

363)



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

Registrar: Robin Vincent

Date: 2nd of May 2005

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

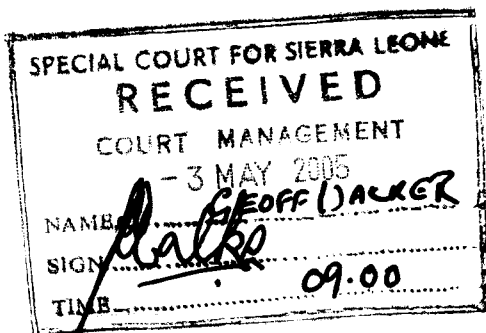
DECISION ON SESAY - MOTION SEEKING DISCLOSURE OF THE RELATIONSHIP
BETWEEN GOVERNMENTAL AGENCIES OF THE UNITED STATES OF AMERICA
AND THE OFFICE OF THE PROSECUTOR

Office of the Prosecutor:
Luc Côté
Lesley Taylor
Peter Harrison

Defence Counsel for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Shekou Touray
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao
Andreas O'Shea
John Cammegh



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

SEIZED of the *Motion Seeking Disclosure of the Relationship Between the United States of America’s Government and/or Administration and/or Intelligence and/or Security Services and the Investigation Department of the Office of the Prosecutor*, filed on the 1st of November, 2004 (“Motion”) on behalf of Issa Hassan Sesay (“Accused”);

MINDFUL of the *Prosecution Response to this Motion* filed on the 16th of November 2004 (“Response”) by the Office of the Prosecutor (“Prosecution” or “OTP”);

NOTING the Defence Reply thereto, filed on the 19th of November 2004 (“Reply”);

MINDFUL of the provisions of Article 15 of the Statute of the Court;

MINDFUL of the provisions of Rule 68 of the Rules of Procedure and Evidence of the Court;

NOW CONSIDERS the matter on the basis of the written submissions of the Parties pursuant to Rule 73(A) of the Rules;

I. SUBMISSIONS OF THE PARTIES

A) *The Defence Motion*

1. The Defence submits that during his testimony from the 4th to 11th of October 2004, Prosecution witness, General Tarnue, made assertions which revealed a relationship between the Office of the Prosecution and the United States Government¹ through the Agency of the FBI. The Defence avers that the evidence given by General Tarnue raises a “*prima facie* case that the Prosecutor, through the intermediary of Dr. White, [Chief of Investigations]², has acted in breach of Article 15 insofar as he worked with and/or at the behest of and/or in conjunction with the FBI”.

¹ Motion, para. 1.

² The Defence concerns are limited to the conduct of the specific investigator and any other aspect of the investigation that is tainted by him and do not concern the Prosecution generally.

2. The Defence submits that the evidence that Dr. White used Prosecution funds during “FBI vetting” discloses a symbiotic relationship between the OTP and the FBI which would be inconsistent with the Prosecution’s obligation pursuant to Article 15 to maintain its independence.³ The Defence also states that the evidence of General Tarnue suggests that Dr. White played an integral role in the relocation and in the granting of asylum to General Tarnue.⁴ The Defence submits that the above evidence raises serious questions about the integrity of the investigations⁵ in this matter in that the Prosecution has violated Article 15 of the Statute of the Court in that it has not acted independently.

3. The Defence further avers that a *prima facie* breach of Article 15 raises issues which relate to an evaluation of the evidence and to an assessment of whether the Prosecution has complied with its disclosure obligations pursuant to Rule 68 of the Rules.⁶

4. The Defence submits that the Chamber will not be able to properly evaluate the veracity and reliability of the evidence of General Tarnue and other witnesses without a clear indication from the Prosecution as to the extent of the relationship between Dr. White acting for the OTP on the one hand, and the American Government and the FBI on the other since the involvement of the latter may have affected the evidence obtained.⁷ The Defence further asserts that Dr. White’s involvement with the outside agencies in assisting in the relocation of General Tarnue and his family must be disclosed since this assistance is capable of being an inducement and might have influenced General Tarnue’s willingness to implicate the Accused.⁸

5. The Defence submits that the Prosecution must disclose anything that reveals the untruthfulness of General Tarnue’s evidence pursuant to its obligation to disclose exculpatory evidence under Rule 68.⁹ The Defence also asserts that General Tarnue’s evidence, and in particular a statement made during his interview with Dr. White in April 2003, suggest that there were previous interviews with Dr. White and the FBI that have not been disclosed.¹⁰

6. In conclusion, the Defence requests that the Prosecution be required to disclose:

³ Motion, paras 5-6.

⁴ *Id.*, para. 7.

⁵ *Id.*, para. 8.

⁶ *Id.*

⁷ *Id.*, paras 10-11.

⁸ *Id.*, para. 9.

⁹ *Id.*, para. 12.

¹⁰ *Id.*, para. 13.

- (i) The relationship between Dr. White and/or the investigation team and the United States government, administration, security services and/or FBI;
- (ii) The extent to which General Tarnue's evidence in this regard is untrue or unreliable;
- (iii) Whether any other investigatory work has been conducted with OTP investigators working alongside any outside agency;
- (iv) Whether any fruits of joint investigation have been shared with any outside agency;
- (v) What assistance was offered and given to General Tarnue by Dr White and/or any other investigator;
- (vi) Any information in the possession of, or known to the OTP which discloses any activity which is *prima facie* either illegal or in breach of the Statute or Rules of the Special Court by any investigator working for the OTP including but not limited to Dr White and including but not limited to any involvement in an alleged attempt to arrest Benjamin Yeaten in Togo between 2000-2004.¹¹

B) The Prosecution Response

7. The Prosecution submits that the Defence Motion should be dismissed in its entirety. It rejects the Defence's assertion that it is not acting independently and has taken instructions from another entity. The Prosecution argues that while it has, as permitted by the Statute and Rules, sought information and assistance from other entities in conducting its investigations, it has in no way acted improperly.¹²

8. The Prosecution submits that the Statute makes it clear in the wording of Article 15 that the Office of the Prosecutor is responsible for both investigating and prosecuting alleged crimes that fall within the jurisdiction of the Court, to be independent of other organs of the Special Court, and in so acting, not to take instructions from any entity. The Prosecution emphasizes, however, that the

¹¹ *Id.*, para. 14.

¹² Response, paras. 7-8.

Handwritten signatures and initials: a large checkmark-like signature, the letter 'B', and the initials 'RST'.

Statute, while prohibiting the Prosecution from taking instructions from any entity, does not prohibit it from seeking assistance or information from any other source.¹³

9. Indeed, Article 15(2) of the Statute specifically provides that the “Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned”. However, the Prosecution submits that it should be implied that its ability to seek assistance and information from other entities extends to those entities outside of Sierra Leone. It submits further, that it must seek assistance from other entities in order to pursue thorough investigations in accordance with its mandate since accused persons, witnesses and physical evidence may be located in other countries and jurisdictions that are not within the authority and limited territorial jurisdiction of the Court.¹⁴

10. In support of its position, the Prosecution relies on Rules 8 (C) (D) and (E), 39 and 40 of the Rules which make reference to assistance from other States. The Prosecution also relies to the *Blaskic* decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) which noted that international tribunals “must rely on the cooperation of States”.¹⁵

11. With regard to the Defence allegation that there is *prima facie* evidence that the Prosecution has breached Article 15 insofar as Dr. White “has worked with and/or at the behest of and/or in conjunction with the FBI”, the Prosecution states that it has not engaged in any wrong doing and that the action complained of is permitted by the governing legislation. Submitting that Article 15(1) of the Statute prohibits “seeking or receiving instructions” and not “seeking assistance”, the Prosecution contends that the Accused does not allege that the Prosecution sought or received instructions from another entity.¹⁶

12. The Prosecution further submits that cooperation between the Prosecution and foreign security agencies is necessary for the relocation of witnesses in order to ensure protective measures in the country of relocation.¹⁷

13. It asserts that the Motion shows no evidence whatsoever that the Prosecution has failed to comply with its disclosure obligations pursuant to Rule 68 and states that it has disclosed the evidence in its possession, while remarking that it cannot disclose evidence that is not in the

¹³ Article 15(1)(a)(b)(c) of the Statute and Response, paras 9-13.

¹⁴ Response, para. 15.

¹⁵ *Prosecutor v. Tihomir Blaskic*, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber 11 of 18 July 1997, 29 October 1997, para. 29.

¹⁶ Response, paras 20-22.

¹⁷ *Id.*, para. 23.

The page contains three handwritten signatures or initials. The first is a large, stylized 'L' or 'B' shape. The second is a large, stylized 'B'. The third is a signature that appears to be 'A. 237'.

possession of the Office of the Prosecutor because the Prosecution cannot compel other independent entities or Agencies to produce documents or evidence.¹⁸

14. In response to the specific requests for disclosure contained in the Motion, the Prosecution submits that:

- (i) The word “relationship” is vague. There are no grounds to disclose calls and meetings and if something else is sought, it must be specified in a motion.¹⁹
- (ii) The Prosecution has already disclosed the evidence in its possession relating to the untruthfulness or unreliability of General Tarnue’s evidence. Defence may seek to compel evidence from other sources by means of court order.²⁰
- (iii) Disclosure of other investigations in which investigators of the Office of the Prosecutor are working alongside any outside agency is outside the scope of the conduct complained of without evidentiary basis and would compromise ongoing investigations.²¹
- (iv) As above in (iii).²²
- (v) General Tarnue was examined on the issue of the assistance given to him by the Chief of Investigation and other investigators and this is sworn evidence. Defence could compel others to testify on this and related topics.²³
- (vi) The request for disclosure of any activity that is illegal or in breach of the Statute or Rules, including an alleged attempt to arrest Benjamin Yeaten in Togo between 2000 and 2004 is a “fishing expedition”. An alleged arrest of Mr. Yeaten is irrelevant to the matters at hand.²⁴

¹⁸ *Id.*, paras 25-26.

¹⁹ *Id.*, para. 27.

²⁰ *Id.*, para. 28.

²¹ *Id.*, para. 29.

²² *Id.*, para. 30.

²³ *Id.*, para. 31.

²⁴ *Id.*, para. 32.

C) *The Defence Reply*

15. The Defence agrees that the Statute and the Rules permit the Prosecution to seek information and assistance from other entities while carrying out its mandate and that this may be necessary in order to provide protective measures to relocated witnesses.²⁵

16. It asserts, however, that the evidence of General Tarnue that Dr. White's actions were based upon a decision of the U.S. State Department suggests that the Prosecution's actions were based upon instructions received from the State Department. The Defence argues that if the Prosecution was not taking instructions from the FBI but merely seeking information and assistance as they affirm, they ought therefore to disclose that assistance pursuant to Rule 68 since this may impact on the motivation and credibility of General Tarnue.²⁶

17. The Defence clarifies that they are only seeking information regarding the relationship or ongoing investigations between the Prosecution and the U.S. administration in those cases where it breaches the Rules or results in assistance provided to General Tarnue or any other witness. The Defence reiterates that the evidence given by General Tarnue *prima facie* discloses a breach of Article 15 and/or assistance offered to him by the Prosecution.²⁷

18. The Defence submits that it is General Tarnue's evidence that Dr. White assisted him in his attempt to obtain asylum and to escape to Ghana and that this assistance "may affect the credibility of prosecution evidence".²⁸ The Defence highlights that the Prosecution has suggested that the Defence can obtain further details of assistance by compelling others to testify. The Defence submits that this is an admission that further information exists and that the Prosecution has not fulfilled its duty to disclose that evidence pursuant to Rule 68. The Defence suggests that the information is within the custody, control and possession of the Prosecution.²⁹

19. The Defence maintains that it is not on a "fishing expedition". It asserts that it simply seeks that the Prosecution put before the Chamber, all the evidence which might affect the motivation and the credibility of the evidence it relies upon.³⁰

²⁵ Reply, paras 2 and 4.

²⁶ *Id.*, paras 2-5.

²⁷ *Id.*, para. 6.

²⁸ *Id.*, para. 9 and Rule 68.

²⁹ *Id.*, paras 10, 11 and 13.

³⁰ *Id.*, paras 14-15.

Handwritten initials 'L B' and 'RST' are present on the page. 'L B' is written in a large, stylized cursive font, and 'RST' is written in a smaller, more compact cursive font to its right.

II. APPLICABLE LAW

(A) *Authority, Autonomy and Independence of the Office of the Prosecutor*

20. The law applicable to the subject-matter of the instant Motion is embodied in five key statutory provisions of the Court, to wit, Article 15(1) of the Statute, Section 15 of the Special Court Agreement, 2002 Ratification Act, 2002 (“Special Court Agreement”) and Rules 8, 39, and 68 of the Rules.

21. Underscoring the centrality of the prosecutorial role within the Special Court’s adversarial system for the adjudication of criminal cases, Article 15(1) of the Statute of the Court sets up an autonomous and independent machinery for the prosecution of crimes against humanity and war crimes in these terms:

The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. **The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.**
(emphasis added)

22. In the Chamber’s opinion, it is absolutely clear that Article 15(1) reinforces, in unambiguous terms, an internationally accepted norm governing the exercise of prosecutorial authority, in International Criminal Tribunals namely, autonomy and independence. To this end, the Chamber acknowledges that it is imperative not only in preserving the integrity of the administration of criminal justice in international law but also to ensure the confidence of the international community in mechanisms set up to ensure accountability for war crimes against humanity, that the Office of the Prosecutor enjoys an unfettered functional and investigative discretion, subject only to recognised and accepted judicial controls in respect of the functions conferred on it by the Statute of the Special Court.

(B) *Statutory Obligation on Sierra Leone to Provide Assistance to the Court.*

23. The Chamber acknowledges that it was in recognition of the need for co-operation between the Court, the relevant Sierra Leone authorities and other states to fulfil the Court’s mandate that Article 15(1) of the Statute, Section 15 of the Special Court Agreement and Rule 39 of the Court’s

Rules, were enacted. The provisions of Article 15(1) of the Statute are already set out in paragraph 21 above. Section 15(1) of the Act enables the Court to request assistance from the State of Sierra Leone through the office of the Attorney-General. Rule 39 expressly vests the Prosecutor with certain clearly – defined powers, for the purpose of conducting an investigation, in these terms:

In the conduct of an investigation, the Prosecutor may:

- i. Summon and question suspects, interview victims and witnesses and record their statements, collect evidence and conduct on-site investigations;
- ii. Take all measures deemed necessary for the purpose of the investigation, including the taking of any special measures to provide for the safety, the support and the assistance of potential witnesses and sources;
- iii. **Seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL); and**
- iv. Request such orders as may be necessary from a Trial Chamber or a Judge.
(emphasis added)

24. Rule 8(C) is to this effect:

The Special Court may invite third States not party to the Agreement to provide assistance on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

25. The Chamber opines that the foregoing statutory provisions are quite explicit in their intent to ensure that the prosecuting arm of the Court is guaranteed the necessary investigative and prosecutorial logistics and support to enable the Court to function effectively and efficiently in the discharge of its duties within the mandate that has been conferred on it.

26. In addition to these provisions, this is clearly a case that comprises crimes with international components and connections in foreign countries like Liberia, where Prosecution Witness General Tarnue, who has already testified, hails from.

27. This being the case, it is within the discretion of the Prosecution, in the conduct of its investigations, to transcend, should this become necessary, the national frontiers of Sierra Leone with a view to co-operating and working with and alongside willing foreign bodies or agencies.

28. In this context, it is, in our view, legitimate for the Prosecution to seek the assistance of any State, Authority, or any relevant international body as stipulated in Rule 39 of the Rules of Procedure and Evidence of the Court, in order not only to properly fulfill the mandate conferred *on* it by Statute but also to discharge the heavy burden of proof it bears to establish the guilt of the accused beyond reasonable doubt.

29. Indeed and as was pertinently pointed out by the Appeals Chamber of the ICTY in the *Blaskic* case:

“... It is self evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of Sovereign States not being endowed with enforcement agents of its own, must rely upon the cooperation of the States. The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal.”³¹

(C) *Disclosure Obligation of Prosecutor under Rule 68*

30. Rule 68 provides that:

(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.

31. The provisions of Rule 68, as has been the case in the ICTY and the ICTR, have also come under scrutiny in Trial Chamber I of the Special Court for Sierra Leone.

32. On this issue and in the case of *Prosecutor v. Delalic*, the Trial Chamber of the ICTY had this to say:

³¹ *Prosecutor v. Blaskic*, *supra* note 15.

"... 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..."³²

33. In the *Brima* decision relating to the Principal Defender of the 6th of May 2004, this Chamber had this to say:

"In this regard, we would like to recall in order to emphasize, that in interpreting statutory or regulatory instruments, due regard should primarily be paid to their ordinary and natural meaning so as to avoid... importing extraneous interpretations to statutory provisions or regulations which are as clear as those we have just reproduced for purposes of scrupulous examination."³³

34. In two of its recent Decisions, namely, *Prosecutor v. Issa Hassan Sesay et al.*,³⁴ where we cited this passage contained in the *Brima* decision, and *Prosecutor v. Allieu Kondewa*³⁵, the Chamber expounded on what we considered to be the true and proper meaning of Rule 68 in the light of its legislative intent and consistent with the basic canons of statutory interpretation, especially and in particular, the golden rule. In this regard, this Chamber in the *Kondewa* decision which was delivered soon after the Chamber's landmark *Brima* decision relating to the Principal Defender, had this to say:

"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."³⁶

35. For the purposes of the instant Motion and guided by the foregoing principles, we again, on this issue reiterate our stand that Rule 68 imposes on the Prosecution, a legal obligation to disclose "within 30 days of the initial appearance of the accused," and continuously thereafter, exculpatory

³² *Prosecutor v. Delalic et al.*, Case No. IT-96-21, *Decision on the Motion on Presentation of Evidence by the Accused*, Esad Landzo, 1 May 1999, para 17.

³³ *Prosecutor v. Brima*, Case No. SCSL-04-16-PT, *Decision on Applicant's Motion Against Denial by the Acting Principal Defender to Enter a Legal Service Contract for the Assignment of Counsel*, 6 May 2004, para. 90.

³⁴ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, *Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules*, 9 July 2004, paras 16-18.

³⁵ *Prosecutor v. 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.

³⁶ *Id.*, para. 19.

evidence, meaning evidence that in anyway leads to suggest the innocence of the accused, or evidence that in anyway tends to mitigate the guilt of accused or evidence favourable to the accused that may affect the credibility of the prosecution evidence.

36. Having examined the legal nature and scope of the Prosecution's obligation under Rule 68 to disclose exculpatory evidence, we would like to restate here that in order to sustain an allegation by the Defence of a breach by the Prosecution of its disclosure obligations under Rule 68, the Defence must demonstrate, by *prima facie* proof: (1) that the targeted evidentiary material is exculpatory in nature, (2) the materiality of the said evidence, (3) that the Prosecution has, in its possession, custody, or control, the targeted exculpatory evidentiary material, and (4) that the Prosecution has, in fact, failed to disclose the targeted exculpatory evidentiary material.

III. EVALUATION OF MERITS OF APPLICATION

37. On the merits of this application, we observe that the Motion raises three key issues for our determination. The first is whether, as alleged by the Defence, there has been a breach on the part of the Prosecution of Article 15(1) of the Statute of the Court on the grounds, as alleged by the Defence, that General Tarnue's testimony revealed a relationship between the Office of the Prosecutor and the Government of the United States of America or the FBI. As already noted, Article 15(1) guarantees that Office prosecutorial autonomy and independence. Put slightly differently, the issue is whether the Office of the Prosecutor has, on that score, compromised its autonomy and independence by, as alleged, taking *instructions* from the United States Government, notably from the State Department or from its Agency, the FBI.

38. The second issue is whether, under the statutory framework of the Court which creates the Office of the Prosecutor, there is any provision precluding that Office from *seeking assistance*, as distinct from *receiving instructions* which is what is prohibited by Article 15(1) of the Statute, from any entity or source in the discharge of both its investigatory and prosecutorial functions. In effect, does the Statute foreclose the benefit of *assistance* from any source whatever to the Office of the Prosecutor in the execution of its mandate?

39. The third key issue is whether, in the light of contentions by the Defence in respect of General Tarnue's testimony as to his dealings with Dr. White and the U.S. Government, Rule 68 is, in fact and in law, implicated here making it obligatory on the part of the Prosecution to disclose

certain key information allegedly arising out of the relationship between General Tarnue, Dr. White and the United States Government as set out in paragraph 6 herein.

(A) *Alleged Breach of Article 15(1)*

40. The Chamber notes that both the Defence and the Prosecution agree that within the proper context and interpretation of the Statute and the Rules, Article 15(1) does vest on the Prosecution, the autonomy and independence in the discharge of its functions, and that the Office of the Prosecutor must act as an independent body that does not take *instructions* from any other entity.

41. It seems clear to the Chamber that the arguments and submissions of the Defence as regards the alleged breach of Article 15(1) are predicated upon the assumption that the Office of the Prosecutor has taken *instructions* from another entity. The Prosecution submits that it has not. The crux of the matter, from the Chamber's perspective, is whether there is, at this point in time, any evidentiary basis or factual foundation for the allegation put forward by the Defence, to warrant a conclusive finding of fact that there has in law been a breach of Article 15(1). The Defence assert that the evidence from which such inference should be drawn is that of General Tarnue that Dr. White's actions were, according to Dr. White, to be based upon a decision of the State Department of the Government of the United States.

42. Does this piece of evidence irresistibly sustain the Defence contentions, even if given a liberal evaluation? In other words, does it necessarily follow that because General Tarnue stated that Dr. White told him that the latter's actions were to be based on a decision of the State Department of the U.S. Government, the Office of the Prosecutor was acting on the *instructions* 'received' from the U.S. Government? In the Chamber's opinion, an inference of this nature cannot lightly be drawn from such evidence, given its grave implications for the justice process.

43. The Chamber, likewise, emphasises that the suggestion of the Defence that General Tarnue's testimony revealed a relationship between the Office of the Prosecutor and the United States of America, even if it were true, could not in law justify, without more, the inference that the Prosecution was receiving *instructions* from the U.S. Government in breach of Article 15(1). This is so even if the Office of the Prosecutor sought *assistance* from the U.S. Government as envisaged by Rule 8(C) of the Rules of Procedure and Evidence. Certainly, in the Chamber's view, it would do violence to the plain meaning and context of the Statute and the Rules if conceptually the words "*instructions*" and "*assistance*" were construed as being synonymous and interchangeable. The

contentions of the Defence on this issue, therefore, are legally unsustainable in that, on the whole, the Defence has failed to substantiate, by *prima facie* proof, the allegation of breach of Article 15(1), on the part of the Office of the Prosecutor. This Chamber does not find any, as the Defence contends, “master-servant” relationship between Dr. White, as FBI agent and the Prosecution which would occasion a breach of Article 15(1).

(B) *Discretion to Seek Assistance*

44. The Chamber recalls that both the Defence and Prosecution agree that within the framework of the Court’s Statute and Rules, the Office of the Prosecutor is vested with some measure of discretionary latitude in seeking *assistance* from internal and external agencies for the purpose of the conduct of its investigations. We observe that, unlike Article 15(1) of the Statute which is an exclusionary clause designed to protect and preserve prosecutorial independence, there is no similar statutory prohibition for the Prosecution, in the exercise of its prosecutorial discretion, to seek, within the confines of the law, any *assistance* from other bodies and Institutions in fulfilling the duties conferred on it by the Statute. Clearly, Article 15(2) of the Statute is explicit in its purport and intendment that:

“The Office of the Prosecutor shall have power to question suspects, victims, and witnesses, to collect evidence and evident on - site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leone authorities concerned.”

45. By parity of reasoning, Rules 8(C), (D) and (E), 39, and 40 of the Court’s Rules of Procedure and Evidence cumulatively establish a machinery for co-operation between the Office of the Prosecutor and external agencies or entities, be they States, Governments, Organisations, Bureaus, or related bodies.

46. In this regard, the Defence submissions do not really challenge the authority of the Office of the Prosecutor to seek *assistance* in the conduct of its investigations. Accordingly, the Chamber concludes that there is clear statutory authority for the Prosecution to seek *assistance* from both internal and external sources for the purposes of the conduct of its investigations in the course of fulfilling its mandate to bring to justice those who bear the greatest responsibility for crimes against humanity, war crimes and related offences during the hostilities that took place in Sierra Leone at the material times.

47. The complexity, roles, and functions of any such agencies or bodies cannot legally operate as limiting or restricting such authority in the absence of any express statutory provision to that effect.

(C) Disclosure under Rule 68

48. The third key issue relates to whether in the light of the contentions by the Defence about General Tarnue's testimony as to his dealings with Dr. White and the United States Government, Rule 68 is thereby implicated in fact and in law, requiring the Prosecution therefore to disclose certain key information as set out in the Defence Request (reproduced at paragraph 6 herein), the Chamber's findings are set out below in sub-paragraphs (iv) - (ix) of paragraph 64 herein.

49. In arriving at these conclusions, the Chamber notes that the requests made by the Defence in this application are either too broad, too vague, or indeed unspecific.

50. In seeking to establish a breach of Article 15(1) of the Statute, there has been a total lack of specificity on instructions received which the Defence alleges amounts to a breach by the Prosecution of its statutory obligations under Article 15(1). These same comments apply to the application where the Defence seeks to compel the Prosecution to disclose exculpatory evidence under Rule 68 as to the assistance offered by Dr. White to General Tarnue to obtain asylum and a relocation of himself and his family in the U.S.A.

51. In this regard, the Chamber would like to state here that for the Defence to succeed in this Motion, it is not enough to premise its application either on presumptions, on speculations, or on probabilities. If it does, as it seems, seek to establish the subservience of the Prosecutor to a foreign Government or Agency, it must provide concrete proof of those instructions and their contents and not just invite this Chamber, merely on the basis of speculation and without any legal or factual proof, to draw such a conclusion or even such an inference.

52. We are strongly of the opinion that mere evidence of the cooperation between the Prosecution and the FBI or the US Government, without proof that the former received instructions from the latter, including the nature and contents of such instructions, does not, per se, fulfill the test to establish a violation of Article 15(1) of the Statute.

(D) Exculpatory Evidence Under Rule 68

53. In the same vein, a mere speculative assertion without specifying or advancing concrete proof of the nature and content of the exculpatory evidence which the Defence is alleging to be in the

C

B

1435

possession of the Prosecution of General Tarnue and his family's relocation, to our mind, fails to meet the test required to warrant an Order by the Chamber for the Prosecution to disclose under Rule 68 of the Rules.

54. The Chamber recognizes that disclosure procedures are not only intended to ensure and protect the rights of the accused to a fair trial, but also and more importantly, for him to be informed of the nature and cause of the charge against him, and further, to enable him to have adequate time and facilities for the conduct of his or her defence.

55. We observe however, that where the request to disclose lacks specificity as to the details of facts sought to be disclosed, and proof that those facts are indeed in the possession of the Prosecution, the Chamber cannot, and should not be called upon to grant, a vaguely formulated request particularly so because even if it were conceded that such facts, unknown to the Prosecution, exist with the F.B.I. or the US Government, the Prosecution cannot be compelled to produce information that is in possession of a foreign Independent Agency or in that of the US Government represented by the Department of State.

56. In circumstances such as these where the Prosecution has declared that it has disclosed everything and that it has nothing more to disclose to the Defence under Rule 68, the Defence, in the absence of concrete elements to substantiate its claims, we contend, has the alternative weapon of cross-examination to establish such facts in evidence and thereafter, to base an application of this nature on the facts so established.

57. In this regard we observe that General Tarnue was in the witness box for slightly over 8 days, when these and other issues arose and were extensively highlighted, not only during examination-in-chief which lasted 7 hours 12 minutes but also, and even more fully highlighted and explored in the course of the extensive, lengthy, exhaustive cross examination of this witness by Learned Counsel for the 1st Accused, the Applicant in this Motion, Mr. Jordash, which lasted 15 hours 38 minutes, by counsel for 2nd Accused which lasted 4 hours 38 minutes, and by counsel for 3rd Accused which lasted 5 hours 27 minutes.

58. It would, in our opinion, be unfair, after such a lengthy, protracted, and extensive cross-examination, to compel a disclosure of evidence under Rule 68 when the Prosecution avers, and without any concrete evidence proffered by the Defence to contradict this assertion, that it has disclosed all it had to disclose and that it has nothing more to disclose following the vague and speculative application of the Defence for it to fulfill this obligation under Rule 68 of the Rules.

59. We consider it pertinent in this regard to refer to our decision in the case of the *Prosecutor v. Allieu Kondewa* of the 8th of July 2004³⁷ where the Defence, under Rule 68 of the Rules, sought an Order to compel the Prosecutor to disclose whether it has such exculpatory mitigating material in its possession and to disclose same to the Defence. The Prosecution argued that the Defence 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.

60. We had this to say in our Decision in this case:

“This Chamber adopts this reasoning and takes the view 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....

[T]he 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....

The Chamber finds that nowhere in the said Motion does the request for the disclosure of the targeted exculpatory evidence or material clearly specify the material so desired.... 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 all about or what precisely it is, and the extent to which it is exculpatory...”³⁸

61. We accordingly, took the view and ruled 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.”³⁹

62. In yet another Chamber’s Decision of the *Prosecutor v Issa Hassan Sesay et al.* dated the 9th of July 2004⁴⁰, the Defence sought disclosure under Rule 68. It averred that it had ascertained through its own investigations, that there were several Prosecution Witnesses whose evidence is wholly exculpatory of the Accused. It sought disclosure as to the evidence relating to inducements made to the witnesses to facilitate their cooperation in giving evidence. Furthermore and as regards the interviews of so called “insiders”, those conducting the interviews are alleged to have offered rewards

³⁷ *Prosecutor v. Kondewa*, *supra* note 35.

³⁸ *Id.*, paras 24-26.

³⁹ *Id.*, para. 26.

⁴⁰ *Prosecutor v. Sesay et al.*, *supra* note 34.

to them for continued cooperation. The Defence therefore sought all details of offers made and rewards, including relocation packages, amenities, and monies given or due.

63. The Prosecution argued that for the Defence to succeed in its application, the request must be for a specific material or materials. The Prosecution further asserts that the Defence did not request any specific material but made generic requests which the Prosecution considers as tantamount to a “fishing expedition” into the Prosecution’s records.

64. In this case and as we had similarly held in the *Kondewa* case,⁴¹ we had this to say:

“...The Trial Chamber considers that the key question to be answered here is whether the Defence has made a *prima facie* showing of exculpatory material sought from the Prosecution. Furthermore in resolving this important 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.”⁴²

65. The Chamber accordingly dismissed the application for a want of legal sustainability given the lack of specific identification of material evidence which the Defence alleges the Prosecution has withheld, and for which disclosure is sought.

66. Applying the aforementioned principles, the Chamber has reviewed the contentions of the Defence in respect of the alleged non-disclosure of the alleged specific information arising from General Tarnue’s contact with Dr. White and the U.S. Government and finds specifically as follows:

- i. that the Prosecution through Dr. Alan White, did seek and obtain assistance from the U.S. Government or the FBI;
- ii. that the finding in (i) above does not imply that Dr. Alan White or other investigators of the Office of the Prosecutor received instructions from those outside agencies;
- iii. that there is, by reason of our findings in (i) and (ii), no legal basis for issuing a disclosure order against the Prosecution in respect thereof;
- iv. that the evidence of the relationship between Dr. Alan White or other investigators and the U.S. Government or its agencies cannot, without more, be regarded as

⁴¹ *Prosecutor v. Kondewa*, *supra* note 35.

⁴² *Prosecutor v. Sesay et al.*, *supra* note 34, para. 43.

exculpatory merely by reason of the fact that it may have resulted in assisting in the relocation of General Tarnue and his family;

- v. that it is premature, at this stage and without more, to reach any conclusive finding as to the alleged untruthfulness or unreliability of General Tarnue's evidence;
- vi. that upon a full consideration of the evidence before it, the Chamber finds that the Defence has not established on a *prima facie* basis that there was an earlier interview between Dr. White and General Tarnue that has not been disclosed;
- vii. that there is both in fact and in law no basis for a disclosure order in respect of other investigating work allegedly conducted jointly with Prosecution investigators and any outside agency because the Defence has not identified with certainty and precision, the fact or areas which would justify our issuing such an Order;
- viii. that there is also no basis in fact and in law for a disclosure order in respect of any allegedly *prima facie* authority or violation of the Statute or the Rules of the Court by Dr. White or any other investigator including but not limited to any involvement in the alleged attempt to arrest Benjamin Yeaten in Togo during 2000-2004.
- ix. that there is no legal basis for a disclosure order to be directed to the Prosecution to disclose any information relating to assistance given by the Prosecution or its agents to General Tarnue in respect of his asylum claim or relocation.

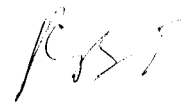
DISPOSITION

FOR ALL THE ABOVE REASONS,

67. The Trial Chamber finds no factual or legal merits or sufficient grounds to warrant the granting of this Defence Motion.

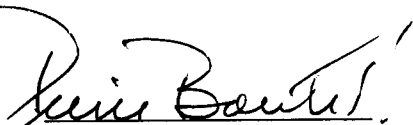
ACCORDINGLY IT IS DENIED AND DISMISSED.

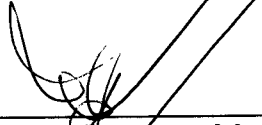


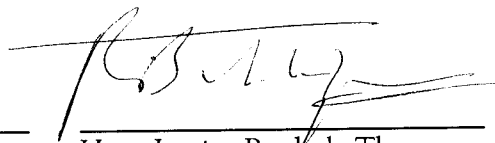


Hon. Justice Pierre Boutet appends a Partially Dissenting Opinion to this Decision with reference to the findings "that there is no legal basis for a disclosure order to be directed to the Prosecution to disclose any information relating to assistance given by the Prosecution or its agents to General Tarnue in respect of his asylum claim or relocation."

Done at Freetown, Sierra Leone, this 2nd day of May 2005


Hon. Justice Pierre Boutet


Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I


Hon. Justice Bankole Thompson

