

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

SEIZED OF the "Defence Request for Full Review of Prosecution Evidence to Identify Rule 68 Material for Disclosure", filed *confidentially*¹ by Court Appointed Counsel for the Second Accused ("Counsel for Fofana") on the 24th of October 2006 ("Motion"),² wherein Counsel for Fofana request an Order from The Chamber to the Prosecution to review all material in their possession for potential Rule 68 material;³

NOTING the "Order for Expedited Filing" issued by The Chamber on the 26th of October 2006,⁴ wherein The Chamber ordered that "[a]ny Response to the Motion shall be filed no later than Monday, the 30th of October 2006, at 1:00 p.m." and that "[a]ny Reply to the said Response shall be filed no later than Wednesday, the 1st of November 2006, at 4:00 p.m.";

NOTING the "Prosecution Response to Confidential Defence Request for Full Review of Prosecution Evidence to Identify Rule 68 Material for Disclosure", filed *confidentially* by the Office of the Prosecutor ("Prosecution") on the 30th of October 2006,⁵ opposing the Motion;⁶

NOTING the "Defence Reply to Prosecution Response to Defence Request for Full Review of Prosecution Evidence to Identify Rule 68 Material for Disclosure", filed *confidentially* by Counsel for Fofana on the 1st of November 2006;⁷

NOTING that Counsel for Fofana premise their Motion on two recent instances when the Prosecution failed to disclose allegedly exculpatory material and argue that, therefore, such failure gives rise to a concern that the Prosecution may not be fully appraised of their responsibilities under Rule 68 with the possible consequence that other important material may not have been disclosed,⁸ which could cause prejudice to the Defence;⁹

NOTING that as a possible remedy for such alleged non-disclosure Counsel for Fofana seek that The Chamber sets out the definition of material capable of amounting to Rule 68 material and orders the Prosecution to provide a signed report from a representative of the Prosecution team, who from his personal knowledge, can certify that a full search has been conducted of all the materials in the possession or within the knowledge of the Prosecution for the existence of Rule 68 material;¹⁰

¹ The Chamber is cognisant of the fact that the Motion as well as the Response and the Reply thereto were filed on a *confidential* basis. However, bearing in mind the provisions of Article 17(2) of the Statute and of Rule 78 of the Rules that the proceedings shall be held in *public*, The Chamber issues the present Decision as a *public* document. Any information that might lead to an identification of the protected witness or disclosure of the information conveyed in closed session will not be discussed or quoted in this Decision.

² SCSL-04-14-T-724.

³ *Ibid.*, para. 1.

⁴ SCSL-04-14-T-726.

⁵ SCSL-04-14-T-728.

⁶ *Ibid.*, paras 5, 29.

⁷ SCSL-04-14-T-729.

⁸ Motion, paras 3, 4, 15, 33-37.

⁹ Reply, paras 21-22.

¹⁰ Motion, para. 38.

CONSIDERING that sub-Rule 68(B) of the Rules of Procedure and Evidence of the Special Court ("Rules") provides as follows:

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.

CONSIDERING from the plain reading of this sub-Rule what constitutes exculpatory material is clear and unambiguous;¹¹

CONSIDERING, moreover, that the decision at this stage as to what material meets Rule 68 disclosure requirements falls within the Prosecution's discretion;¹²

CONSIDERING further that the Prosecution are expected to fulfill this obligation in good faith and that an order of the type sought should only be contemplated where the Defence can satisfy The Chamber that the Prosecution have failed to discharge their obligations as expected under Rule 68;¹³

CONSIDERING that the material described by Counsel for Fofana in their Motion as being exculpatory material, in the circumstances of the present case, does not constitute exculpatory material;

CONSIDERING, therefore, that neither instance cited by Counsel for Fofana of the non-disclosure of material by the Prosecution gives rise to a conclusion that the Prosecution have failed to discharge their obligation under Rule 68;

CONSIDERING that no additional showing has been made by Counsel for Fofana which would necessitate the invocation by The Chamber of its inherent power to intervene in this matter and issue orders such as those sought in the Motion;

PURSUANT to Rules 54, 68 and 73 of the Rules;

¹¹ See also, *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-04-14-T, "Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68", 8 July 2004, para. 23.

¹² *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, 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*"), p. 2, referring to *Prosecutor v. Tihomir Blaskic*, IT-95-14-A, Appeal Judgement, 29 July 2004, para. 264.

¹³ *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, "Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68", 1 November 1999, paras 1-2; see also, *Brdjanin Decision*, p. 3, referring to *Prosecutor v. Blaskic*, IT-95-14-A, "Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings", 26 September 2000, para. 45.

THE CHAMBER DISMISSES THE MOTION.

Done in Freetown, Sierra Leone, this 6th day of November 2006.

[Handwritten signatures of Hon. Justice Benjamin Mutanga Itoe, Hon. Justice Bankole Thompson, and Hon. Justice Pierre Boutet]

Hon. Justice Benjamin Mutanga Itoe Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet
Presiding Judge
Trial Chamber I

[Seal of the Special Court for Sierra Leone]

