

749)

SCSL - 04 - 15 - T  
(27018 - 27034)

27018

**SPECIAL COURT FOR SIERRA LEONE**  
OFFICE OF THE PROSECUTOR  
FREETOWN - SIERRA LEONE

**TRIAL CHAMBER I**

Before: Hon. Justice Bankole Thompson  
Hon. Justice Pierre Boutet  
Hon. Justice Benjamin Itoe  
  
Acting Registrar: Mr. Herman von Hebel  
  
Date filed: 16 April 2007

SPECIAL COURT FOR SIERRA LEONE	
<b>RECEIVED</b>	
COURT MANAGEMENT	
16 APR 2007	
NAME	THOMAS GEORGE
SIGN	<i>[Signature]</i>
TIME	11:13

**THE PROSECUTOR**

**Against**

**Issa Hassan Sesay  
Morris Kallon  
Augustine Gbao**

Case No. SCSL-04-15-T

---

**PUBLIC**

**PROSECUTION RESPONSE TO 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**

---

Office of the Prosecutor:  
Pete Harrison  
Vincent Wagona

Defense Counsel for Issa Hassan Sesay  
Mr. Wayne Jordash  
Ms. Sareta Ashraph

Defense Counsel for Morris Kallon  
Mr. Shekou Touray  
Mr. Charles Taku  
Mr. Melron Nicol-Wilson

Defense Counsel for Augustine Gbao  
Mr. Andreas O'Shea  
Mr. John Cammegh

## I. INTRODUCTION

1. On 30 March 2007, the Accused Sesay filed a “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” (“Motion”).<sup>1</sup> The motion should be dismissed.

## II. FACTUAL BACKGROUND

2. On 1 March 2007, counsel for Sesay sent an email message to the Prosecution. That email is attached as Confidential Appendix A to this Response, and the material part can be reproduced here except for the position and name of the subject:

It has come to my attention (through the witnesses) that we (the OTP and my team) may have been, in certain instances, interviewing the same witnesses. At this stage I am willing to disclose that we have interviewed a \_\_\_\_\_ known as \_\_\_\_\_ but I believe there may be more. I was wondering if you were prepared to consider mutual exchange of witness statements in regard to this prospective witness (and any others which both parties might have concerns about).

3. The operative words of the email are a Defence request to consider a “mutual exchange of witness statements.” No request was made to inspect documents, either pursuant to Rule 66(A)(iii) or otherwise.
4. The Prosecution response to this email, dated 5 March 2007, is reproduced as Appendix B to this Response, the material part of which reads as follows:

In general, the prosecution does not confirm to an accused in one trial whether or not a person is a witness in any other trial. If the person is not a witness there is no reason to refer to the person, if the person is a witness a protective measures order may prohibit the prosecution from disclosing information.

5. Attached as a confidential annex to the Motion is a letter dated 23 March 2007. The Prosecution did not receive that letter. A somewhat different letter of 23 March 2007 was received, which is attached as Confidential Appendix C to the Response. The names of witness DIS-126 and DIS-258 were disclosed to the Prosecution, and the letter went on to state:

---

<sup>1</sup> *Prosecutor v. Sesay et al*, SCSL-04-15-T-748, “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,” 30 March 2007.

Pursuant to the Trial Chamber's 14<sup>th</sup> June 2006 Order in the CDF case, the Sesay Defence wish to know whether the Prosecution are in Possession (custody or control) of any statements and/or interview notes from these witnesses? If so, the Sesay Defence takes the position that such statements and/or notes are material to the preparation of our defence case and formally requests disclosure of the same from the Prosecution.

6. The above request was clearly for disclosure, not an opportunity to inspect documents.
7. On 29 March 2007, counsel for Sesay wrote an email, attached as Appendix D, which states as follows:

In relation to the disclosure of IS-126 and 258, dated 23<sup>rd</sup> March 2007, can you let me know if the Prosecution is likely to disclose any material concerning these witnesses?

8. The following day, 30 March 2007, the Prosecution wrote to the First Accused and advised of Rule 66(A)(iii). The letter is attached as Appendix E, and the material part of the letter states:

The prosecution is aware of its obligation under Rule 68 and will continue to comply with that obligation. Rule 66(A)(iii) grants to the defence, where a request is made by the defence, an opportunity to inspect documents in the custody or control of the Prosecutor 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. The Rule is limited to granting an opportunity to inspect.

9. The Prosecution advised the First Accused of Rule 66(A)(iii), which confers a more limited entitlement than disclosure, that of an opportunity to inspect documents. Some hours after the Prosecution delivered Appendix E to the First Accused the Motion was filed, and at the same time the First Accused sent an email to the Prosecution, which is attached as Appendix F to this Response. In all of the correspondence from the First Accused no request was made to inspect documents. That request was made only in the Motion.

10. On the working day immediately following receipt of the Motion, 3 April 2007, the Prosecution wrote to the First Accused, a copy of that letter is attached as Appendix G to this Response, advising, in part, as follows:

Further to our letter of 30 March 2007, where we referred to the opportunity to inspect documents in the custody or control of the Prosecutor contemplated by Rule 66(A)(iii), and to your Motion filed on 30 March 2007, please contact our office to arrange a mutually agreeable time for you to inspect the statements of DIS-126 and DIS-258.

11. The Prosecution denies the allegations in paragraphs 1, 2, 3 and 6 of the Motion that the First Accused made a request to inspect documents and the Prosecution refused the request.

### III. THE RIGHTS AND OBLIGATIONS CREATED BY RULE 66

12. There is no ambiguity in Rule 66, reproduced below. Sub-Rule 66(A)(i) uses the word disclose, and the obligation imposed on the Prosecutor is to “*disclose to the defence copies*” of statements of witnesses the Prosecutor intends to have testify. Sub-Rule 66(A)(ii) furthers that obligation: the Prosecution must “*continuously disclose to the Defence copies*” of witness statements whom the Prosecution intends to call. Sub-Rule 66(A)(iii) applies to the case at hand and it does not create an obligation to disclose. To comply with Rule 66(A)(iii) the Defence must make a request and “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,” the Prosecutor shall then permit the Defence “to inspect” the requested documents.

#### **Rule 66: Disclosure of materials by the Prosecutor**

(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.

13. All the correspondence forwarded by the First Accused, prior to the Motion, used either the words “mutual exchange of witness statements” or, “disclosure” of statements, or “disclose”. The Prosecution read the correspondence as written, as an assertion that the Prosecution should disclose statements it might have of DIS-126 and DIS-258. No such obligation exists, and the Motion is not accurate when it says that “The Defence has requested to be permitted to inspect the statements but the Prosecution has declined the request.”<sup>2</sup>

#### IV. RULE 68

14. The Motion makes a second argument, that because Defence statements suggest that Charles Taylor had little to do with Sesay<sup>3</sup> (the Prosecution does not have copies of these Defence statements), the defence evidence will affect the credibility of other Prosecution witnesses, and Prosecution statements will corroborate this and must be disclosed as Rule 68 exculpatory material.<sup>4</sup> That simply is not in accord with the wording of the Rule:

**Rule 68: Disclosure of Exculpatory Evidence**

(A) The Prosecutor shall, within 14 days of receipt of the Defence Case Statement, make a statement under this Rule disclosing to the

<sup>2</sup> Motion, para. 6. See similar incorrect assertions, or assertions by implication, at paras. 1, 2 and 3 of the Motion.

<sup>3</sup> The vague wording in the Motion that “Mr. Taylor had little to do with Mr. Sesay” does not advance the complaint very far. The defence evidence may show little contact in terms of the numbers of occasions when the two met, but that such contact was significant and contributed greatly to the joint criminal enterprise.

<sup>4</sup> Motion, para. 10.

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.

15. This part of the Motion is moot as the Prosecution has already made available to the First Accused an opportunity to inspect the documents. However, the Prosecution advises the Trial Chamber that it reviews statements in conformity with Rule 68 and discloses to the defence such exculpatory material, and continues to do so as part of the “continuing obligation” to disclose exculpatory material under Rule 68.
16. Where the Prosecution does not have Defence statements it cannot assess them nor can it use them as a basis to determine whether Rule 68 material may exist. The test that has been applied by this Trial Chamber, and by other international courts, was stated in a decision in this trial:

36. With regard to the scope of the Prosecution’s obligation to disclose exculpatory evidence to the Defence, the Trial Chamber of the ICTY in the case of *Prosecutor v. Blaskic* reasoned:

If the Prosecution fulfils its above indicated obligations but the Defence considers that evidence other than that disclosed might prove exculpatory for the Accused and was in the possession of the Office of the Prosecution, it must submit to the Trial Chamber all *prima facie* proofs tending to make it likely that the evidence is exculpatory and was in the Prosecutor’s possession. Should it not present this *prima facie* proof to the Trial Chamber, the Defence will not be granted authorization to have the evidence disclosed.

37. The same Trial Chamber of the ICTY in another decision in the case of *Prosecutor v. Blaskic*, held that: all “these considerations lead the Trial Chamber to deem that the Prosecutor’s obligation is, in part and of necessity, tinged with subjectivity, which also leads the Chamber to presume that the Prosecutor has acted in good faith.”<sup>5</sup>

---

<sup>5</sup> *Prosecutor v. Sesay et al*, SCSL-04-15-T-189, “Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules,” 9 July 2004, paras. 36 and 37, citing *Prosecutor v. Blaskic*, Case

17. No *prima facie* proof has been demonstrated and the relief sought should be denied.

## V. DEFENCE LEGAL OBLIGATION TO DISCLOSE

18. Paragraph 11 of the Motion advises that the First Accused wishes to consider a “legal obligation” namely “whether the Defence is under a duty to disclose this material to Mr. Taylor’s legal representatives.” A protective measures Order exists in the current case which states:

j. The Defence shall refrain from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence.<sup>6</sup>

19. The Order clearly prohibits the First Accused from disclosing non-public materials of any sort or “information contained in any such documents” to any person. The Order demands nothing less than strict compliance.

## VI. CONCLUSION

20. The Motion is moot as the Prosecution has already granted the First Accused an opportunity to inspect the relevant documents (the First Accused expressed his intention to inspect the documents on today’s date). Prior to filing the Motion, the First Accused never made a request to the Prosecution to inspect the documents in question. Nonetheless, the Motion uses the following phrases:

- a) “The Prosecution is refusing to take steps to disclose these statements. It is submitted that the Defence ought to be permitted to inspect the documents pursuant to Rule 66(A)(iii)”;<sup>7</sup>
- b) “The Prosecution declined the request asserting protective measures and refusing to disclose any statements or permit inspection of the same”;<sup>8</sup>

---

No. IT-95-14-PT, “Decision on the Motion to Compel the Production of Discovery Materials,” 27 January 1997, and *Prosecutor v. Blaskic*, Case No. IT-95-14, “Decision on the Defence Motion for Sanctions for the Prosecutor’s Repeated Violations of Rule 68 of the Rules of Procedure and Evidence,” 29 April 1998, para. 21.

<sup>6</sup> *Prosecutor v. Sesay et al*, SCSL-04-15-T-180, “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses,” 5 July 2004, p. 16.

<sup>7</sup> Motion, para. 1

<sup>8</sup> Motion, para. 2.

c) "Included in the notification was a request to the Prosecution to allow inspection of any statements in their possession relating to the two witnesses";<sup>9</sup> and

d) "The Defence has requested to be permitted to inspect the statements but the Prosecution has declined the request."<sup>10</sup>

21. Statements b), c) and d) incorrectly assert that the Prosecution refused to permit inspection of documents; statement a) is at least misleading. No credence can be given to the assertion that the Prosecution is attempting to ambush the Defence,<sup>11</sup> quite the contrary, the Prosecution delivered a letter advising of the right to inspect afforded by Rule 66(A)(iii). The Motion should not have been filed.<sup>12</sup>

22. Nor is it appropriate to suggest, or for the Trial Chamber to countenance a submission, that if the Prosecution fails to deny the assertion that it is intending to use statements for cross-examination reasonable inferences should be drawn. No intention can be formed until such time as the witness' evidence is heard and assessed. An irrelevant submission or assertion need not be responded to and should not be responded to by a party.

23. For the above reasons the Motion should be dismissed.

Done in Freetown, 16 April 2007

For the Prosecution,



Pete Harrison

<sup>9</sup> Motion, para. 3.

<sup>10</sup> Motion, para. 6.

<sup>11</sup> Motion, para. 9.

<sup>12</sup> Paragraph 5(ii) of the Motion acknowledges this when it summarizes the law as follows: "The Trial Chamber will consider a Defence Request for permission to inspect the documents only if the initial request to the Prosecution was unsuccessful."



**INDEX OF AUTHORITIES****A. Decisions and Motions**

*Prosecutor v. Sesay et al*, SCSL-04-15-T-189, “Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules,” 9 July 2004.

*Prosecutor v. Sesay et al*, SCSL-04-15-T-180, “Decision on Prosecution Motion for Modification of Protective Measures for Witnesses,” 5 July 2004.

**B. Other Documents**

Email from First Accused to the Prosecution, 1 March 2007 (Confidential Annex A)

Email from Prosecution to the First Accused, 5 March 2008 (Annex B)

Letter from First Accused to the Prosecution, 23 March 2007 (Confidential Annex C)

Email from First Accused to the Prosecution, 29 March 2007 (Annex D)

Letter from Prosecution to the First Accused, 30 March 2007 (Annex E)

Email from First Accused to the Prosecution, 30 March 2007 (Annex F)

Letter from Prosecution to the First Accused, 3 April 2007 (Annex G)

**C. Statutes and Rules of Procedure and Evidence**

Rules 66 and 68 of the Rules of Procedure and Evidence of the Special Court.

# Appendix B

27029

Peter Harrison/SCSL


05/03/2007 14:52

"Wayne Jordash"

To <w.jordash@doughtystreet.co.uk>@UN-MAILHUB@UNITE  
D NATIONS LOGISTICS BASE

cc

bcc

Subject Re: witnesses 

An email sent was sent from your office inquiring about persons who may have been interviewed by defence investigators. I am responding to that email.

In general, the prosecution does not confirm to an accused in one trial whether or not a person is a witness in any other trial. If the person is not a witness there is no reason to refer to the person, if the person is a witness a protective measures order may prohibit the prosecution from disclosing information.


We regret the delay in responding. For your reference you should know that Mohamed Bangura will be involved in other matters for the foreseeable future and should you wish a prompt response to a query you would be better off contacting Penelope Mammattah or Vincent Wagona. Thank you for your attention to this matter.

Pete Harrison

Appendix D

27028

SCSL Defence-Sesay/SCSL  
29/03/2007 13:51

To Charles Hardaway/SCSL@SCSL, Peter  
Harrison/SCSL@SCSL  
cc  
bcc  
Subject Re: IS 126 and 258 

In relation to the disclosure of IS-126 and 258, dated 23rd March 2007, can you let me know if the Prosecution is likely to disclose any material concerning these witnesses?

thanks  
Sareta



Appendix E

SPECIAL COURT FOR SIERRA LEONE  
OFFICE OF THE PROSECUTOR

27029

JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN • SIERRA LEONE  
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 297000  
FAX: Extension: 178 7366 or +39 0831 257366 or +232 22 297366

---

30 March, 2007

Mr. Wayne Jordash  
c/o – Defence Office  
Special Court for Sierra Leone

Dear Sirs / Madams,

**Re: Rules of Procedure**

Your office has communicated with the Prosecution regarding disclosure. The prosecution is aware of its obligation under Rule 68 and will continue to comply with that obligation. Rule 66(A)(iii) grants to the defence, where a request is made by the defence, an opportunity to inspect documents in the custody or control of the Prosecutor 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. The Rule is limited to granting an opportunity to inspect.

We also take this opportunity to restate Order (j) from the "Decision on Prosecution Motion for Modification of Protective Measures for Witnesses," dated 5 July 2004:

j. The Defence shall refrain from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence.

This order imposes the same obligation with respect to non-public material that is inspected pursuant to Rule 66 (A) (iii).

Thank you for your attention to this matter.

Yours truly,

Pete Harrison

Appendix F

27080



"Wayne Jordash"  
<w.jordash@doughtystreet.co.uk>

30/03/2007 13:52

To <harrisonp@un.org>  
<saretaa@gclaw.co.uk>,  
cc <sareta\_is@rlya8b.mailcontroller.altohiway.com>,  
<defence-sesay@un.org>

bcc

Subject RE: Letter from OTP - Rules of Procedure

Dear Pete,

I really do not follow what you are trying to say in the below email. I am not trying to be difficult but if you would care to explain in more concrete terms what you mean it would help.

Regards

Wayne

**From:** defence-sesay@un.org [mailto:defence-sesay@un.org]  
**Sent:** 30 March 2007 13:31  
**To:** Wayne Jordash  
**Cc:** saretaa@gclaw.co.uk; sareta\_is  
**Subject:** Letter from OTP - Rules of Procedure

Letter from OTP below:

\*\*\*\*\*

Re: Rule of Procedure

Your office has communicated with the Prosecution regarding disclosure. The prosecution is aware of its obligation under Rule 68 and will continue to comply with that obligation. Rule 66(A)(iii) grants to the defence, where a request is made by the defence, an opportunity to inspect documents in the custody or control of the Prosecutor which are material to the preparation of the defence case, 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. The Rule is limited to granting an opportunity to inspect.

We also take this opportunity to restate Order (j) from the "Decision on Prosecution Motion for Modification of Protective Measure for Witnesses," dated 5 July 2004:

j. The Defence shall refrain from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence.

This order imposes the same obligation with respect to non-public material that is inspected pursuant to Rule 66(A)(iii).

27031

Thank you for your attention to this matter.

Yours truly,

Peter Harrison

\*\*\*\*\*This email has been checked by the althiway  
Mailcontroller Service\*\*\*\*\*



Appendix G

27032

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 297000

FAX: Extension: 178 7366 or +39 0831 257366 or +232 22 297366

3 April, 2007

Mr. Wayne Jordash  
c/o – Defence Office  
Special Court for Sierra Leone

Dear Sirs / Madams,

**Re: Rules of Procedure**

Further to our letter of 30 March 2007, where we referred to the opportunity to inspect documents in the custody or control of the Prosecutor contemplated by Rule 66(A)(iii), and to your Motion filed on 30 March 2007, please contact our office to arrange a mutually agreeable time for you to inspect the statements of DIS-126 and DIS-258.

In general, we suggest that you make such arrangements by contacting Charles Hardaway, however, Mr. Hardaway will be away for one week starting tomorrow. In his absence please contact Penelope-Ann Mamattah.

Thank you for your attention to this matter.

Yours truly,

Pete Harrison



**SPECIAL COURT FOR SIERRA LEONE**  
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE  
PHONE: +39 0831 257000 or +232 22 297000 or +39 083125 (+Ext)  
UN Intermission 178 7000 or 178 (+Ext)  
FAX: +232 22 297001 or UN Intermission: 178 7001

Court Management Section – Court Records

**CONFIDENTIAL DOCUMENT CERTIFICATE**

This certificate replaces the following confidential document which has been filed in the *Confidential* Case File.

Case Name: The Prosecutor – v- Sesay, Kallon & Gbao  
Case Number: SCSL-2004-15-T  
Document Index Number: 749  
Document Date 16 April 2007  
Filing Date: 16 April 2007  
Number of Pages:15 Page Numbers: 27033-27034  
Document Type:-**Confidential Annexes**

- Affidavit
- Indictment
- Correspondence
- Order
- Motion**

Document Title: **Prosecution Response To Sesay Defence  
Motion Request The Trial Chamber To  
Permit Inspection Of Witness Statements  
( Rule 66(A) (iii) ) And/Or Order Disclosure  
Pursuant To Rule 68**

Name of Officer:

Thomas George

Signed