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SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995

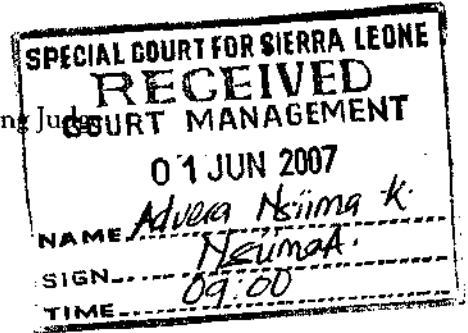
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

TRIAL CHAMBER I

Before: Hon. Justice Bankole Thompson, Presiding Judge
 Hon. Justice Pierre Boutet
 Hon. Justice Benjamin Mutanga Itoe

Registrar: Herman von Hebel, Acting Registrar

Date: 31st of May 2007



PROSECUTOR

Against

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

Public Document

**DECISION ON MOTION FOR INSPECTION OF WITNESS STATEMENTS (RULE 66(A)(iii))
 AND/OR ORDER DISCLOSURE PURSUANT TO RULE 68**

Office of the Prosecutor:

James C. Johnson
Peter Harrison

Defence Counsel for Issa Hassan Sesay:

Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:

Shekou Touray
Charles Taku
Melron Nicol-Wilson

Court Appointed Counsel for Augustine Gbao:

Andreas O'Shea
John Cammegh

TRIAL CHAMBER I ("Trial 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 Motion to Request the Trial Chamber to Permit Inspection of Witness Statements (Rule 66(A)(iii)) and/or Order Disclosure Pursuant to Rule 68, filed by Counsel for the First Accused, Issa Hassan Sesay ("Sesay Defence") on the 30th of March 2007 ("Defence Motion");

PURSUANT to Rules 66(A)(iii) and 68 of the Rules of Procedure and Evidence ("Rules");

HEREBY DECIDES:

I. PROCEDURAL HISTORY

1. On the 30th of March 2007, the Sesay Defence filed the Defence Motion.
2. On the 16th of April 2007, the Prosecution filed its Prosecution Response to the Sesay Defence Motion to Request the Trial Chamber to Permit Inspection of Witness Statements (Rule 66(A)(iii)) and/or Order Disclosure Pursuant to Rule 68 ("Prosecution Response").
3. On the 23rd of April 2006, the Sesay Defence Filed its Defence Reply to Prosecution Response to Request the Trial Chamber to Permit Inspection of Witness Statements (Rule 66(A)(iii)) and/or Order Disclosure Pursuant to Rule 68 ("Defence Reply").
4. On the 24th of April 2007, the Prosecution filed its Prosecution Application to Respond to the Sesay Defence Reply to Prosecution Motion to Request the Trial Chamber to Permit Inspection of Witness Statements (Rule 66(A)(iii)) and/or Order Disclosure Pursuant to Rule 68 ("Application").
5. On the 25th of April 2007, the Chamber issued its Order on Prosecution Application for Leave to Respond to Sesay Defence Reply Regarding Defence Motion for Disclosure Pursuant to Rule 66(A)(iii) and/or Disclosure Pursuant to Rule 68 ("Order"), in which it granted the Prosecution Application and ordered the Sesay Defence to file its response to the Prosecution Application within three days from the date of the Order.
6. On the 30th of April 2007, the Sesay Defence filed its Defence Reply to the Prosecution 24th April 2007 Leave to Respond to Application ("Defence Reply to Prosecution Application").

7. On the 2nd of May 2007 a Status Conference was held in respect of the commencement of the Defence phase of the trial ("2nd of May Status Conference").

II. SUBMISSIONS OF THE PARTIES

A. Defence Motion

8. The Sesay Defence argues that the Prosecution has interviewed and taken statements from a certain number of Defence witnesses, two of which, Witnesses DIS-126 and DIS-258 are known to it.¹ The Sesay Defence contends that the statements of such witnesses are material to the Defence preparation.² The Sesay Defence argues further that the Prosecution intends to use these statements in order to cross-examine Defence witnesses. The Sesay Defence argues that, under Rule 66(A)(iii), it should therefore be allowed to inspect the statements of these witnesses.³

9. The Sesay Defence argues further that the statements which it has obtained from Witnesses DIS-126 and DIS-258 suggest that Mr. Taylor had little to do with Mr Sesay, which has the effect of discrediting the evidence of certain Prosecution witnesses. It is therefore exculpatory and the Prosecution is under an obligation to disclose it under Rule 68.⁴

B. Prosecution Response

10. The Prosecution argues that on the 3rd of April 2007, on the working day immediately following the receipt of the Defence Motion, it wrote to the Sesay Defence and offered it the opportunity to inspect the statements of witnesses DIS-126 and DIS-258.⁵

11. The Prosecution argues further that the request for disclosure under Rule 68 is moot as it has already provided the Sesay Defence with the opportunity to inspect the documents.⁶ The Prosecution advises the Chamber that, as part of its continuing obligation to do so, it continually reviews

¹ Defence Motion, para 1.

² *Ibid*, para 7.

³ *Ibid*, para 8.

⁴ *Ibid*, para 10. The Sesay Defence notes further, at para 11, that if the statements of such witnesses which are in the possession of the Prosecution dispute that Mr. Taylor had little to do with Mr. Sesay, then the Sesay Defence is in possession of material which significantly affects the credibility of proposed witnesses against Mr. Taylor. The Sesay Defence states that consequently it "would wish to consider the interests of justice and its consequential legal obligation in relation to the material, namely whether the Defence is under a duty to disclose this material to Mr. Taylor's legal representatives."

⁵ Prosecution Response, para 10.

⁶ *Ibid*, para 20.

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statements in accordance with Rule 68.⁷ It argues further that where the Prosecution is not in possession of Defence statements it cannot assess them or use them as a basis to determine whether Rule 68 material exists or not.⁸

C. Defence Reply

12. The Sesay Defence argues that its request for disclosure is not moot simply because it has been allowed to inspect the documents on the 17th of April 2007, because the Prosecution has failed to disclose the statements of Witness DIS-258 pursuant to Rule 68.⁹

13. The Sesay Defence argues further that it is not suggesting that the Prosecution use Defence statements, which are not in the Prosecution's possession to determine whether it has Rule 68 material which it ought to disclose.¹⁰

14. The Sesay Defence refers to statements from Witness DIS-258 dated the 16th of May 2000 and the 16th of December 2006, respectively, and argues that such statements are "manifestly exculpatory" and that the Prosecution is under a duty to disclose them pursuant to Rule 68.¹¹

15. They argue that the fact that the Prosecution did not appreciate that these statements are exculpatory indicates that the Prosecution either does not understand their obligations under Rule 68 or has not fulfilled them with due diligence.¹² They further argue that the Prosecution's failure in this regard gives it cause for concern that the Prosecution has not fulfilled their Rule 68 obligations with due diligence and that it is in possession of other material that is exculpatory. In view of this possibility, the Sesay Defence argues that it is seeking an order that a representative from the Prosecution sign a report certifying that a full search of all Rule 68 material within the Prosecution's possession or knowledge has been conducted and that all such material has been disclosed to the Defence.¹³

⁷ *Ibid*, para 15.

⁸ *Ibid*, para 16. In relation to the Sesay Defence's arguments regarding whether it should disclose material in its possession which could be exculpatory in the prosecution against Mr. Taylor, the Prosecution argues, at paras 18-19, that there is a protective measures order in the current case which prohibits the Sesay Defence from disclosing non-public materials of any sort or any information contained in such material to any person.

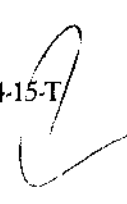
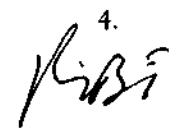

⁹ Defence Reply, para 4.

¹⁰ *Ibid*, para 5.

¹¹ *Ibid*, para 7 and 10.

¹² *Ibid*, para 10.

¹³ *Ibid*, para 11. In relation to the material which it is considering disclosing to the Taylor Defence, the Sesay Defence notes, at para 12, that it does not need to be reminded of its Rule 68 obligations. The Defence argues further that the

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D. Prosecution Application

16. The Prosecution applies for leave to file a further response to the Defence Reply in order to respond to what it alleged to be factual errors contained in the Defence Reply.¹⁴ It argues that the Defence Reply asserted in paragraphs 4 and 8 that the Prosecution had failed, pursuant to Rule 68, to disclose the statements of Witness DIS-258 dated 16th of May 2000 and 16th of December 2006, respectively.¹⁵

17. The Prosecution argues that these statements had been disclosed.¹⁶

E. Defence Reply to Prosecution Application

18. The Sesay Defence notes that the statements of Witness DIS-258 dated 16th of May 2000 and 16th of December 2006, respectively have been disclosed.¹⁷

F. 2nd of May Status Conference

19. The Sesay Defence states that it has been provided with the opportunity to inspect the statements of Witnesses DIS-126 and DIS-258.¹⁸

III. APPLICABLE LAW

20. Rule 66(A)(iii) of the Rules provides that:

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 the 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.

Prosecution's approach "smacks of double standards" because they decided unilaterally to allow the Defence the opportunity to inspect the statements of witnesses DIS-126 and DIS-258, presumably because it considers it to be in the interests of justice to do so. The Sesay Defence argues that it would adopt a similar approach in the event that it receives a similar request for disclosure, exchange or inspection.

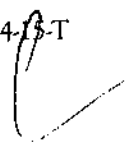
¹⁴ Prosecution Application, para 1.

¹⁵ *Ibid*, para 2.

¹⁶ It attached as "Annex A" to the Prosecution Application a copy of the receipt signed by the Sesay Defence acknowledging that the 16 May 2000 statement had been disclosed to them. It attached as Annex B to the Prosecution Application a copy of the receipt which the Sesay Defence had signed acknowledging that the 16 December 2000 statement had been disclosed to them.

¹⁷ *Ibid*, paras 1-2.

¹⁸ *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, Transcript of 2 May 2007, Status Conference, p. 55, lines 7-9.



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21. Rule 68 provides, in relevant part, that:

(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 evidence.¹⁹

22. This Chamber has previously held that when the Defence seeks the disclosure of evidence under Rule 68, it must be specific as to the evidence that it wishes to have disclosed and make a *prima facie* showing that such evidence is exculpatory.²⁰ It is insufficient to simply allege non-compliance on the part of the Prosecution. The Defence must set out with particularity the information that it is seeking and the extent to which it is exculpatory.²¹ The Chamber reiterates that these are the basic principles governing applications of this type.

IV. DELIBERATION

23. The Chamber finds, on the basis of the Defence Reply and the statements of the Sesay Defence at the 2nd of May Status Conference, that the Prosecution afforded the Sesay Defence the opportunity to inspect the statements of Witnesses DIS-126 and DIS-258 on the 17th of April 2007. The Chamber is therefore of the view that the Sesay Defence's request for relief under Rule 66(A)(iii) is no longer in issue.

24. The Chamber is of the view that the Sesay Defence's request for disclosure under Rule 68 relates to documents in the Prosecution's possession. In the Defence Motion, the Sesay Defence referred to the statements of "these witnesses",²² which tends to suggest that its request was in relation to the statements of DIS-126 and DIS-258. However, in the Defence Reply, the Sesay Defence referred only to the statements of Witness DIS-258 dated the 16th of May 2000 and the 16th of December 2006, respectively. It did not make any further requests regarding the disclosure of the statement/s of Witness DIS-126.

¹⁹ See in this regard *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T, Decision on Sesay - Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor, (TC), 2 May 2005, paras 35-36.

²⁰ *Prosecutor v Sesay, Kallon and Gbao*, SCSL-2004-15-T, Sesay - Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, (TC), 9 July 2004, paras 43-44; *Prosecutor v Norman, Fofana and Kondewa*, SCSL-2004-14-T, Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68, (TC), 8 July 2004, para 24.

²¹ *Ibid.*

²² Defence Motion, para 10.

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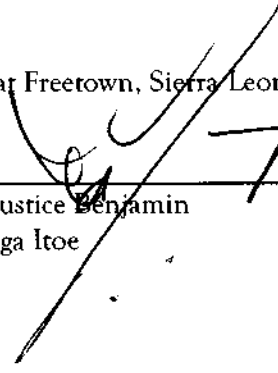
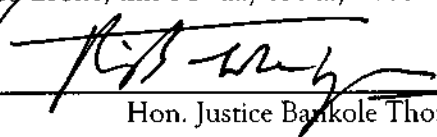
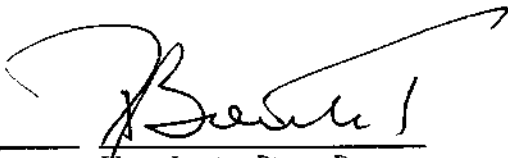
25. The Chamber, on the basis of the Prosecution Application and the Defence Reply to the Prosecution Application, finds that the specific statements of Witness DIS-258 referred to above have been disclosed to the Sesay Defence. With regards to Witness DIS-126, the Chamber, guided by the applicable principles of law, is of the view that the Sesay Defence has not made out a *prima facie* case that the statements of such witness are exculpatory.

26. The Chamber further reiterates its previous decisions on this issue and states that for a request for disclosure under Rule 68 to be sustained, it must be specific on the information for which the Defence seeks the disclosure and also satisfy the Chamber that it is *prima facie* exculpatory. In this regard, we reject the Sesay Defence's request for an order that a representative from the Prosecution signs a report certifying that a full search of all Rule 68 material within the Prosecution's possession or knowledge has been conducted and that all such material has been disclosed.

THE CHAMBER HAVING REGARD TO THE ABOVE,

DISMISSES the DEFENCE MOTION IN ITS ENTIRETY

Done at Freetown, Sierra Leone, this 31st day of May 2007

 <hr/> Hon. Justice Benjamin Mutanga Itoe	 <hr/> Hon. Justice Bankole Thompson Presiding Judge Trial Chamber I	 <hr/> Hon. Justice Pierre Boutet
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