THE SPECIAL COURT FOR SIERRA LEONE

CASE NO.: SCSL- 04-15-T
TRIAL CHAMBER I

THE PROSECUTOR
OF THE SPECIAL COURT
v.
ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

9 JULY 2004
1203H
CONTINUED TRIAL

Before the Judges:
Benjamin Mutanga Itoe, Presiding
Bankole Thompson
Pierre Boutet

For the Registry:
Ms. Maureen Edmonds
Mr. Geoff Walker

For the Prosecution:
Ms. Lesley Taylor
Mr. Abdul Tejan-Cole
Ms. Boi-Tia Stevens

For the Accused Issa Hassan Sesay:
Mr. Timothy Clayson
Mr. Wayne Jordash

For the Accused Morris Kallon:
Mr. Raymond Brown
Ms. Wanda Akin

For the Accused Augustine Gbao:
Mr. Andreas O'Shea
Mr. John Cammegh

Court Reporter:
Mr. Momodou Jallow

MS. EDMONDS:

All persons having anything to do before this Special Court Trial Chamber draw near and give your attendance.

MR. PRESIDENT:

We are resuming the session, and once more the Chamber would like to present its excuses to learned counsel for the one hour delay. It was -- is attributable to housekeeping issues, and we hope you do understand.

We have, I think, to our knowledge, three issues to address this morning. The first minor issue is the point raised by the Defence in its entirety, for bills and payments, you know, made to the -- to some Prosecution witnesses to be disclosed to them. The Chamber has noted that there is an exchange between the Prosecution and the Defence on this issue, at least from the correspondences that we have before us, which are copied to us because every correspondence on this issue has only been copied to us although, of course, the matter was raised in open court, and we hope that it will be resolved that way because our recollection is that the Prosecution, I think, in a letter -- we stand to be corrected. The Prosecution has engaged, you know, to make some disclosures to the Defence by Monday. Are we right?

MS. TAYLOR:

Yes, Your Honour. The -- in response to a letter received, a joint letter received from all my learned friends on the other side, I responded to that letter indicating that the Prosecution would answer this specific question asked of us, and disclose such materials on Monday of next week.

MR. PRESIDENT:

Well, we would have preferred, you know, that this process takes place before Monday because you do recollect that the Chamber did indicate that we were going to proceed with the witnesses. We hope that that procedure of replying or taking whatever steps, you know, on Monday would not delay the process.

MS. TAYLOR:

In relation to the payments to at least the first 14 witnesses, all of that material has been -- the disbursement lists in relation to payments to those witnesses have been disclosed already to the Defence. The Defence have asked for the material in total, in relation to all of the witnesses that the Prosecution intends to call at this trial. As Your Honours would appreciate, that is quite some volume of material and that is why we take it to Monday so that that material can be disclosed.

MR. PRESIDENT:

Thank you. Does the Defence confirm that disclosures have been made, you know, for the first 14 witnesses?

MR. O'SHEA:

Can I just add that with regard to our request in relation to additional disclosure information regarding

payments to witnesses, we confirm that we have received information with regard to disbursements which have been made, that was the reason and subject of the application which we made earlier this week. But it's not just the question of receiving that information of all the witnesses, it's also a question of receiving the complete information in relation to the witnesses for this session, and I think the Prosecution understands the point because we've conveyed it to them.

MR. PRESIDENT:

Is there any other comment from the Defence? Alright, and I think we will leave that -- we have always encouraged the spirit of -- the culture of dialogue, you know, between the Defence and the Prosecution in these matters which are fundamental to the process, and we would like to encourage the Defence and the Prosecution to come closer and narrow their differences so that they don't impact on the normal procedures and the normal processes of trial because as we continue to say, we would like to move as expeditiously as possible, and we count on your understanding of this determination by the Chamber.

MR. O'SHEA:

Your Honour, may I add something? Having regard to what Your Honour has just said, I noticed this morning that Your Honours have now made an order for final witness list for this trial and an indication with regards to -- I can call them stand-by witnesses, I can't remember what expression the Court used.

JUDGE BOUTET:

Backup witnesses.

MR. O'SHEA:

Backup witnesses. Thank you, Your Honour. In the spirit of cooperation, I should indicate to the Prosecution that it is our intention to possibly put in an application before this Court to exercise its discretion to order the Prosecution to reduce the number of witnesses. Now, it may be that the Prosecution, when it is addressing Your Honours can address that issue themselves first voluntarily.

MR. PRESIDENT:

Well, Mr. 0'shea, I'm not speaking for the Prosecution, but you know that the burden that is placed on the Prosecution is very, very high and the discretion is for them to determine the number of witnesses they need to discharge this burden that is placed on them. So, if you are asking them to reduce, what would you expect the Court to do? We do not know what the witnesses are coming to say. We can make a general appeal to them, you know, to cut down the number of witnesses, but they remain masters of the situation and –

MR. O'SHEA:

Well, it's a matter that has been discussed in status conferences, and we can discuss again in the future on it, but it has always been my submission that this Court has a supervisory jurisdiction.

MR. PRESIDENT:

It is an ideal situation, Mr. O'Shea. I share this opinion -- I share this opinion. I mean, I do not know

whether we need hypothetically 200 witnesses in order to prove a case with seven counts on the indictment. Even if there were 30 counts on the indictment, I wonder if we need so many, but again, we are very, very careful on this because the burden is on the Prosecution and they have the strategy as to how they would conduct their prosecution to a logical conclusion. So we will just wait and see.

JUDGE THOMPSON:

Mr. O'Shea, isn't it too early to want the Court to invoke that undoubted jurisdiction which it has? We haven't really began, and it would seem to me that even if the Court were to be inclined to exercise such a discretion, it should be exercised with extremely great caution, having regard to the fact that the Prosecution bears the persuasive burden of proving the case against each Accused beyond a reasonable doubt, and without due judicial sensitivity to the autonomy which the Prosecution enjoys in presenting their case. In short, what I am saying to you is that, does the Court at this point in time have enough material upon which to invoke that exceptional jurisdiction?

MR. O'SHEA:

Your Honour makes a very good point and I accept both points entirely. It's just that I am one for catching the mosquito before it starts flying around the room, and that -- it's exactly because we do not intend to make that application to the Court now.

MR. PRESIDENT:

I hope you have a very efficient net to do that job.

JUDGE THOMPSON:

But I would like to say too, that this Court does not necessarily believe as a general rule in the doctrine of pre-emptive strike.

MR. O'SHEA:

Your Honour, thank you. It's --

JUDGE BOUTET:

If I may, Mr. O'Shea, on that very issue, I need not to say that I subscribe fully and entirely with what my brother, Judge Thompson has just said but I would also, just to put things in perspective, this last order that has been issued ordering the Prosecution to clearly spell out which and who is a core and non-core witness, was delayed because of the decision of the Court about judicial notice. We could not issue that decision -- that order prior no making a decision on judicial notice, but we have done so and the judicial notice decision is out and that is why we have followed subsequently with that particular order and which we had indicated, indeed, at the status conference, that is what it intended to do. But also, and related to the subject matter you reasoned as such, I would urge you and your colleagues as well to see, and make efforts to see how you can reach some agreements on facts that could be agreed upon, and that would also help to reduce substantially the number of witnesses to be called on both sides, and therefore this is not only one sided, and I fully agree that in that spirit as such, maybe you can device an instrument that would catch mosquitoes, as you said, before they get out and that could be a concerted effort to do that. And I would urge you to do it. So, I mean, yes,

agreements on facts would dispense with the calling presumably of many witnesses if these witnesses are not fundamentally essential on both sides. So I would urge you to look into this again. Thank you.

MR. O'SHEA:

Thank you, Your Honour. At this stage, all I'm attempting to do is to address the Prosecution through Your Honours, rather than make any specific application on this.

JUDGE BOUTET:

Thank you, Mr. O'Shea.

MR. PRESIDENT:

The second issue we would like to deal with is on learned counsel, Mr. O'Shea's application for us to order the Prosecution to fulfil its disclosure obligation under Rule 66, and in this regard the Trial Chamber has this to say:

At the hearing of the 7th of July 2004, learned counsel for the third Accused, Mr. Andrea O'Shea applied to this Court to order the Prosecution to respect its disclosure obligations, pursuant to Rule 66 of the Rules of Procedure and Evidence.

This application was made, according to learned counsel, principally in respect of Witness TF1-151 whose evidence learned counsel says is very material and runs to about 764 pages of disclosed statements, and subsidiarily, in respect of Witnesses TF1-O74, TF1-060, TF1-217, TF1-O77, TF1-199 and TF1-253.

This application is made on the basis of the fact that these witnesses are listed to testify and that their full statements were supposed to have been disclosed at least 42 days before they appear to testify.

Given that these witnesses have not yet been called upon to testify, and that all of them might not even testify during the current session, the Chamber is of the opinion that the application by learned counsel for the Defence is premature. However, this issue could be raised and entertained at an appropriate time. In so holding, the Chamber in the meantime calls on both the Prosecution and the Defence to continue to live up to, and to respect their obligations under Rules 66 of the Rules of Procedure and Evidence, and other statutory and regulatory instruments that governed the due process in the Special Court. That is the ruling of the Court on this issue.

The third issue is the decision of the Chamber on the Defence motion for disclosure, pursuant to Rule 66 and 68 of the Rules. This is the decision of the Chamber:

The Trial Chamber of the Special Court for Sierra Leone, composed of Honourable Judge Benjamin Mutanga Itoe, Presiding Judge, Honourable Judge Bankole Thompson and Honourable Judge Pierre

Boutet, seized of the motion for disclosure pursuant to Rule 66 and Rule 68, filed on the 28th of May 2004, on behalf of Mr. Issa Hassan Sesay;

Noting the Prosecution response to the Defence's motion for disclosure, pursuant to Rule 66 and Rule 68 filed on the 9th of June 2004 by the Office of the Prosecutor, and the Defence reply thereto, filed on the 14th of June 2004;

Noting the order to the Prosecution to file disclosure materials and other materials in preparation for the commencement of the trial of the 1st of April 2004;

Noting the pre-trial conference of the 29th of April 2004, and the oral submissions of the parties about disclosure of exculpatory material by the Prosecution made on the 6th of July 2004;

Considering that the Defence did not raise pertinent disclosure issues at the status conference that was held on the 23rd of June 2004;

Considering the oral submissions of counsel for the parties made in Court on the 6th of July 2004;

Noting the order to the Prosecution to produce witness list and witness summaries of the 7th of July 2004;

Considering the Rules of Procedure and Evidence, now considers the matter on the basis of the written submissions of the parties, pursuant to the provisions of Rule 73(A) of the Rules of Procedure and Evidence.

Submission of the parties:

The Defence submits that the Prosecution has not fulfilled its unequivocal commitment made during the pre-trial conference of the 6th of May 2004, to give the Defence access to evidence which it had in its possession and which it did not seek to rely upon, pursuant to Rule 66(A)(ii) of the Rules. It argued that the Prosecution had brought all arguments about interpretation of the Rule 66(A)(ii) of the Rules to a close by making the purported guarantee and, as a result, the Defence abandoned its request for a schedule of the evidence.

It further submits that the interest of justice and of the Accused are not served by a number of issues, namely, the discord in the Prosecution team about a clear interpretation of Rule 66 of the Rules. The failure of the Prosecution to identify and distinguish which material it was serving, pursuant to Rules

66 and 68 of the Rules, and the Prosecution's refusal to even admit to having material in their possession which they were not seeking to rely upon in the trial.

The Defence concedes that the obligation to show good cause in Rule 66(A)(ii) of the Rules is incumbent on the Defence. However, it submits that it cannot show good cause when it does not know what materials the Prosecution has in its possession.

The Defence further gives notice to the Prosecution, pursuant to Rule 66(A)(ii) of the Rules, and that it is seeking to inspect any books, documents, photographs and tangible objects of the following categories, *inter alia,* the role of the Economic Community of West African States *(ECOWAS)* in the disarmament of the RUF *(Revolutionary United Front)*, AFRC *(Armed Forces Ruling Council)* and the CDF *(Civil Defence Force)*, pursuant to the peace agreement; the role played by Charles Taylor in the conflict; the alleged training of the RUF command structure in Libya; clarification of the role played by the Accused in the release of the United Nations Assistance Mission in Sierra Leone (UNAMSIL) troops at the time of the conflict.

The Defence negates the assertion that the Prosecution has disclosed all the evidence which falls within the ambit of Rule 66 of the Rules. It avers that it has ascertained, through its own investigation, that there are several Prosecution witnesses whose evidence is wholly exculpatory of the Accused. It further submits that the Prosecution has only served exculpatory evidence contained within statements which are principally incriminatory in their nature. The Defence submits that the duty of the Prosecution to disclose exculpatory evidence is of great importance, and that such a duty under Rule 68 of the Rules continues until the date when the Trial Chamber delivers its judgment.

The Defence submits in particular that the material it seeks at minimum in paragraph 16 of the motion and especially in paragraph 16(1), concerns *inter alia*, evidence which relates to inducements made to witnesses to facilitate their cooperation in giving evidence. It further submits that with regard to the interviews of the so-called 'insiders', those conducting the interviews appear to offer rewards for continued cooperation. Thus, the Defence seeks all the details of offers made and rewards, including relocation packages, amnesties and monies given or due.

The response by the Prosecution is that it refutes the Defence's assertion that it has not complied with the unequivocal commitment that was offered at the pre-trial conference of the 6th of May 2004, to allow the Defence access to material which the Prosecution does not want to use at the trial, pursuant to Rule 66(A)(ii) of the Rules.

The Prosecution submits that assertions and insinuations by the Defence that the Prosecution has

been untruthful and unfair are not grounded in facts and calls on the Chamber to take note of the fact that such unfounded statements by the Defence have been misconceived -- have received unfavourable consideration by this Court in the past. The Prosecution submits that the Defence erred when it asserted that the Prosecution made an unequivocal commitment to disclose evidence at the pre-trial conference of the 6th of May 2004, because the pre-trial conference was indeed held on the 29th of April 2004. It further adds that the Defence prepared the motion without perusing the relevant documents.

The Prosecution submits that the Defence has failed to show good cause under Rule 66(A)(ii) of the Rules. It submits that under that Rule 66(A)(ii) of the Rules applies to two sets of witnesses: additional witnesses whom the Prosecution intends to call to testify at the trial, and those the Prosecution does not intend to call at the trial. With regard to the witnesses it intends to call, the Prosecution asserts that it has disclosed their statements, and will continue to disclose to the Defence copies of any new supplemental statements of these witnesses if the need arises.

With regard to the witnesses the Prosecution does not intend to call to testify at the trial, the Rule states that disclosure can only be made upon the Defence showing good cause. It is the Prosecution's submission that the Defence application must fail, in the absence of the Defence satisfying the prerequisite of good cause. The Prosecution further submits that the Defence's requests must be for a specific material or materials with regards to Rule 66(A)(ii) of the Rules. It 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.

The Prosecution proffers that there are three parts to Rule 66(A) of the Rules, and the statement made regarding access to materials was clearly in reference to Rule 66(A)(iii) of the Rules and not Rule 66(A)(i) or (ii) as mentioned by the Defence. The Prosecution adds that such access could only be granted pursuant to an application by the Defence. The Prosecution submits that to satisfy its obligation of disclosure to the Defence, to be satisfied under Rule 66(A)(iii) of the Rules, the Defence must *prima facie* establish that such evidence is material to the case. The Prosecution submits that it has disclosed to the Defence all materials in its possession, and that the onus is on the Defence to specifically identify evidence material to the preparation of the Defence case that is being withheld by the Prosecutor.

With regard to Rule 68 of the Rules, the Prosecution avers that the Defence: (i) have not specified the evidence requested; (ii) have produced no evidence to substantiate their claim that the Prosecution is in possession of exculpatory evidence; and (iii) have failed to show *prima facie* evidence to indicate that the evidence is exculpatory.

Consequently, the Prosecution submits that the Defence request is a clear ploy to delay the commencement of the trial, and urges the Chamber to dismiss the Defence motion.

In reply, the Defence submits that it cannot identify documents, photographs and tangible objects which it would wish to obtain, if the Prosecution persist on their current position and refuse to state what they have in their possession, pursuant to Rule 66(A)(iii) of the Rules. The Defence further submits that they are not seeking a sanction approach to non-compliance as alleged by the Prosecution, but they are concerned that there have been clear violations by the Prosecution and these concerns have not been allayed by the Prosecution's response.

The deliberation:

This is a motion on behalf of the Accused, Mr. Issa Hassan Sesay to compel the production by the Prosecution of witness statements, other materials and exculpatory evidence, pursuant to Rules 66 and 68 of the Rules. The motion and the response raise questions about the interpretation of Rule 66(A)(ii) and (iii), as well as of Rule 68 of the Rules, since the Defence is seeking relief from the Chamber for alleged breaches by the Prosecution of the aforementioned Rules.

As a result of what the Defence alleges are breaches of the Rules by the Prosecution, the Defence seeks the following relief from the Chamber: That the Chamber orders the Prosecution to allow the Defence access to the evidence it does not seek to rely upon;

(ii) In the alternative, it seeks an order that the Prosecution provides a schedule with summaries of statements in its possession which it does not seek to rely upon at the trial;

That the Trial Chamber should order the Prosecution -- that is number three -- should order the Prosecution to comply with its obligation to disclose exculpatory evidence, pursuant to Rule 68 of the Rules; and,

(iv) That the Trial Chamber orders the Prosecution to disclose the items listed in paragraph 17 of the motion, pursuant to Rule 66(A)(iii) of the Rules.

The Defence motion is predicated on issues that revolve around the interpretation of Rule 66(A)(ii) and Rule 66(A)(iii), and also Rule 68 of the Rules of Procedure and Evidence.

In order for the Trial Chamber to assess the merits of the motion in terms of its substantive arguments, it is imperative to determine the correct construction of the aforementioned Rules in the

light of the basic rules of statutory interpretation.

The Chamber observes by way of first principles of interpretation that no rule, however formulated, should be applied in a way that contradicts its purpose. As stated in the case of the *Prosecutor v. Kondewa*, 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. Another basic law of statutory interpretation is that a statute is to be interpreted in accordance with the legislative intent. In this regard, this Trial Chamber, in the case of the *Prosecutor v. Brima*, took the following stand, and I quote, "We would like to recall in order to emphasise that in interpreting statutory or regulatory instruments, due regard should be paid to the ordinary and natural meaning so as to avoid importing extraneous interpretations to statutory provisions or regulations which are as clear as those under examination."

The International Criminal Court for former Yugoslavia in its Trial Chamber case of the *Prosecutor v. Delalic*, in this respect, also had this to say: "The fundamental rule for the construction of the provision of a statute to which all others are subordinate, is that a statute is to be expounded according to the intent of the law maker. In an effort to discover the intention of the law maker, many rules to aid interpretation have been formulated. Of the many rules, one of the most familiar and commonly used is the literal or golden rule of construction. By this rule, the interpreter is expected to rely on the words in the statute, and to give such words their plain import in the order in which they are placed. 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."

Consistent with its previous decision, the Chamber accepts and adopts this view of the basic approach to statutory interpretation, and now proceeds to ascertain the meaning of Rules 66 and 68 of the Rules as presently formulated, not according to what is just and expedient, but consistent with the plain and unambiguous connotation of the Rule.

An examination of the submissions of both parties elicit that they are diametrically opposed in their interpretation of whether an unequivocal commitment was made during the pre-trial conference by the Prosecution to allow the Defence access to materials the Prosecution did not want to use at the trial, pursuant to Rule 66(A)(ii) of the Rules, and the Defence's stance that it relied on the guarantee to its detriment. To resolve this variance, the Chamber is constrained, in the light of the above, to examined and to determine the proper interpretation of Rule 66(A)(ii) of the Rules.

Rule 66(A)(ii) of the Rules stipulates that, "Subject to the provisions of Rules 50, 53, 69 and 75 of the Rules, the Prosecutor shall: 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 of the 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 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."

From an ordinary and plain reading 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 Rule 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. There is no contention here, as the Prosecution states that it has made such disclosures and pledged to continue disclosure of supplemental copies to the Defence should the need arise.

The second part of the Rule places the burden on the Defence to show good cause why the evidence of the witnesses whom the Prosecution does not want to call to testify at trial should be disclosed to the Defence. The Defence acknowledges in its motion that it is obvious from a reading of Rule 66(A)(ii) of the Rules that the obligation is on the Defence to show good cause, although it asserts that it cannot show such good cause without knowing what material exists in the possession of the Prosecution. Despite this admission by the Defence, it still seeks to rely on what it describes as guarantee by the Prosecution to allow the Defence access to materials pertaining to Rule 66(A)(ii) of the Rules, which guarantee is contested by the Prosecution.

The obligation in Rule 66(A)(ii) of the Rules should be resolved by a clear interpretation of the Rules. The Chamber takes cognisance of the Prosecution's statement that it has disclosed to the Defence the statements of witnesses -- of the witnesses it intends to call to testify at the trial and observes that the Defence has made some sweeping request for disclosure by the Prosecution of material under Rule 66(A)(ii) of the Rules, without specifying any evidence that could guide the Chamber in deciding whether or not the Prosecution is in possession of additional witness statements it does not intend to call to testify. Furthermore, the Defence has not adduced any evidence to show good cause why such materials, if they exist, should be disclosed to it.

In its submission, the Defence has given notice, pursuant to Rule 66(A)(iii) of the Rules that it is seeking *inter alia*, the inspection of all books, documents, photographs, tangible objects of some categories like the role of ECOWAS in the disarmament of the RUF, AFRC and CDF, pursuant to the

peace agreement; the role played by Charles Taylor in the conflict; the alleged training of the RUF command structure in Libya; clarification of the role played by the Accused in the release of UNAMSIL troops at the time of the conflict.

In their response, the Prosecution asserts that it has disclosed to the Defence all materials in their possession and contends that the burden shifts to the Defence to specifically identify evidence material to the preparation of the Defence case that is being withheld by the Prosecutor. This assertion is disputed by the Defence.

The Prosecution submits that the Defence must *prima facie* establish materiality under Rule 66(A)(iii) of the Rules and that it must also specify the required items and not simply embark on generalities. The Prosecution further urges the Chamber to dismiss the Defence's request, because it merely gives notice to the Prosecution and states that the general materials listed in the motion are material to the Defence without adducing any evidence to that effect.

Rule 66(A)(iii) of the Rules provides, "At the request of the Defence, subject to Rule -- Sub-Rule (B), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, upon a showing by the Defence of categories of, or specific books, documents, photographs and tangible objects which the Defence considers to be material to the preparation of the defence, or to inspect any books, documents, photographs and tangible objects in his custody or control which are intended for use by the Prosecutor as evidence at the trial, or were obtained from or belonged to the Accused.

In the *Celibici* case, the Trial Chamber of the International Criminal Tribunal for former Yugoslavia acknowledged that the Rules provide no guidelines regarding the process of determining the materiality of evidence. However, recourse to national jurisdiction has elucidated what parameters should be taken into consideration in determining the materiality of evidence.

In this regard, the Chamber finds instructive the reasoning of the United States Supreme Court in the case of the *United States v. Mandel*, where it was held that as a threshold matter the Prosecution is initially the party responsible for deciding what evidence it has in its possession that may be material for the preparation of the defence, by virtue of the simple fact that it is the party with possession of the evidence.

If the Defence believes that the Prosecution has withheld evidence material to its preparation, it can challenge the Prosecution by asserting its rights to the evidence. At that point, there are three alternatives for the Prosecution: (i) to hand over the requested evidence; (ii) to deny that it has the

requested in its possession; and, (iii) to admit that it has the evidence, but refuses to allow the Defence to inspect it. Only if there is a dispute as to the materiality would the Trial Chamber become involved and act as a referee between the parties in order to make this determination.

We therefore emphasise that when presenting this issue to the Trial Chamber, the Defence should be guided by the above definitions of materiality. The Defence, however, 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.

The jurisprudence on the ICTY and the International Criminal Tribunal for Rwanda has articulated requirements for disclosure under Rule 66(A)(iii). Instructively, in the *Celibici* case, the ICTY Trial Chamber concluded with regard to the extent of the Prosecution's disclosure obligations under the ICTY Rules, that Rule 66(B) imposes on the Prosecution the responsibility of making the initial determination of materiality of the evidence within its possession, and if disputed, requires the Defence to specifically identify evidence material to the preparation of the defence that is being withheld by the Prosecutor. The same interpretation was adopted in the case of the *Prosecutor v. Ndayambaje*, where the Trial Chamber of the ICTR found that the Defence must *prima facie*, establish materiality.

Consistent with our recent decision in the *Kondewa* case, it is the Chamber's view that the materials requested by the Defence are in general, germane to the conflict that took place in Sierra Leone, but not specific to the alleged criminal responsibility of the Accused in particular.

The Chamber finds that the Defence has not shown how the evidence it requests, namely the role of ECOWAS in the disarmament of the RUF, AFRC and CDF, pursuant to the peace agreement; the role played by Charles Taylor in the conflict; the alleged training of the RUF command structure in Libya; clarification on the role by the Accused in the release of UNAMSIL troops at the time of the conflict, will be material to its case.

The Defence contests the submission that the Prosecution do not have in their possession evidence which is wholly or principally exculpatory of the Accused. It has asserted that pursuant to its own investigations, it ascertained a considerable number of witnesses whose evidence would be wholly or partially exculpatory of the Accused.

The Prosecution submits that the Defence has not produce -- has not provided the Chamber with the findings of its investigation or any evidence to support its assertion, and in consequence, the Defence

request must be dismissed by the Trial Chamber.

Rule 68(B) of the Rules stipulates: "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 the 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 the Prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose such exculpatory material."

A review of the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda elicits that in the case of the *Prosecutor v. Bagilishema*, the Trial Chamber found that Rule 68 has two main elements. Firstly, the evidence is shown to the Prosecutor, which can be interpreted as evidence in custody and control, or possession of the Prosecution; secondly, it must in some way be exculpatory, suggest the innocence or mitigate the guilt of the Accused. The Trial Chamber held that the obligation on the Prosecutor to disclose possible exculpatory evidence would be effective only when the Prosecutor is in actual custody, possession, or has control of the said evidence. The Prosecutor cannot disclose that which she does not have.

The International Criminal Tribunal for Rwanda did hold in one of its chambers that in the case of the *Prosecutor v. Kajelijeli*, concurred with the above interpretation in the *Bagilishema* decision, of Rule 68. Furthermore, in the case of *Prosecutor v. Ndayambaje*, the International Criminal Tribunal of Rwanda Trial Chamber held that it is established jurisprudence of the ICTY and the ICTR that, pursuant to Rule 68 of the Rules, the Prosecutor is only to disclose any exculpatory material that is in her possession. It is also established that the Defence must justify such requests by *prima facie* establishing the exculpatory nature of the material requested.

It is evident that pursuant to Rule 26 *bis* of the Rules, the proceedings of the Special Court are conducted with full respect for the rights of the Accused and due regard for the protection of victims and witnesses, and so the Chamber opines that it is incumbent on the Prosecution to disclose all potentially exculpatory evidence. In this view, an established extraction of the said evidence from its context would not, principally, be conducive to a full understanding of the text, nor permit one to measure its full scope.

The Defence submits in particular that the material it seeks at the minimum concerning *inter alia*, evidence which relates to inducements made to witnesses to facilitate their cooperation in giving evidence must exist, and would fall within Rule 68. It further avers that the Prosecution does not confirm or deny whether material has been disclosed to the Defence. In the absence of some level of

specificity on the part of the Prosecution, albeit that it is acting *bona fide*, the Defence submits that it has no other recourse, but to seek relief from the Trial Chamber compelling the Prosecution to engage with the Defence's request for disclosure of Rule 68 material.

With regard to the scope of the Prosecution's obligation to disclose exculpatory evidence to the Defence, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the case of the *Prosecutor v. Blaskic* reasoned as follows: "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 authorisation to have the evidence disclosed.

The Trial Chamber, still of the International Criminal Tribunal of the former Yugoslavia in the case of the *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."

The Defence asserts that the jurisprudence from the two international tribunals clearly demonstrate at the very best, the desirability of the Prosecution to identify exculpatory material, pursuant to Rule 68. It asserts that although it is the Special Court's prerogative whether or not to follow *stare decisis* of other tribunals when the right of the Accused to a fair trial are under consideration, nothing but inequity results from ignoring lessons learnt elsewhere.

In the recent judgment rendered by the Appeals Chamber of the International Criminal Tribunal for former Yugoslavia in the case of the *Prosecutor v. Krstic,* the Defence contended that the Prosecution violated its disclosure obligations under Rule 68 by, *inter alia*, failing to disclose a number of witness statements containing exculpatory materials, and failing to disclose exculpatory materials amongst other evidence without identifying that material as exculpatory, and wanted a re-trial as a result. The Appeals Chamber proceeded to clarify the rules of disclosure under Rule 68 as follows: "As a general proposition, where the Defence seeks a remedy for the Prosecution's breach of its disclosure obligations under Rule 68, the Defence must show (i) that the Prosecution has acted in violation of its obligations under Rule 68, and (ii) that the Defence's case suffered material prejudice as a result. In other words, if the Defence satisfies the Tribunal that there has been a failure by the Prosecution to comply with Rule 68, the Tribunal in addressing the aspect of appropriate remedies, will examine whether or not the Defence has been prejudiced by that failure to comply before considering whether a remedy is appropriate."

In the instant case however, the Defence simply claims that it has ascertained through its own investigation that there are several Prosecution witnesses whose evidence is wholly exculpatory of the Accused. The Chamber has taken note of the concession by the Defence that the Prosecution have indeed served exculpatory evidence on the Defence, albeit, contained within statements which are principally incriminatory in their nature.

The Appeals Chamber of the ICTY in the *Krstic* judgment agreed with the Prosecution that Rule 68 does not require the Prosecution to identify the material being disclosed to the Defence as exculpatory. The jurisprudence of the Tribunal shows that while some Trial Chambers have recognised that it would be fairer for the Prosecution to do so, there is no *prima facie* requirement absent as an order of the Trial Chamber to that effect.

In that case -- in the case of the *Prosecutor v. Jean Paul Akayesu*, the Appeals Chamber of the International Criminal Tribunal of Rwanda held that an order staying proceedings on the ground of abuse of process should never be made where there were other ways of achieving a fair hearing of the case, still less, where there was no evidence of prejudice to the defendant.

Relying persuasively on the aforementioned, 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.

This Chamber also notes that from the 26th of April 2004, when its order to the Prosecution to file disclosure materials became effective, the Defence had sufficient time to analyse the material before the 5th of July 2004, when the trial started, and in any event, still has the opportunity to challenge the evidence during cross-examination.

Given the foregoing jurisprudential analysis, the Trial Chamber, in the light of the submissions made, and the information available, finds that the Defence has not met the onus placed on it and that its request, pursuant to Rule 66(A)(ii) of the Rules, cannot therefore be legally sustained.

In addition, given the absence of a specific identification of material that the Defence alleges the Prosecution has withheld, the Chamber is left with no option but to dismiss the Defence request, pursuant to Rule 66(A)(iii) of the Rules as it cannot be legally sustained.

In the light of the above, the Trial Chamber is of the opinion that the burden of showing that there is, or there has been an abuse of process related to the alleged non-disclosure of exculpatory evidence by the Prosecution rests with the Defence in a situation where it contests the Prosecution's submission that it has disclosed the relevant material, pursuant to Rule 68 of the Rules. The Defence has neither discharged that burden, nor have they shown that they have suffered prejudice from the alleged abuse of process by the Prosecution.

Consequently, the Defence request, pursuant to Rule 68 of the Rules cannot be legally sustained and is accordingly dismissed.

For all the above reasons, the Chamber dismisses the motion by the Defence.

Well, as we indicated before we rose day before yesterday, we would be adjourning to resume the session on Money, the 12th of July at ten o'clock, and I suppose that the Prosecution would be ready to go on with calling at least the first witness. So the Court will rise and we will resume at ten o'clock.

And this written decision, we would do everything to make it available to counsel this afternoon. As soon as we leave here, we would tidy it up and it would be filed with Court Management and made available to counsel for all the parties in the case. Thank you.

Yes, I thought I saw you –

MS. TAYLOR:

Yes.

MR. PRESIDENT:

-- wanting to rise on your feet.

MS. TAYLOR:

I'm sorry, Your Honour, I thought Your Honour wanted me to respond, to confirm that the Prosecution is indeed prepared to call its first witness at ten o'clock on Monday. There was one small issue that I thought I should raise and as a matter of record, part of it. Your Honours granted the third Accused the opportunity to make an opening statement, pursuant to Rule 84. The third Accused began to do that in person and was stopped several times by the Chamber for not complying with the terms of Rule 84. Before the evidence is called, I thought it was worth clarifying for the record and to all the parties concerned whether the Chamber is now of the view that the third Accused has made his opening statement, or that the third Accused still has to rise to make an opening statement at some later stage.

MR. PRESIDENT:

We have taken note of that. We will revisit that, please. The Court will rise.

(Court adjourned at 1310H)

(Pages 1 to 16 by Momodou Jallow)

C E R T I F I C A T E

I, Momodou Jallow Official Court Reporter for the Special Court for Sierra Leone, do hereby certify that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated; that it was taken in shorthand *(machine writer)* and thereafter transcribed by computer; that the foregoing pages contain a true and correct transcription of said proceedings to the best of my ability and understanding.

I further certify that I am not of counsel nor related to any of the parties to this cause and that I am in nowise interested in the result of said cause.

_____ Momodou Jallow