Court, and that discrepancies between their pre-trial statements and their testimony have already been explored by the Defence.

7. With regards to the statement of witness TF1-277 dated 25 November 2003, the Prosecution submits that the Joint Defence Motion does not refer to the Interview notes of 17 February 2005 in which clarification of a particular incident is given.

8. The Prosecution further submits that a court will usually assess any discrepancies between pre-trial statements and testimonies and give appropriate weight to the evidence without reference to original investigation notes².

9. Also, the Prosecution submits that under Rule 70 of the Rules he is not required to disclose internal memoranda arising from investigations.³

10. The Prosecution submits that the original interview notes no longer exist and therefore cannot be subject to disclosure.

REPLY

11. In its Reply, the Defence modifies its relief sought as formulated in its Motion and seeks an “order that the Prosecution, by destroying the materials requested by the Defence in its Motion, has failed to fulfil its disclosure obligations under Rules 66 and 68 of the Rules.”

12. The Defence submits that Rule 70 does not curtail the Prosecutor’s disclosure obligations under Rule 68 on which it relies. The Defence argues that an obligation under Rule 68 stands uncontested by the Prosecution.

13. The Defence also submits that under the case law of the Special Court⁴, it is entitled to have access to the requested materials under Rule 66 of the Rules.

² On the issue of discrepancies, the Prosecution relies on the ICTR case of *The Prosecutor v. Niyitegeka*, Judgement and sentence, ICTR-96-14-T, 16 May 2003 at para 41; and also the ICTR case of *The Prosecutor v. Nahimana et al.*, Judgement and sentence, ICTR-96-14-T, 13 December 2003 at para 61.

³ In this regard, the Prosecution relies on the ICTY case of *The Prosecutor v. Blaskic*, Decision on the production of discovery materials, IT-95-14-PT, 27 January 1997 at para 40.

⁴ See *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T, Ruling on disclosure of Witness statements, 1 October 2004.

14. The Defence submits that even if the Prosecution may not be in possession of the requested materials, it is still necessary for the Chamber to rule on the relevance of these materials, and to make an assessment as to whether the Prosecution has met its disclosure obligations under Rules 66 and 68 of the Rules.

II. THE APPLICABLE LAW

15. The law governing the disclosure of materials is embodied in Rules 66, 67, 68 and 70 of the Rules of Procedure and Evidence of the Special Court ("Rules") which read as follows:

Rule 66: Disclosure of materials by the Prosecutor (amended 29 May 2004)

(A) Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:

- i. Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial.
- ii. Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence within a prescribed time.
- iii. At the request of the defence, subject to Sub-Rule (B), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, upon a showing by the defence of categories of, or specific, books, documents, photographs and tangible objects which the defence considers to be material to the preparation of a defence, or to inspect any books, documents, photographs and tangible objects in his custody or control which are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

(B) Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to a Judge designated by the President sitting *ex parte* and *in camera*, but with notice to the Defence, to be relieved from the obligation to disclose pursuant to Sub-Rule (A). When making such an application the Prosecutor shall provide, only to such Judge, the information or materials that are sought to be kept confidential.

Rule 67: Reciprocal Disclosure of Evidence (amended 7 March 2003)

Subject to the provisions of Rules 53 and 69:

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

- i. The Prosecutor shall notify the defence of the names of the witnesses that he intends to call to establish the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-Rule (ii)

below, or any defence pleaded in the Defence Case Statement served under Sub-Rule (C);

- ii. The defence shall notify the Prosecutor of its intent to enter:
 - a. The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;
 - b. Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

(C) To assist the Prosecutor with its disclosure obligations pursuant to Rule 68, the defence may prior to trial provide the Prosecutor with a Defence Case Statement. The Defence Case Statement shall:

- i. set out in general terms the nature of the accused's defence;
- ii. indicate the matters on which he takes issue with the prosecution; and
- iii. set out, in the case of each such matter, the reason why he takes issue with the prosecution.

(D) If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.

Rule 68: Disclosure of Exculpatory Evidence (*amended 14 March 2004*)

(A) The Prosecutor 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 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 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.

Rule 70: Matters not Subject to Disclosure (*amended 7 March 2003*)

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. The consent shall be in writing.

(D) If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.

(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to limitations contained in Sub-Rules (C) and (D).

(F) Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber's power to exclude evidence under Rule 95.

III. DELIBERATIONS

16. It is our opinion that the following propositions are correct statements of the law governing disclosure obligations.

- The cited Rules, with the exception of Rule 70, impose an obligation of continuous disclosure⁵.
- ***What is a Witness Statement:*** Any statement or declaration made by a witness in relation to an event he or she witnessed and recorded in any form by an official in the course of an investigation, falls within the meaning of a “witness statement” under Rule 66(A)(i). Accordingly, facts contained in an investigator’s interview notes which constitute statements made by the witness in the course of an investigation come within the meaning of “witness statements” under Rule 66(A)(i)⁶.
- ***What must be disclosed:*** Rule 66 requires disclosure of all witness statements in the possession of the Prosecution, regardless of their form or source, save for any material covered by Rule 70 (A). An investigator’s notes of statements made by a witness would therefore be disclosable⁷, but only to that extent.

⁵ See *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T, Ruling on disclosure of Witness statements, 1 October 2004, para. 2.

⁶ See *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT, Decision on Disclosure of Witness Statements and Cross-examination, 16 July 2004, para. 10.

⁷ See *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT, Decision on Disclosure of Witness Statements and Cross-examination, 16 July 2004, para. 7 and 16.

- **What need not be disclosed:** Pursuant to Rule 70(A), any reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions. It follows that investigator's notes of an internal nature not containing statements made by a witness would not be disclosable.
- **The role of the Trial Chamber:** It is the role of the Trial Chamber to enforce disclosure obligations in the interests of a fair trial, and to ensure that the rights of the Accused, as provided in Article 17(4), to have adequate time and facilities for the preparation of his or her defence and to examine, or have examined, the witnesses against him or her, are respected⁸.
- **Late Disclosure:** Where evidence has not been disclosed or is disclosed so late as to prejudice the fairness of the trial, the Trial Chamber will apply appropriate remedies, which may include the exclusion of such evidence⁹. The specific remedy applied may vary from case to case.
- **Bona Fides of the Parties:** In explaining the rationale behind Rule 66, we adopt the principle enunciated by Trial Chamber 1, which is as follows: "The premise underlying disclosure obligations is that the parties should act bona fides at all times. There is authority from the evolving jurisprudence of the International Criminal Tribunals that any allegation by the Defence as to a violation of the disclosure rules by the Prosecution should be substantiated with *prima facie* proof of such a violation. This Chamber in recent decisions has indeed ruled that the Defence must "make a *prima facie* showing of materiality and that the requested evidence is in the custody or control of the Prosecution"¹⁰.

17. In the present case, the Prosecution has explained in its Response that during the initial investigation phase investigators' notes were taken in rough form which included statements of potential witnesses together with information that was relevant only to the internal functioning of the OTP, such as investigative leads. In other words, disclosable and non-disclosable materials were recorded in the same investigator's notes without distinction. All evidentiary material collected in rough form was then transferred to written witness statements (either handwritten or typewritten) and non-disclosable material was transferred to Internal Memoranda. The rough notes were thus rendered superfluous and were destroyed.

18. It seems to us that the procedure adopted by the Prosecution to separate disclosable and non-disclosable material by reducing the disclosable material to the form of a witness statement was reasonable in the circumstances. In our view, the fact that the rough notes containing both disclosable and non-disclosable material were later destroyed does not, by itself, amount to a failure by the Prosecution to fulfil its disclosure obligations.

⁸ See *Prosecutor v. Furundzija*, Scheduling Order, 29th April 1998; *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Decision on Disclosure of Witness Statements and Cross-Examination, 16th July 2004, para. 7

⁹ See *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-T, Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 Dated Respectively 9th of October, 2004, 19th and 20th of October, 2004, and 10th of January, 2005, 3 February 2005, para. 20 f.

¹⁰ See *Prosecutor v. Sesay*, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, para. 27.

19. There is nothing before the Trial Chamber which would entitle it to conclude that the Prosecution has concealed or destroyed material which it was obliged to disclose. As stated by the Prosecution, all witness statements within the possession or control of the OTP have been disclosed to the Defence, and there are no longer any original investigators notes in existence. The Defence has not established any reason to refute the assumption that the Prosecution acted in good faith. Further, the Prosecution undertakes that in the future, it will provide handwritten statements as well as typed versions thereof, where such hand written versions exist. The Trial Chamber therefore finds that the Defence has failed to demonstrate or substantiate by *prima facie* proof the allegation of breach by the Prosecution of Rules 66 and 68.

20. There is one last matter. The Trial Chamber notes that, in its Reply, the Defence sought to substantially modify the relief sought. This is a practice that must be discouraged. A Reply is meant to answer matters raised by the other party in its Response, not to claim additional relief to that sought in the Motion. Obviously the other party, having already filed a Response to the Motion, has no way under the Rules to answer the new prayer, except to apply to the Trial Chamber for leave to do so. In future, the Trial Chamber will not hear claims for additional relief contained in a Reply.

FOR ALL THE ABOVE-STATED REASONS,

The Trial Chamber dismisses the Motion.

The Honourable Judge Julia Sebutinde will append a separate concurring opinion to this Decision.

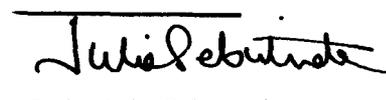
Done at Freetown this 4th May 2005



Judge Richard Lussick



Judge Teresa Doherty
Presiding Judge



Judge Julia Sebutinde

[Seal of the Special Court for Sierra Leone]