

TRIAL CHAMBER I (“The Chamber”) of the Special Court for Sierra Leone (“Special Court”) composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson and Hon. Justice Benjamin Mutanga Itoe;

SEIZED OF the Oral Application brought by Court Appointed Counsel for the Second Accused (“Counsel for Fofana”) during court proceeding of the 27th of January, 2006 (“Motion”);

NOTING the Oral Response made by the Prosecutor during the same court proceeding of the 27th of January, 2006 (“Response”);

NOTING the Oral Reply made by Counsel for Fofana during the same court proceeding of the 27th of January, 2006 (“Reply”);

PURSUANT to Rules 54, 66(A)(iii) of the Rules of Procedure and Evidence of the Special Court (the “Rules”),

HEREBY ISSUES THE FOLLOWING DECISION:

I. PARTIES' SUBMISSIONS

1. The Motion is brought pursuant to Rule 66(A)(iii) of the Rules by Counsel for Fofana. Counsel for Fofana request to be permitted to inspect material statements and/or interview notes, which allegedly have been given by witnesses who the Second Accused intends to call at trial and are in the possession of the Prosecution.¹ Counsel for Fofana admit that there is no inherent obligation on the Prosecution to disclose the witness statements at issue.² The alleged statements or interview notes in question are neither from witnesses that the Prosecution intend to call at trial, which the Prosecution are required to disclose under Rule 66(A)(i) nor do they include information that the Prosecution consider exculpatory and which the Prosecution are also required to disclose under Rule 68. Rather, these alleged statements and/or interview notes would be part of what is referred to as a “residual category”.³ As such, Counsel for Fofana submit that there are three instances under which they would have the right to inspect documents in custody or control of the Prosecution in this residual category: (i) when the Defence consider such documents material for the preparation of the case; (ii) when the Prosecution intend to use these documents in trial as evidence; and (iii) when it concerns material obtained from the accused.⁴

2. Counsel for Fofana submit that the first two instances are applicable in the present case.⁵ With respect to the first circumstance, such documents, they submit, are considered material for the preparation of the Defence case. Counsel for Fofana rely on an interpretation of Rule 66(B) of the International Criminal Tribunal for the former Yugoslavia’s Rules of Procedure and Evidence (“ICTY Rules”) given by the ICTY Appeals Chamber in the *Kristic* case. Counsel for Fofana suggest that under Rule 66(B) of the ICTY Rules, which is almost analogous to Rule 66(A)(iii) of the Rules, “the criterion [to determine whether or not documents are ‘material to the preparation of the Defence case’] is liberal,

¹ Transcript of the 27th of January 2006, p. 50.

² *Ibid.*, pp. 49-50.

³ *Ibid.*, p. 51.

⁴ *Ibid.*, pp. 52-53.

⁵ *Ibid.*, p. 53.

maybe even vague [...] a very wide criterion”.⁶ With respect to the second instance, namely when the Prosecution intend to use the documents in trial as evidence, Counsel for Fofana submit that it is their understanding that the Prosecution intend to use the documents, more particularly statements made by some witnesses to be called by the Second Accused, during cross-examination of these witnesses, and that this in itself would constitute a sufficient reason to permit the inspection of such documents.⁷

3. The reasons advanced by Counsel for Fofana for requesting inspection of the documents at issue were (i) to refresh the memories of Defence witnesses, as they often do not remember what they may have told the Prosecution or the OTP Investigators; (ii) to establish whether these people have indeed spoken to the Prosecution or OTP Investigators; (iii) to assist Counsel for Fofana in the preparation of the examination-in-chief of the witness; (iv) to further assist Counsel for Fofana with their own investigation in general; and (v) to know whether the Prosecution have met all obligations under Rule 68.⁸

4. The Prosecution respond that the Motion is misconceived.⁹ The Prosecution agree that there is no inherent obligation for the Defence to receive any statement of a witness the Prosecution have not used whom the Defence wish to call as a witness.¹⁰ Furthermore, with respect to Rule 66(A)(iii), the Prosecution argue that it is apparent from the language of that sub-Rule that it is confined to exhibits.¹¹ Although Rule 66(A)(iii) does use the word “documents”, it was not intended to include witness statements as this would render sub-rule (ii) wholly otiose.¹² The Prosecution admit, however, that the word “documents” “[had] to be used by the drafters because plainly documents are often exhibits.”¹³

5. The Prosecution submit that Counsel for Fofana should have brought the Motion under Rule 66(A)(ii), in which case it would fail for different reasons.¹⁴ The Prosecution argue that Rule 66(A)(ii) sets out a discretionary standard and that The Chamber should refuse the Motion because it seeks to deny the principle of equality of arms to the Prosecution by hampering the Prosecution in its right to cross-examine as to the credit of a witness. Furthermore, the Prosecution submit that to allow inspection of previous statements would enable defence witnesses to fashion their evidence in the light of their earlier statements. The Prosecution contend that the result would be to take a step back from the truth, because if defence witnesses are telling the truth, they should not require the earlier statements.¹⁵

6. With respect to the authorities provided by Counsel for Fofana, the Prosecution submit that they are irrelevant.¹⁶ The Prosecution rely on a Decision in the *Blagojevic* case to state that “The Trial Chamber observes while maintaining its position that the term ‘documents’ in Rule 66(B) is not

⁶ *Ibid.*, see *Prosecutor v. Krstic*, ICTY Case No. IT-98-33-A, Appeals Chamber, “Decision on the Prosecution’s Motion to be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66(C)”, 27 March 2003.

⁷ Transcript of the 27th of January 2006, p. 53.

⁸ *Ibid.*, pp. 53-54.

⁹ *Ibid.*, p. 55.

¹⁰ *Ibid.*, pp. 55, 58, 60, 63.

¹¹ *Ibid.*, p. 56.

¹² *Ibid.*, pp. 57, 66.

¹³ *Ibid.*, p. 67.

¹⁴ *Ibid.*, p. 58.

¹⁵ *Ibid.*, pp. 58, 60, 68-69, 71-72.

¹⁶ *Ibid.*, p. 61.

intended to include witness statements.”¹⁷

7. Finally, the Prosecution note that to date, they have not received a single Defence witness statement and that the Prosecution would be disadvantaged because their right to cross-examine a potential defence witness would be blunted by the Defence being given “the right to go on a fishing expedition so as to alert their witnesses to the contents of an earlier statement”.¹⁸

8. In reply, Counsel for Fofana note the Prosecution admission that they intend to use the statements and reiterate that this is a sufficient basis for allowing an inspection.¹⁹ Counsel for Fofana observe that there are many reasons why the Prosecution may choose not to call a witness, including the fact that the evidence of a truthful witness might not support the Indictment.²⁰ Counsel for Fofana submit that the Defence are acting in good faith, and that it is also in the pursuit of the truth.²¹

9. Counsel for Fofana submit that Rule 66(A)(ii) is not the right Rule under which to decide the Motion and note that all of the authorities submitted on ICTY and ICTR Rule 66(B) relate to witness statements.²² Counsel for Fofana submit that the principle of equality of arms is not applicable to the disclosure of evidence; if such were the case it would violate both the right of the accused not to incriminate himself and the burden of proof, which clearly rests on the Prosecution.²³ Furthermore, Counsel for Fofana remind The Chamber that during the cross-examination of witnesses led by the Prosecution, the Defence never used witness statements which were not also known to the Prosecution.²⁴

II. APPLICABLE LAW

10. The relevant law governing the requests submitted in the present Motion is Rule 66(A) of the Rules, which provides as follows:

(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

¹⁷ *Ibid*, p. 80, citing *Prosecutor v. Blagojevic*, ICTY Case No. IT-02-60, “Joint Decision on Motions Related to Production of Evidence”, 12 December 2002.

¹⁸ Transcript of the 27th of January 2006, pp. 63-64.

¹⁹ *Ibid*, p. 72.

²⁰ *Ibid*.

²¹ *Ibid*, p. 73.

²² *Ibid*, pp. 73, 77.

²³ *Ibid*, p. 74.

²⁴ *Ibid*, p. 75.

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.

III. DELIBERATIONS

11. As a preliminary matter, The Chamber is of the view that the Prosecution's submission that they would be disadvantaged if the Motion were to be granted because they have not received a single Defence witness statement is wholly irrelevant to the Motion. It is apparent from the plain and ordinary meaning of the Rules dealing with disclosure that the obligations imposed on the Prosecution and the Defence are not equivalent. In this regard, The Chamber recalls its recent "Decision on Prosecution Request for Order to Defence Pursuant to Rule 73ter(B) to Disclose Written Witness Statements", where we held that:

[A]s a matter of law [...] the Prosecution logically has no right to disclosure of Defence witness statements, and thereby there is no correlative legal obligation on the Defence to produce such witness statements to the Prosecution.²⁵

12. The Chamber opines that the Prosecution's submission that the Motion is misconceived seems predicated upon the question of whether witness statements and/or interview notes of the kind sought to be permitted for inspection by Counsel for Fofana qualify as "documents" within the wording of Rule 66(A)(iii). Therefore, The Chamber must consider this question before proceeding to any other determination necessitated by this application.

13. The specific issue of whether witness statements and/or interview notes constitute "documents" within the meaning and contemplation of Rule 66(A)(iii) has never arisen before this Chamber for determination, nor did our "Decision on Disclosure of Witness Statements and Cross-Examination"²⁶ provide any guidance on the issue. It is, therefore, instructive to have recourse to Black's Law Dictionary for a definition of the word "document". A "document" is defined as meaning "[s]omething tangible on which words, symbols, or marks are recorded".²⁷ Instructively too, we defined a "witness statement" in our decision as "any statement or declaration made by a witness in relation to an event he witnesses and recorded in any form by an official in the course of an investigation."²⁸

14. It is noteworthy that the jurisprudence of other international criminal tribunals does not provide

²⁵ *Prosecutor against Norman, Fofana, Kondewa*, SCSL-04-14-562, "Decision on Prosecution Request for Order to Defence Pursuant to Rule 73ter(B) to Disclose Written Witness Statements", the 21st of February 2006, para. 11.

²⁶ *Prosecutor against Norman, Fofana, Kondewa*, SCSL-04-14-152, "Decision on Disclosure of Witness Statements and Cross-Examination", 16 July 2004.

²⁷ *Black's Law Dictionary*, Seventh edition, Ed. B.A. Garner, West Group, St. Paul, Minn., 1999, p. 498.

²⁸ *Supra* note 26, para. 24 [emphasis added].

much guidance on this issue.²⁹ For example, in *Kajelijeli*, a Trial Chamber of the ICTR stated that “if the Defense seeks disclosure of [copies of the witness interviews, either in the form of original tape recordings, and/or transcripts of the tape recordings] and the items are indeed in the custody or control of the Prosecutor, the Defense could pursue the matter under the provisions of Rule 66(B) of the Rules.”³⁰ In *Ntagerura*, a Trial Chamber of the ICTR ruled that “[t]he appropriate legal procedure for the Defence to gain access to [the audio recordings and transcripts from the questioning of Jean Kambanda] is, pursuant to Rule 66(B), to request the Prosecutor to permit the inspection.”³¹

15. We hold, therefore, that although sub-Rule 66(A)(iii) deals essentially with items of a “tangible” nature, such as books, documents, photographs and tangible objects, which are in custody or control of the Prosecution, and which may be tendered as exhibits, the language of that sub-Rule, with the use of the words “documents” and “tangible objects”, given the definition of “documents” as previously stated, is sufficiently broad to include witness statements recorded in the form of written statements, interview notes, audio and video tape recordings and/or transcripts of the recordings. Hence, in our opinion, pursuant to sub-Rule 66(A)(iii) the Defence may be permitted to inspect documents in custody or control of the Prosecution, which may consist of witness statements and/or interview notes given by witnesses for the Defence.

16. Furthermore, it is our view that the passage from *Blagojevic* quoted by the Prosecution during the oral application was taken out of context, in that the position attributed to the ICTY Trial Chamber is in fact the position of the Prosecution on that motion.³² Due to various circumstances peculiar to that case, the ICTY Trial Chamber in fact declared the question of whether witness statements are included in the term “documents” under Rule 66(B) to be moot in that instance.³³

17. Having concluded that the Motion is brought under the appropriate Rule, The Chamber now proceeds to determine whether Counsel for Fofana have satisfied the criteria as set out by sub-Rule 66(A)(iii) of the Rules in order for The Chamber to permit the inspection. In this regard The Chamber notes that it is only proper to consider the Defence request for permission to inspect these documents only if the initial request to the Prosecution was unsuccessful.³⁴ This has been clearly demonstrated in this case.³⁵

18. In addition, The Chamber has emphasized, in a number of recent Decisions, the importance of

²⁹ The Chamber makes the following observations with a caveat in mind that Rule 66(B) of the ICTR Rules of Procedure and Evidence (“ICTR Rules”) and Rule 66(B) of the ICTY Rules differ slightly from sub-Rule 66(A)(iii) of the SCSL Rules in that they are not contingent on 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”.

³⁰ *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, “Decision on Defence Motion Seeking to Interview Prosecutor’s Witness or Alternatively to be Provided with a Bill of Particulars”, 12 March 2001, paras 12, 11.

³¹ *Prosecutor v. Ntagerura*, ICTR-99-46-T, “Decision on Bagambiki’s Motion for Disclosure of the Guilty Pleas of Detained Witnesses and of Statements by Jean Kambanda”, 1 December 2000, paras 16, 4.

³² Transcript of the 27th of January 2006, p. 80; Cf. *Prosecutor v. Blagojevic*, *supra* note 17, para. 12.

³³ *Prosecutor v. Blagojevic*, *ibid.*, para. 14.

³⁴ *Prosecutor v. Ntagerura*, ICTR-99-46-T, “Decision on Bagambiki’s Motion for Disclosure of the Guilty Pleas of Detained Witnesses and of Statements by Jean Kambanda”, 1 December 2000, para. 16: “Resorting to the Chamber is permissible only if the request to the Prosecutor was unsuccessful”.

³⁵ Transcript of the 27th of January 2006, p. 49; Counsel for Fofana submits as follows: “My application today is the result of negotiations, fruitless negotiations, we have had with the Prosecution. We have tried to settle this case, of course, out of court but we have been unsuccessful.”

giving effect to the plain and ordinary meaning of statutory provisions and rules.³⁶ Under the disjunctive terms of sub-Rule 66(A)(iii), the plain and ordinary meaning of the sub-Rule is clear – there are three instances when the Defence may be granted a permission to inspect documents. First, the Defence may be granted the permission to inspect books, documents, photographs and tangible objects in the custody or control of the Prosecution upon a showing by the Defence of categories of such items, or specific items, which the Defence consider to be material to the preparation of a defence; second, the Defence may be granted the permission to inspect books, documents, photographs and tangible objects in the custody or control of the Prosecution which are intended for use by the Prosecution as evidence at trial; or third, the Defence may be granted the permission to inspect books, documents, photographs and tangible objects in the custody or control of the Prosecution if these items were obtained from or belonged to the accused.

19. Only the first and second instances are relevant here. The Chamber is satisfied that the Motion can be granted on the basis that the Prosecution intend to use these documents as evidence at trial, the Prosecution having admitted that the statements sought for inspection by Counsel for Fofana, should they exist, would then be intended to be used by the Prosecution in cross-examination of the witnesses, who allegedly gave such statements, in order to demonstrate previous inconsistent statements. Moreover, the Prosecution stated in their submissions that the Prosecution decided not to call these witnesses on their behalf as they allegedly were proven not to be witnesses of truth.

20. Furthermore, The Chamber opines that the permission to inspect under sub-Rule 66(A)(iii) can be granted on the basis that Counsel for Fofana consider that the specified witness statement and/or interview notes are material to the preparation of their defence. In this respect, The Chamber recalls its previous interpretation given in *Sesay* of the requirements put to the Defence as to the application brought under sub-Rule 66(A)(iii):

The Defence [...] may not rely on unspecified and unsubstantiated allegations or a general description of the information, but must make a *prima facie* showing of materiality and that the requested evidence is in the custody or control of the Prosecution.³⁷

21. With respect to materiality, The Chamber has adopted the articulation of requirements for disclosure under Rule 66(A)(iii) as set out by the ICTY in *Delalic*.³⁸ The Chamber further stated that the Prosecution have the obligation to make the initial determination of materiality of all evidence in their possession.³⁹ Should the Defence dispute the Prosecution's decision, they must specifically then identify the material evidence that is being withheld.⁴⁰ Where the Defence fail to do so, a request pursuant to

³⁶ See *supra* note 26, paras 9-10; see also *supra* note 25, paras 9-10.

³⁷ *Prosecutor v. Sesay, Kallon, Gbao*, "Sesay - Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules", 9 July 2004, para. 27 ("Sesay Decision of the 9th of July 2004").

³⁸ *Ibid.*, para. 28; In *Delalic*, the ICTY noted that in the United States, "it is generally accepted that to be material, the requested information must have 'more than [...] abstract logical relationship to the issues'; [...] it must be 'significantly helpful to an understanding of important inculpatory or exculpatory evidence'; [and] it is material if there 'is a strong indication that [...] it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal'." *Prosecutor v. Delalic et al.*, "Decision on the Motion by the Accused Zejnir Delalic for the Disclosure of Evidence", 26 September 1996, para. 7.

³⁹ *Sesay* Decision of the 9th of July 2004, para. 28.

⁴⁰ *Ibid.*

Rule 66(A)(iii) will be dismissed for lack of a legal basis.⁴¹

22. In the instant case, witness statements and/or interview notes, for which permission to inspect is sought, were reportedly taken by the Prosecution from witnesses whom the Second Accused intends to call in his defence and therefore are material for the preparation of his defence case. Counsel for Fofana stated that they “have checked the witness statements which were disclosed so far by the Prosecution and [...] are convinced, in at least one case, that [they] have not received the statements or the interview notes made by investigators or prosecution with these particular witnesses.” The Chamber opines that Counsel for Fofana have made a *prima facie* showing of materiality of the required documents and therefore, the Motion can be granted on this basis as well.

IV. DISPOSITION

23. The Chamber hereby **GRANTS** the Motion and **ORDERS** the Prosecution to permit Court Appointed Counsel for the Second Accused to inspect witness statements and/or interview notes in their custody or control, of those witnesses, whom the Second Accused intends to call on his behalf in his defence case, and whom Court Appointed Counsel for the Second Accused listed on their core witness list, filed as a document on the 5th of May, 2006.⁴²

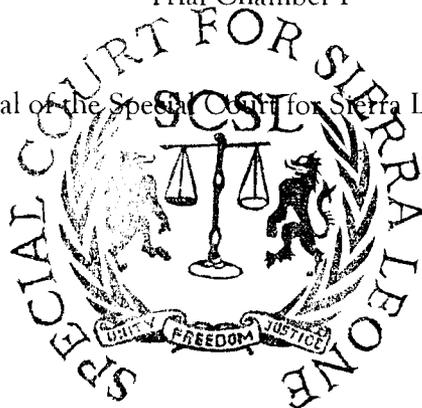
Done in Freetown, Sierra Leone, this 14th day of June 2006.

Hon. Justice Benjamin Mutanga Itoe

Hon. Justice Pierre Boutet
Presiding Judge,
Trial Chamber I

Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]



⁴¹ *Ibid.*, para. 46.

⁴² SCSL-04-14-591, “Fofana Notice of Reduction of Witnesses”, Annex A.