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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

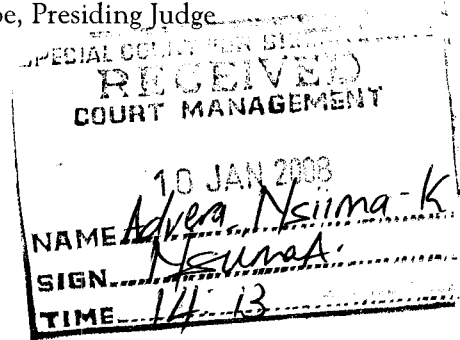
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

TRIAL CHAMBER I

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

Registrar: Mr. Herman von Hebel

Date: 10th of January 2008



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

Public Document

**DECISION ON SESAY APPLICATION FOR DISCLOSURE PURSUANT TO RULES 89(B)
AND/OR 66(A)(ii)**

Office of the Prosecutor:

Peter Harrison
Reginald Fynn
Charles Hardaway
Vincent Wagona

Defence Counsel for Issa Hassan Sesay:

Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:

Shekou Touray
Charles Taku
Kennedy Ogetto
Lansana Dumbuya

Court Appointed Counsel for Augustine Gbao:

John Cammegh
Prudence Acirokop

23645

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

SEIZED of the Application for Disclosure Pursuant to Rules 89(B) and/or 66(A)(ii) filed by Counsel for the First Accused, Issa Hassan Sesay ("Defence") on the 4th of September 2007 ("Motion");

NOTING the Response to the Motion filed by the Office of the Prosecutor ("Prosecution") on the 14th of September 2007 ("Response") and the Reply thereto filed by the Defence on the 17th of September 2007 ("Reply");

PURSUANT to Articles 17 of the Statute of the Special Court ("Statute") and Rules 89 (B) and 66 (A) (ii) of the Rules of Procedure and Evidence ("Rules");

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. SUBMISSIONS OF THE PARTIES

A. The Motion

1. The Defence seeks an order that the Prosecution disclose all the statements in its possession now and from henceforth which are the result of interviews with Defence witnesses. According to the Defence, the said disclosure would enhance the integrity of the process, save both the Prosecution and the Defence time and resources, and may well prevent lengthy and repeated requests for adjournments.¹

2. The Defence states that in compliance with the Chamber's Order of the 30th of November 2006,² it disclosed the names and identities of 10 witnesses.³ Prior to their insertion into the Defence witness list, the said witnesses were interviewed by the Prosecution and witness statements were obtained. The Defence avers that the Prosecution has refused to disclose the statements and has

¹ Motion, para. 20.

² *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Sesay Defence Motion for Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 30 November 2006.

³ The Defence allocated the witnesses the following pseudonyms: DIS-072, DIS-085, DIS-095, DIS-126, DIS-142, DIS-155, DIS-156, DIS-241, DIS-258, and DIS-294 (Motion, para. 1).

indicated that in lieu of disclosure that the Defence can inspect the statements in line with Rule 66(A)(iii) of the Rules and the Decision in the *Norman* case.⁴

3. The Defence submits that for this volume of evidence, the inspection procedure does not provide an effective means by which the detail of the facts and the information contained in the statements can properly be assessed. In these circumstances, the Defence submits that the inspection procedure, allowing the Defence to peruse the material under the watchful eye of the Prosecutor, is impractical and offers only illusory rights to the facts and information contained therein.⁵

B. The Prosecution Response

4. In its Response, the Prosecution submits that the Chamber should dismiss the Motion because the Prosecution had told the Defence months ago that the documents could be inspected and the Defence has failed to show good cause for the Chamber to issue an order for disclosure.⁶

5. The Prosecution avers that the Sesay Defence was notified on the 3rd of April 2007 that it could inspect the statements of DIS-126 and 258; on the 25th of April 2007, that it could inspect the statements of DIS-085 and 156; on the 30th of April 2007, statements of DIS-072 were made available for inspection by the Defence; on the 17th of May 2007, it was notified that it could inspect the statements of DIS-095; 21st of May 2007, it was notified that it could inspect the statements of DIS-142, 241 and 294; and on the 11th of July 2007, it was notified that it could inspect the statement of DIS-155.⁷ The Prosecution further submits that statements of DIS-126 and DIS-258 were inspected by the Defence on the 17th of April 2007, whilst the statements of DIS-085 were first given to the Defence in 2004, with a second copy provided on the 25th of April 2007.⁸

C. The Defence Reply

6. In its Reply, the Defence submits that the issue is not reducible to a technical discussion concerning "whether a procedural obligation exists compelling the Prosecution to disclose copies of

⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on the Application by the Second Accused Pursuant to Sub-Rule 66(A)(iii), 14 June 2006 [*Norman* Decision].

⁵ The Defence further states that it has unsuccessfully attempted to convey to the Prosecution the impracticality of the inspection procedure given the number and volume of the statements and that the Prosecution has ignored the explanations and steadfastly refuses to discuss the issue. No explanation has been forthcoming concerning the reason for the refusal and no reasonable explanation is apparent (Motion, paras. 3-4).

⁶ Response, para. 3.

⁷ *Ibid.*, para. 8.

⁸ *Ibid.*, para. 4.

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statements of persons who are now claimed to be Defence witnesses”⁹ but is instead about whether the Trial Chamber ought to exercise its discretion and intervene to prevent unfairness, in order to ensure that the administration of justice is not brought into disrepute by the unreasonable stance of a party, and to ensure that the Rules are interpreted in such a way as to provide practical solutions to practical problems.¹⁰

7. The Defence reiterates its request in its Motion for an order that the Prosecution disclose all the statements in its possession, now or in the future, which are the result of interviews with defence witnesses.¹¹ The Defence requests that in the alternative:

- (i) the Defence be permitted to copy by hand the statements being inspected; or
- (ii) the Accused be permitted to attend the inspection appointments to be able to provide instructions on the totality of the witness statements;
- (iii) that a witness be permitted to attend a separate inspection of his/her witness statements to allow the Defence an opportunity to “proof” the witness on its contents; and
- (iv) that the Prosecution be prohibited from entering the inspection office during (ii) and (iii).¹²

II. APPLICABLE LAW

8. The Chamber recalls that Rules 66(A)(ii) and (iii) of the Rules make provision for disclosure of materials by the Prosecution and for the inspection of materials in the possession of the Prosecution. According to these Rules, the Prosecution shall:

(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 statement 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

⁹ Reply, para. 2.

¹⁰ *Ibid.*, para. 2.

¹¹ *Ibid.*, para. 5.

¹² *Ibid.*, para. 6.

23648

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.

9. An equally important provision is Rule 89(B). Rule 89(B) states:

In cases not otherwise provided in this section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of Law.

10. A related provision is Rule 68(B), which states:

The Prosecutor shall, within 30 days of 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.

11. A further provision in the context of the instant application is Article 17 of the Court's Statute. The relevant portions provide that that:

(2) The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

(4) In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

III. DELIBERATION

12. In two previous Decisions,¹³ the Chamber has expounded on the proper interpretation of Rule 66, the rationale behind the statutory framework for disclosure obligations, and the principles

¹³ See *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060, 23 July 2004 and *Norman* Decision. See also *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-PT, Kanu-Decision on Motions for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Statements. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004 [Sesay Decision on Disclosure], paras. 21-22 and *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on the Oral Application of the Exclusion of Part of the Testimony of Witness TF1-199, 26 July 2004, para. 7.

to be applied in determining issues of this nature. As to the true and proper interpretation of Rule 66, the Chamber has held:

As a matter of statutory interpretation, it is the Chamber's opinion that Rule 66 requires, *inter alia*, that the Prosecution disclose to the Defence copies of the statements of all witnesses which it intends to call to testify and all evidence to be presented pursuant to Rule 92bis, within 30 days of the initial appearance of the Accused. In addition, the Prosecution is required to continuously disclose to the Defence, the statements of all additional Prosecution witnesses it intends to call, not later than 60 days before the date of trial, or otherwise ordered by the Trial Chamber, upon good cause being shown by the Prosecution.¹⁴

13. Explaining the rationale behind Rule 66 and enunciating the applicable principle, the Chamber had this to say:

It is evident that the premise underlying the disclosure obligations is that the parties should act *bona fides* at all times. There is authority from the evolving jurisprudence of the International Criminal Tribunals that any allegation by the Defence as to a violation of the disclosure rules by the Prosecution should be substantiated with *prima facie* proof of such a violation.¹⁵

14. In *Sesay* Decision on Disclosure, We addressed the issue of the proper interpretation of Rule 66(A)(ii) of the Rules in respect of the statutory obligation of disclosure of witness statements to the Defence.¹⁶

15. Consistent with the settled jurisprudence on the subject, We hold that the question of the timing of the disclosure is indeed within the discretion of the Chamber, bearing in mind the right of each accused to have adequate time and facilities to prepare his Defence. We are of the opinion that where the requested materials are intended to assist the Defence in selecting its witnesses, disclosure at the time of cross-examination would not be sufficient to enable the Accused to prepare his Defence.

16. Furthermore, in the Chamber's view, one key question for determination in the instant application is whether the witness statements requested by the Defence fall within the purview of Rule 66(A)(ii); another key issue is whether a person who has been interviewed but not called upon as a witness qualifies as an additional witness.

¹⁴ *Norman* Decision, para. 5.

¹⁵ *Ibid.*, para. 7.

¹⁶ *Sesay* Decision on Disclosure. See also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Oral Application for the Exclusion of Statements of TF1-141 dated respectively 9th of October, 2004, 19th and 20th of October 2004, 10th of January, 2005, 3 February 2005.

17. The Chamber recalls that in *Prosecutor v. Kordic and Cerkez*,¹⁷ it was held that the obligation to provide witness statements pursuant to Rule 66(A)(ii) is intended to assist the Defence in its understanding of the case against the accused in accordance with his rights under Article 21 of the Statute of the ICTY and the statements should thus be provided to the Defence as far in advance of the trial as is possible, even if this means that statements are disclosed sequentially and that statements are disclosed of witnesses who eventually are not called to testify in the matter.

18. The Prosecution submits that DIS-072, DIS-085, DIS-126, DIS-155, DIS-156, DIS-241 and DIS-294 have never been on the Prosecution list of core or back-up witnesses and that the Prosecution never had any intention of calling the aforesaid persons as witnesses in the proceeding. Thus, it submits that they cannot be considered as additional witnesses falling within the ambit of the second part of Rule 66(A)(ii) which makes provision for the Chamber, upon good cause being shown by the Defence, to issue an order that copies of the statement of additional Prosecution witnesses that the Prosecution does not intend to call be made available to the Defence. The Prosecution on the other hand acknowledges that since DIS-095, DIS-142 and DIS-258 were on the Prosecution witness list, they fall within the ambit of the second part of Rule 66(A)(ii).

19. The Chamber is of the view that any witness, who was interviewed by the Prosecution, whether or not the witness was ever placed on the Prosecution list of core or back-up witnesses, constitutes an "additional witness that the Prosecution does not intend to call" and therefore falls within the ambit of the second part of Rule 66(A)(ii). Thus, the onus in the instant application is for the Defence to show good cause why the evidence of all those witnesses that the Prosecution does not intend to call to testify at the trial should be disclosed to the Defence.

20. The Chamber recalls that it had, in an earlier Decision stated that:

From an ordinary and plain meaning of Rule 66(A)(ii) of the Rules, it is clear that it imposes a reciprocal obligation; one on the Prosecution and the other on the Defence. The first part of the Rules places the onus of showing good cause on the Prosecution, in a case where it intends to call additional witnesses to testify at the trial. [. . .] The second part of the Rule places the burden on the Defence to show good cause why the evidence of witnesses whom the Prosecution does not want to call to testify at the trial should be disclosed to the Defence.¹⁸

21. With respect to the requirement of the showing of good cause in Rule 66(A)(ii), the key question for determination by the Chamber in disposing of the issue raised here is whether it applies

¹⁷ *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, Order on Motion to Compel Compliance by the Prosecutor with Rules 66(A) and 68 (TC), 26 February 1999.

¹⁸ *Sesay* Decision on Disclosure, para. 21.

in the circumstances of the instant application. If it does apply, then the Prosecution must disclose the statements. If it does not, then the Chamber must consider whether the Defence request can be fulfilled simply by allowing inspection of the statements under Rule 66(A)(iii).

22. In determining applications of this nature, this Chamber has derived guidance from the jurisprudence of the ICTR in assessing whether an application meets the “good cause” test based on criteria such as “the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements, and corroboration of evidence.”¹⁹

23. The Chamber observes that the Defence has made general requests for disclosure by the Prosecution of witness statements under Rule 66(A)(ii), without specifying any evidence of materiality that could guide the Chamber. We find that the Defence has therefore not adduced any evidence to show good cause why such statements should be disclosed to it.

24. The Chamber notes that the Defence submits in its reply that the Chamber should exercise its discretion and intervene to prevent unfairness. We note likewise, that the Defence Motion is partly predicated on the provision of Rule 89(B) which provides:

In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and consonant with the spirit of the Statute and the general principles of law.

25. The Chamber observes that the disclosure rules are complete and exhaustive and that the instant application falls within the express provision of these rules. However, the Chamber recalls that it has always, in its dispensation of even handed justice, been guided by the philosophy of fairness and equality between the parties, applying rules of evidence that will be fair to all the parties. In the circumstances of this application, however, the Chamber cannot reasonably conclude that the Defence has satisfied the test for “good cause” for disclosure under Rule 66(A)(ii), or that this results in any unfairness to the Defence, particularly given that the Prosecution has indicated its willingness to allow inspection of such documents.

26. Having thus found, the Chamber will now proceed to consider the Defence request for inspection of statements under Rule 66(A)(iii), as an alternative relief. The Chamber notes that the relief of inspection is predicated upon certain conditions.

¹⁹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Prosecution Request to Call Additional Witnesses, 29 July 2004, para. 29, quoting *Prosecutor v. Nahimana*, ICTR-99-52-1, Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001, para. 20.

27. In the Chamber's view, Rule 66(A)(iii) requires that the Prosecution must make available all materials which will assist the Defence in countering the evidence to be presented by the Prosecution.²⁰ In this regard, the Chamber takes cognisance of the Prosecution's submission in its Response that it had notified the Defence for Sesay that they could inspect the statements of all ten witnesses. This submission is not contested by the Defence.

28. The Chamber recalls that with respect to DIS-126 and DIS-258, it had in its previous Decision ruled that the relief requested by the Sesay Defence under Rule 66(A)(iii) with reference to these two witnesses was no longer in issue.²¹

29. We also note that the Sesay Defence has asserted that the specified witness statements and/or interview notes are material to the preparation of their Defence and that permission to inspect under Rule 66(A)(iii) should be granted on this basis. In this respect, the Chamber recalls its previous interpretation given in *Sesay Disclosure Decision* of the requirements put to the Defence as to the application brought under sub-rule 66(A)(iii):

The Defence [...] may not rely on unspecified and unsubstantiated allegations or a general description of the information, but must make a *prima facie* showing of materiality and that the requested evidence is in the custody or control of the Prosecution.²²

30. Noting, however, that in light of the fact that the Prosecution had already offered the Defence the opportunity to inspect these witness statements, We deem it unnecessary to address the issue of materiality.

31. It is, likewise noteworthy, that the Defence has requested that if the Chamber orders inspection rather than disclosure, certain procedures should be put in place as specified above in paragraph 7(i)-(iv). However, while the Chamber considers that the Defence should be allowed to take notes during the inspection, it is of the view that the remaining conditions requested by the Defence are not necessary in order for the Defence to have a fair opportunity to inspect the statements.

32. Guided by aforementioned applicable Rules and the propositions of law as enunciated in the jurisprudence and applying them to the instant application, the Chamber finds as to the merits of the present application as follows:

²⁰ *Prosecutor v. Bagosora, Kabiligi, Ntabakuze, and Nsengiyumva* ICTR-98-41-T, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witness (TC), 27 September 2005, para. 5.

- (i) That the Defence has not met the onus placed on it of showing good cause pursuant to Rule 66(A)(ii) of the Rules for disclosure of all statements in the Prosecution's possession which are the results of interviews with witnesses that the Defence intends to call. The Defence request for disclosure is therefore lacking in merit.
- (ii) That there is merit in the Defence application for an order for inspection of all statements in its possession which are the result of interviews with witnesses whom the Defence intends to call.

V. DISPOSITION

33. Based on the foregoing considerations, the Chamber hereby **REJECTS** the Defence Motion in part as it relates to the Prosecution disclosure of statements in its possession which are the result of interviews with Defence witness whom the First Accused, Issa Hassan Sesay, intends to call on his behalf.

34. The Chamber hereby **GRANTS** the Defence Motion as it relates to the permission for the Defence for the First Accused to inspect witness statements and/or interview notes in the Prosecution's custody or control, of those witnesses whom the First Accused, Issa Hassan Sesay, intends to call on his defence, except for those witnesses whose statements the Defence has already had the opportunity to inspect.

35. The Chamber **ORDERS** as follows:

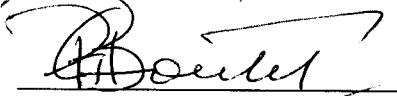
- (i) That the Prosecution and the Defence for the First Accused agree on the time when the inspection of witness statements and/or interview notes will take place;
- (ii) That the inspection of the witness statements and/or interview notes shall take place at the Registry Conference Room;
- (iii) That the inspection of the witness statements and /or interview notes shall be done in the presence of the Prosecution;
- (iv) That the Defence for the First Accused be permitted to make notes from the witness statements and/or interview notes being inspected.

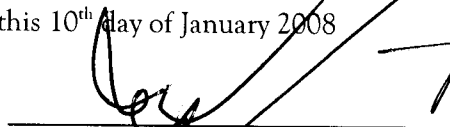
²¹ See *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Motion for Inspection of Witness Statements Rule 66(A)(iii) and/or Order for Disclosure Pursuant to Rule 68, 31 May 2007, para. 23.

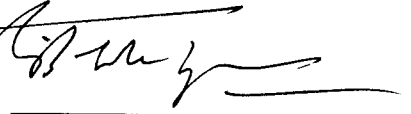
²² *Sesay* Decision on Disclosure, para. 27.

23654

Done at Freetown, Sierra Leone, this 10th day of January 2008


Hon. Justice Pierre Boutet


Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I


Hon. Justice Bankole Thompson

