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SCSL-04-15-T
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

TRIAL CHAMBER I

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

Acting Registrar: Mr. Herman von Hebel

Date filed: 14 September 2007

SPECIAL COURT FOR SIERRA LEONE	
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THE PROSECUTOR

Against

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

**PROSECUTION RESPONSE TO SESAY DEFENCE APPLICATION FOR DISCLOSURE
PURSUANT TO RULES 89(B) AND/OR 66(A)(ii)**

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. John Cammegh

I. INTRODUCTION

1. On 4 September 2007, the Accused Sesay filed a “Defence Application for Disclosure Pursuant to Rules 89(B) and/or 66 (A)(ii) (“Second Motion”).¹
2. Five months ago, on 30 March 2007, the Accused Sesay filed a similar motion, the “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” (“First Motion”).² The First Motion was dismissed by the Trial Chamber on 31 May 2007.³
3. The First Motion sought relief under Rules 66(A)(iii) or 68, while the Second Motion seeks relief under Rules 89(B) or 66(A)(ii). Reliance on Rule 89(B) is misplaced because it is a Rule governing evidentiary issues, and it cannot oust the specific Rules drafted to regulate disclosure. Rule 66(A)(ii) requires the applicant to show “**good cause**” before the Trial Chamber will order that statements of “**prosecution witnesses**” be “**made available**” to the defence within a prescribed time. The Second Motion should be dismissed;⁴ the Prosecution told the Accused months ago that the documents could be inspected and good cause has not been shown to issue any order.

II. COMPLETE CODE FOR DISCLOSURE CREATED BY THE RULES

4. The Accused Sesay seeks an order requiring the Prosecution to serve on the defence copies of statements in its possession of prosecution witnesses who, according to the Accused, agree to testify on behalf of Sesay. Those persons are identified as DIS-072, DIS-085, DIS-095, DIS-126, DIS-142, DIS-155, DIS-156, DIS-241, DIS-258 and DIS-294. The statement of DIS-072 was given to the Accused Sesay on 30 April 2007. The statements of DIS-126 and DIS-258 were inspected on 17 April 2007. The statement of DIS-085 was first given to the Accused in 2004, the

¹ *Prosecutor v. Sesay et al*, SCSL-04-15-T-815, “Defence Application for Disclosure Pursuant to Rules 89(B) and/or 66(A)(ii),” 4 September 2007.

² *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.

³ *Prosecutor v. Sesay et al*, SCSL-04-15-T-791, “Decision on Motion for Inspection of Witness Statements (Rule 66(A)(iii) and/or Order Disclosure Pursuant to Rule 68,” 31 May 2007.

⁴ This Trial Chamber considered another application under Rule 66(A)(iii) in *Prosecutor v. Norman et al*, SCSL-04-14-T-618, “Decision on Application by the Second Accused Pursuant to Sub-Rule 66(A)(iii),” 14 June 2006.

Prosecution advised that if the document had been lost another would be provided and a second copy was provided on 25 April 2007.

5. As the Rules specifically address disclosure obligations the principle *lex specialis derogate generali* governs. The disclosure Rules, Rules 66 to 70, regulate and codify prosecution and defence disclosure obligations. Rule 89(B), on the other hand, is a general statement, and significantly, is related to evidence. The heading and Rule state as follows:

Section 3: Rules of Evidence

Rule 89: General Provisions

(A) The rules of evidence set forth in this section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) 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 are consonant with the spirit of the Statute and the general principles of law.

6. Far from governing disclosure Rule 89(B) provides that “rules of evidence” which favour a fair determination of the matter shall be applied where they are not provided elsewhere in Section 3 of the Rules. The question before the Trial Chamber is not one of evidence, but rather whether a procedural obligation exists compelling the Prosecution to disclose copies of statements of persons who are now claimed to be Defence witnesses. Second, the disclosure Rules create a complete code. There is no need to look elsewhere to determine the disclosure obligations imposed on the parties. Rule 89(B) cannot displace the disclosure Rules, nor is it a guide to interpreting the disclosure Rules.

III. EQUALITY OF ARMS

7. While writing under the heading of Rule 89(B) the Second Motion makes certain assertions. The Prosecution sees them as irrelevant (and inaccurate) and because

they are irrelevant will not comment further.⁵ Equality of arms has no application in the current application. The Prosecution simply does not have anything like a right to statements of defence witnesses who will testify, let alone of witnesses whom the Accused does not intend to call to testify.

8. The Accused Sesay has had from 2 to 5 months to inspect statements. On 3 April 2007 the Accused was notified that he may inspect statements of DIS-126 and 258; on 25 April 2007 the Accused was notified that he may inspect statements of DIS-085 and 156; on 30 April 2007 the statement of DIS-072 was given to the Accused; on 17 May 2007 the Accused was notified that he may inspect the statement of DIS-095; on 21 May 2007 the Accused was notified that he may inspect the statements of DIS-142, 241 and 294; and on 11 July 2007 the Accused was notified that he may inspect the statement of DIS-155.
9. Even if other professional retainers or personal reasons caused one or more of the Accused's counsel to be away from Freetown for parts of April, May, June, July and August, some time could have been set aside to inspect the documents. The Prosecution took the time to inspect the proposed defence exhibits in the presence of defence counsel. This took a number of days and was required because all of the Accused took the position that they would allow the Prosecution to inspect copies of their exhibits but refused to provide copies. This was a time consuming and difficult task given that the Sesay list of proposed exhibits contains 395 documents. Compared to the volume of materials the Prosecution inspected, the amount in question in the Second Motion is small. The Prosecution and counsel for the Accused Sesay came to a mutual agreement on the time when the inspection of the exhibits would take place at the Registry Conference Room, and the inspection proceeded. The Prosecution did not object to the presence of defence counsel in the Registry Conference Room.

IV. THE DISCLOSURE RULES

10. In addition to Rule 89(B), the Accused Sesay refers to Rule 66(A)(ii):

⁵ Certain other comments are made in the Second Motion to suggest that the Prosecution has refused to discuss matters with the Accused Sesay. We are not aware of any approaches made to discuss matters, and the Prosecution remains open to discussions.

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.

11. The Rules contain a codification of all of the disclosure obligations, which is demonstrated by the further requirements established by Rule 67, which includes Defence obligations and further obligations of all parties where additional evidence is discovered, Rule 68, Rule 69, which permits an application to be made for non-disclosure of the identity of a witness, and Rule 70.
12. Rule 66(A)(ii) contemplates two situations and creates obligations consistent with each distinct situation.
13. The first situation is where there are additional prosecution witnesses to be called to testify. The obligation imposed is that the Prosecutor must continuously “disclose ... copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify ...” This obligation does not apply to the Second Motion.

14. The second situation, stated in the second sentence of Rule 66(A)(ii), applies here. It states that upon “**good cause**” being shown the Trial Chamber may order that the statements of “**additional prosecution witnesses**” not called by the prosecution “**be made available** to the defence within a prescribed time.”
15. The following persons have never been “prosecution witnesses”: DIS-072, DIS-085, DIS-126, DIS-155, DIS-156, DIS-241 and DIS-294. Simply talking to a person or interviewing a person does not transform them into a witness. The Trial Chamber ordered the Prosecution to list its witnesses, and that list gave notice of who would be the Prosecution witnesses. None of the above were listed on a core or back-up witness list, and the wording of the Rule makes clear that its scope is limited. To fall within the Rule the person had to have been a witness in the trial in question. It is only copies of statements “of additional witnesses that the Prosecutor does not intend to call...,” that fall within the Rule. The above persons never were on the RUF witness list, the Prosecutor never had an intention to call them in the RUF trial, and Rule 66(A)(ii) does not apply to them.
16. Three of the persons referred to in the Second Motion were on a witness list: DIS-095, DIS-142 and DIS-258. For them the onus is on the applicant to demonstrate good cause. This should be read in the context of Rule 66(A)(iii), which imposes a duty on the Prosecution to permit inspection of documents in certain circumstances. Here the Prosecution has already made the statements available for inspection, but this has been ignored by the Accused.
17. The drafters used the word “disclose” in Rule 66(A)(i) and in the first situation (first sentence) created in Rule 66(A)(ii). They chose not to use that word in the second situation created by Rule 66(A)(ii). This distinction was made for a purpose. While there is no issue that statements of persons who will testify for the prosecution, and that the existence of Rule 68 material, must be disclosed, there is no principled reason why other materials, such as those described in the second sentence of Rule 66(A)(ii) should be disclosed. Witnesses testify for many reasons, one of which is that they hold some fear of the process and they may not wish to have their statements served on the accused. The Rules may permit inspection but

that is a less intrusive incursion into the person's life than having their statement served on the Accused.

18. Where a remedy is made available to a party such as the opportunity to inspect a document it should be accepted. Good cause requires more than slight inconvenience, and in any event the good cause that must be shown under Rule 66(A)(ii) only results in an order that the documents be made available. The Prosecution says this is the same as making the documents available for inspection.

V. CONCLUSION

19. The Second Motion should be dismissed, it is without merit and should not have been filed.

Done in Freetown, 14 September 2007

For the Prosecution,



Pete Harrison

INDEX OF AUTHORITIES

A. Decisions and Motions

Prosecutor v. Sesay et al, SCSL-04-15-T-815, “Defence Application for Disclosure Pursuant to Rules 89(B) and/or 66(A)(ii),” 4 September 2007.

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.

Prosecutor v. Sesay et al, SCSL-04-15-T-791, “Decision on Motion for Inspection of Witness Statements (Rule 66(A)(iii) and/or Order Disclosure Pursuant to Rule 68,” 31 May 2007.

Prosecutor v. Norman et al, SCSL-04-14-T-618, “Decision on Application by the Second Accused Pursuant to Sub-Rule 66(A)(iii),” 14 June 2006.

B. Other Documents

Rules 66 (A) (i) (ii) and (iii), 67, 68, 69, 70 and 89 (A) and (B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone as last amended on 14 May 2007.