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SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

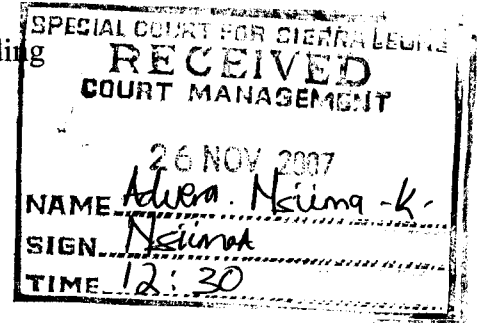
OFFICE OF THE PROSECUTOR

TRIAL CHAMBER I

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

Registrar: Mr. Herman Von Hebel

Date filed: 26 November 2007



THE PROSECUTOR

Against

**Issa Hassan Sesay
Morris Kallon
Augustine Gbao**

Case No. SCSL-04-15-T

PUBLIC

**PROSECUTION REPLY TO SESAY DEFENCE RESPONSE TO PROSECUTION APPLICATION FOR
LEAVE TO APPEAL DECISION ON THE SESAY DEFENCE MOTION REQUESTING THE LIFTING OF
PROTECTIVE MEASURES IN RESPECT OF CERTAIN PROSECUTION WITNESSES**

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I. INTRODUCTION

1. Further to the Prosecution Application for Leave to Appeal¹ and the Sesay Defence Response² thereto, the Prosecution files this Reply (“**Reply**”). The Reply is filed as a public document because unlike the Application for Leave to Appeal it addresses issues of law only.

II. ARGUMENT

2. The case law referred to in the Response arises from the wording of Rules 66 and 68 at the ICTR. The ICTR Rules were drafted differently, and in particular Rule 68 of the Special Court differs from Rule 68 of the ICTR in several important respects. The significance of those differences is obvious from the table below:

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<p>Rule 68: Disclosure of Exculpatory Evidence (<i>amended 14 March 2004</i>)</p> <p>(A) The Prosecutor shall, within 14 days of receipt of the Defence Case Statement, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which may be relevant to issues raised in the Defence Case Statement.</p> <p>(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.</p>	<p>Rule 68: Disclosure of Exculpatory and Other Relevant Material</p> <p>(A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.</p> <p>(B) Where possible, and with the agreement of the Defence, and without prejudice to paragraph (A), the Prosecutor shall make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the Defence can search such collections electronically.</p> <p>(C) The Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule</p>

¹ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-877, “Prosecution Application for Leave to Appeal Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses,” 12 November 2007 (“**Application for Leave to Appeal**”).

² *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-884, “Sesay Defence Response to Prosecution Application for Leave to Appeal Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses,” 19 November 2007 (“**Response**”).

SCSL	ICTR
	<p>70(B) and contains material referred to in paragraph (A) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.</p> <p>(D) The Prosecutor shall apply to the Chamber sitting in camera to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.</p> <p>(E) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above.</p>

3. ICTR Rule 68(D) specifically provides for an application by the Prosecutor for relief from disclosing “information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State....” There is no equivalent in the Rules of the Special Court, but that difference is accounted for by the content of the obligation created by Rule 68 of the Special Court, which is a limited obligation, namely “to make a statement ... disclosing to the defence the existence of evidence known to the Prosecutor” It is not the obligation created by Rule 68 of the ICTR. The obligation created by the Special Court’s Rules has in fact been complied with and exceeded because the Rule 68 information has already been extracted from statements and given to the Accused.
4. The cases referred to in the Response interpret Rule 68 of the ICTR, but those cases also acknowledge the existence and purpose of Rule 68(D) and those cases were determined

on the basis that “The Prosecution has made no application to the Chamber under Rule 68(D).”³

5. In addition, when deciding in *Bagosora* whether statements should be disclosed, the Trial Chamber took note of the significant concession on the part of the Prosecution “that the Accused must already know Witness AIU’s identity, given the content of his statement.”⁴ No such concession is made with respect to the application before this Trial Chamber, indeed the Prosecution would be extremely concerned if the Accused did know the identity of any of the witnesses who are the subject of this application.
6. The Prosecution did seek relief pursuant to Rule 68(D) in an earlier *Bagosora* motion, and in that earlier decision the ICTR Trial Chamber made clear that where Rule 68(D) is invoked the Prosecution may redact the statement so that only the substance of the exculpatory information is disclosed:

8. Having reviewed the statements, the Chamber is satisfied that they may feasibly be redacted so as to conceal the identity of any targets of ongoing investigations, while still conveying the substance of exculpatory information. This is the appropriate means of both respecting the rights of the Accused and safeguarding the ability of the Prosecution to continue its investigations under Rule 68 (D).⁵

7. The above statement is an explicit endorsement of the need to balance the rights of the Accused while at the same time safeguarding the Prosecution’s ability to continue investigations in other proceedings.
8. In the latter *Bagosora* decision referred to in the Response, the Prosecution did not apply for relief under Rule 68(D) and the identity of the witness was already known to the Accused. Nonetheless, the Trial Chamber permitted some redaction of the statements: “Witness AIU’s present location does not assist in understanding the content of the statement. Accordingly, any indications in the statement of the witness’s present location is not exculpatory and need not be disclosed to the Defence.”⁶ Where the witness’

³ *Prosecutor v. Bagosora et al*, ICTR-98-41-T, “Decision on Disclosure of Identity of Prosecution Informant,” 24 May 2006, para. 9.

⁴ *Ibid.*, para. 10.

⁵ *Prosecutor v. Bagosora et al*, ICTR-98-41-T, “Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68(A),” 8 March 2006, para. 8.

⁶ *Prosecutor v. Bagosora et al*, ICTR-98-41-T, “Decision on Disclosure of Identity of Prosecution Informant,” 24 May 2006, para. 6.

identity is not known to the Defence and where the disclosure of non-Rule 68 material is sought, the Prosecution should be permitted, at a minimum, to redact the statements for the purpose of “safeguarding the ability of the Prosecution to continue its investigations.”⁷

9. The Reply also states that “[t]here is a strong presumption in *favour* of ... disclosure to the Defence – rather than it being unusual, novel or in any way exceptional – and the burden lies upon the Prosecution to justify any non-disclosure.”⁸ However, the cases from the ICTY⁹ and ICTR cited in support of this statement do not support unqualified disclosure and access to witnesses. In the *Brđanin* Case, access was only granted to material “after the redaction by the Registry of those parts of it which [would] reveal the identity of any witness who gave evidence for either party on a confidential basis” subject to the right of the Defence to make an application at the appropriate time justifying the revelation to them of the identity of any particular witness.¹⁰ In the *Naletilić* Case, access was granted to specified materials subject to the Prosecution making any application necessary for additional protective measures.¹¹ Finally, the *Bagosora* Decision concerned access by the *Nzirorera* defence team to the material of seven defence witnesses called in the *Bagosora* Case to rebut the testimony of Prosecution witnesses who had testified against *Bagosora* and were now going to be called to testify against *Nzirorera*.¹² The Trial Chamber in the *Bagosora* Decision was, therefore, concerned with placing “the Defence on an even footing with the Prosecution”.¹³ In this *Bagosora* Decision, while the Trial Chamber noted its concern regarding the sufficiency of existing protective measures, it also noted that no particular sensitivities or witness protection interests had been brought to its attention which might prevent the broader disclosure of those

⁷ *Prosecutor v. Bagosora et al*, ICTR-98-41-T, “Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68(A),” 8 March 2006, para. 8.

⁸ Response, para. 12.

⁹ For information, Rule 68 (Disclosure of Exculpatory and Other Relevant Material) at the ICTY is drafted in similar terms to Rule 68 at the ICTR.

¹⁰ *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, “Second Decision on Motions by Radoslav Brđanin and Momir Talić for Access to Confidential Documents,” 15 November 2000, para. 14.

¹¹ *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, “Decision on Joint Defence Motion by Enver Hadzihasanović and Amir Kubura for Access to all Confidential Material, Filings, Transcripts and Exhibits in the Naletilić and Martinović Case,” 7 November 2003, para. 15(a).

¹² *Prosecutor v. Bagosora*, ICTR-98-41-T, “Decision on *Nzirorera* Request for Access to Protected Material”, 19 May 2006.

¹³ *Ibid*, para. 3.

witnesses' identities.¹⁴ In the *Bagosora* Decision, the access granted to the Defence was not as broad as that sought in the instant case and contact by the Defence with any witness whose identity was subject to protective measures was not permitted.¹⁵

III. CONCLUSION

10. The Response seeks an expedited decision. The Prosecution also asks for an expedited decision and that the Application for Leave to Appeal be granted.

Filed in Freetown, 26 November 2007

For the Prosecution,



Pete Harrison

¹⁴ *Ibid*, para. 4.

¹⁵ *Ibid*, para. 7.

INDEX OF AUTHORITIES**A. SPECIAL COURT FOR SIERRA LEONE****Motions**

1. *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-877, "Prosecution Application for Leave to Appeal Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses," 12 November 2007.
2. *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-884, "Sesay Defence Response to Prosecution Application for Leave to Appeal Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses," 19 November 2007.

B. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

1. *Prosecutor v. Bagosora et al*, ICTR-98-41-T, "Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68(A)," 8 March 2006.
<http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/080306.htm>
2. *Prosecutor v. Bagosora*, ICTR-98-41-T, "Decision on Nzirorera Request for Access to Protected Material", 19 May 2006
<http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/190506.htm>
3. *Prosecutor v. Bagosora et al*, ICTR-98-41-T, "Decision on Disclosure of Identity of Prosecution Informant," 24 May 2006.
<http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/240506b.htm>

C. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

1. *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, "Second Decision on Motions by Radoslav Brđanin and Momir Talić for Access to Confidential Documents," 15 November 2000
<http://www.un.org/icty/brdjanin/trialc/decision-e/01115AC213935.htm>
2. *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, "Decision on Joint Defence Motion by Enver Hadzihasanović and Amir Kubura for Access to all Confidential Material, Filings, Transcripts and Exhibits in the Naletilić and Martinović Case," 7 November 2003
<http://www.un.org/icty/naletilic/appeal/decision-e/031107.htm>

D. RULES AND REGULATIONS

1. Rule 68 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.
2. Rules 66 and 68 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.