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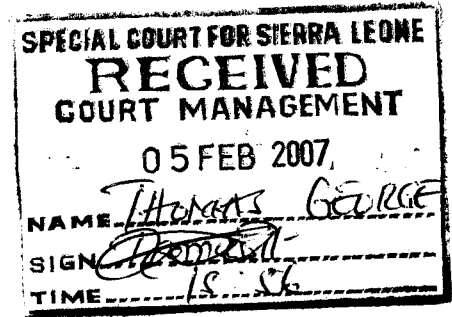
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN - SIERRA LEONE

TRIAL CHAMBER II

Before: Hon. Justice Julia Sebutinde, Presiding
Hon. Justice Teresa Doherty
Hon. Justice Richard Lussick

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 5 February 2007



THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR

Case No. SCSL - 03 - 01 - PT

PUBLIC

**PROSECUTION RESPONSE TO DEFENCE APPLICATION TO INSPECT
EXHIBITS IN THE CUSTODY OF THE PROSECUTION PURSUANT TO RULE
66(A)(iii)**

Office of the Prosecutor
Ms. Brenda J. Hollis
Mr. Urs Wiedemann

Counsel for Charles Taylor
Mr. Karim A. A. Khan
Mr. Roger Sahota

I. INTRODUCTION

1. On 25 January 2007, the Defence filed a motion entitled “Defence Application to Inspect Exhibits in the Custody of the Prosecution Pursuant to Rule 66(a)(iii)” (“Motion”)¹.
2. The Defence seeks an order that the Prosecution disclose:
 - (i) All exhibits in the Prosecution’s custody or control that fall within the categories considered material to the preparation of the Defence as outlined in the Defence letter of 2 October 2006; and
 - (ii) All exhibits in the Prosecution’s custody or control which are intended for use as evidence at trial or were obtained from or belonged to the accused.²
3. The Prosecution hereby responds to the Motion and submits that the Motion should be dismissed as the Defence has failed to demonstrate any violation by the Prosecution of its disclosure obligations.

II. ISSUES

4. While the Motion is entitled “Application to Inspect Exhibits in the Custody of the Prosecution (...)”, the Prosecution submits that it should be noted that the relief sought is an order to disclose exhibits. The Prosecution, therefore, understands and assumes that the Defence is requesting the disclosure of the materials falling within the categories set out in paragraph 2 above *in lieu* of an inspection thereof.
5. In the Motion it is argued that:
 - (i) the Prosecution has allegedly failed to refer explicitly to Rule 66(A)(iii) in any of its correspondence³ and has allegedly failed to indicate in the disclosures packages under which limb of Rule 66(A)(iii) the material was disclosed;⁴ and
 - (ii) the Prosecution has allegedly not made available those exhibits it

¹ *Prosecutor v Charles Taylor*, SCSL-03-1-PT-167, “Defence Application to Inspect Exhibits in the Custody of the Prosecution Pursuant to Rule 66 (A)(iii)”, 25 January 2007 (“Motion”).

² *Ibid.*, para 13.

³ *Ibid.*, para 10.

⁴ *Ibid.*, para 11.

intends to use as evidence at trial or that were obtained from or belonged to the Accused.⁵

6. The Prosecution submits that the issues raised in the Motion all pertain to the content and interpretation of the Prosecution's disclosure obligation under Rule 66 of Special Court's Rules of Procedure and Evidence ("Rules"), in particular Rule 66(A)(iii).

III. GENERAL SUBMISSIONS

i. The Law

7. According to Rule 66(A)(iii), the Prosecution is under an obligation to:

“at the request of the defence, and subject to sub-Rule 66(B), permit the defence to inspect any books, documents, photographs and tangible objects in [the Prosecution's] custody or control, which are material to the preparation of the defence, upon a showing by the defence of the 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, document photographs and tangible objects in the Prosecution custody or control which are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.”

ii. No obligation to indicate the specific nature of the material disclosed

8. The Defence contends that the Prosecution has failed to comply with its disclosure obligations by not referring explicitly to Rule 66(A)(iii) in its correspondence⁶ and by not indicating under which part of Rule 66(A)(iii) the material was disclosed.⁷
9. The Prosecution submits that, contrary to the Defence's assertion, Rule 66 does not require the Prosecution to specify under which limb of Rule 66(A)(iii) the material is being disclosed to the Defence.
10. The ruling of the Appeals Chamber of the ICTY with regards to Rule 68 confirms the nature of the obligation on the Prosecution. The Appeals Chamber held that it

⁵ Ibid., para 12.

⁶ Ibid., para 10.

⁷ Ibid., para 11.

“agrees 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 recognized that it would be fairer for the Prosecution to do so, there is no prima facie requirement, absent an order of the Trial Chamber to that effect, that it must do so.”⁸

11. As confirmed by this jurisprudence, the purpose of the disclosures made under either Rule 66 or Rule 68 is to provide the Defence with material that is or may be relevant to the Defence. The disclosure obligations do not impose a duty on the Prosecution to analyze the material and report to the Defence the nature of the material disclosed. Rather, the purpose of the Rules is to ensure that the Defence is aware of the existence of any material in the possession of the Prosecution that the Prosecution either intends to use as evidence, or which is material to the Defence, which was obtained from or belonged to the accused, or which is exculpatory. Conversely, the purpose of the disclosure Rules is not to prepare the work of the Defence, by analyzing this material for the Defence. The jurisprudence confirms that the obligation to disclose evidence is not intended to serve as a means through which the Prosecution is forced to replace the Defence in conducting the preparation of its case.⁹
12. Asking the Prosecution to indicate specifically which of the material disclosed refers to which limb of Rule 66(A)(iii) goes beyond what is strictly required under the Rule. The material must be available to the Defence. There is no further, retroactive or prospective obligation on the Prosecution to identify precisely what paragraph or page of the material fits within what category of Rule 66, or even less within what limb of Rule 66(A)(iii).
13. In their letter of 2 October 2006, the Defence said: “For the avoidance of doubt we would prefer to “inspect” this material by way of service of the exhibits as hard copies or (depending on volume) in electronic form.”¹⁰ In view of the fact that the Prosecution provides the Defence on an on-going basis with actual copies

⁸ *Prosecutor v. Kristić*, IT-98-33-A, “Judgment”, Appeals Chamber, 19 April 2004, para 190.

⁹ See, for example, this line of reasoning *Prosecutor v. Blagojević*, “Joint Decision on Motions Related to Production of Evidence, Trial Chamber II, 12 December 2002, para. 26.

¹⁰ Letter from Counsel for Mr. Taylor to the Prosecution, dated 2 October 2006.

of the material which it considers either exculpatory or as a potential exhibit, such a request has perhaps been rendered unnecessary. The Prosecution decided to provide copies of such material in order to facilitate the work of the Defence and to demonstrate cooperation.

14. In making disclosure, the Prosecution has ensured that all such material as it has reviewed so far and that corresponds to the request of the Defence in its letter dated 2 October 2007¹¹ is provided to the Defence. The Prosecution has also disclosed purely exculpatory material, which is by definition material to the defence of an accused,¹² under Rule 68 and has specifically identified such material in its disclosures as of August 30, 2006.¹³

15. Thus, the Prosecution has disclosed the following material to the Defence in compliance with its obligations under Rule 66(a)(i) and (ii) (statements of the witnesses that the Prosecution intends to call to testify), Rule 68 (exculpatory material) and Rule 66(A)(iii) (potential exhibits including materials the Defence is requesting the Prosecution to disclose under Rule 66(A)(iii):

- (i) 289 documents and videos;¹⁴
- (ii) 97 publicly available documents;¹⁵
- (iii) hard copies of 9 of the publicly available documents referred to above following a request for assistance from the Defence;¹⁶ and
- (iv) recordings of 11 public radio broadcasts.¹⁷

16. Given the above, the Prosecution submits that it has complied with and, indeed, exceeded its disclosure obligations in order to ensure the fairest trial possible in

¹¹ Letter from the Defence Counsel for Mr. Taylor to the Prosecution, 2 October 2006. Prosecution Letter to Defence Counsel for Mr. Taylor, 13 October 2006.

¹² *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-T, "Decision on the Request of the Accused Hazim Delić Pursuant to Rule 68 for Exculpatory Information", Trial Chamber, 24 June 1997, paras. 14-15.

¹³ *Prosecutor v Charles Taylor*, SCSL-03-01-PT "Prosecution Response to 'Defence Application for Service of a Disclosure Statement pursuant to Rule 68'", Trial Chamber, 5 February 2006.

¹⁴ Disclosure of non-public documents was made to the Defence on the following dates: 17 May 2006, 11 August 2006, 13 October 2006, 27 October 2006, 10 November 2006, 24 November 2006, 13 December 2006, 8 January 2007 and 25 January 2007.

¹⁵ The Prosecution has given notice of these documents; see notice of 97 publicly available documents given to the Defence on 11 August 2006.

¹⁶ The hard and/or electronic copies of the 9 publicly available documents were provided to the Defence on 10 November 2006.

¹⁷ Provided to the Defence on CD on 22 September 2006.

this regard.

iii. The right to inspect/duty to disclose the material that the Prosecution intends to use as evidence or that were obtained from or belonged to the Accused

17. Contrary to the allegations of the Defence, the Prosecution submits that it has not failed to disclose exhibits that the Prosecution intends to use as evidence at trial or that were obtained from or belonged to the Accused.¹⁸
18. The Prosecution has endeavoured to disclose these documents to the Defence as early as possible. The Prosecution continues to review the material in its possession for disclosure and, despite the resources and time necessary to complete this enormous task, is anxious to disclose in a timely manner: the Prosecution has therefore adopted a practice of disclosing biweekly packages to the Defence.
19. Furthermore, there is no obligation under the Rules to provide exhibits at this stage in the pretrial process. According to Rule 73bis, the Prosecution has no duty to file the *list of exhibits* the Prosecution intends to offer until it has been so ordered by the Trial Chamber or a Judge designated from among its members.
20. In the present case, notwithstanding the absence of a legal obligation, in the course of its on-going document review, the Prosecution has already provided copies of those materials it tentatively considers might be used as exhibits. While the determination and list are not yet final, the Prosecution has adopted an approach of early disclosure of such material in order to put the Defence on early notice.
21. The Prosecution has thus *disclosed* the documents that are designated in Rule 66 (A)(iii) second limb instead of merely permitting their inspection. The Prosecution submits that this approach, once again, goes beyond the requirements of Rule 66 as the actual materials are provided to the Defence.
22. The Prosecution submits that it cannot disclose the material without first reviewing it. Indeed, Rule 66 imposes on the Prosecutor the responsibility of

¹⁸ Motion, para 12.

making the initial determination of materiality of evidence within its possession.¹⁹ However, from a practical stand point, the review is not for materiality alone but must also ensure that privileged material falling within Rules 66(B) or 70 is not disclosed and that the protective measures orders under Rules 69 and 75 are given effect to.

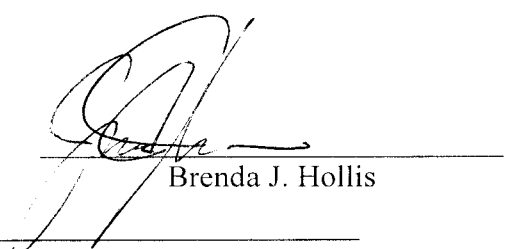
23. In view of the above, the Prosecution therefore submits that it has complied with its disclosure obligations and has even gone beyond the requirements of Rule 66 by actually disclosing documents to the Defence. Material that has been reviewed by the Prosecution and has relevance either under Rule 66 or 68 has already been disclosed. Material not reviewed is being processed and will be disclosed as soon as possible, according to the liberal practice described above. This process will be completed at the latest when the Pre-Trial Brief and the exhibit list are due.²⁰

IV. CONCLUSION

24. The Defence has failed to demonstrate that the Prosecution has failed to comply with its disclosure obligations. Instead, as set out above, the Prosecution has continuously disclosed and is still disclosing all the material it deems relevant under either Rule 66 or Rule 68. Further, the Prosecution is under no retroactive or prospective obligation to indicate precisely, which material falls under what category of Rule 66 (A)(iii).

25. The Motion should therefore be dismissed.

Filed in Freetown,
5 February 2007
For the Prosecution,


Brenda J. Hollis

¹⁹ John R.W.D. Jones and Steven Powles, *International Criminal Practice*, Oxford University Press, 2003, 8.5.331; see *Prosecutor v. Delalić et al. (Čelebići case)*, “Decision on Disclosure”, 6 September 1996, para. 11.

²⁰ *Prosecutor v Charles Taylor*, SCSL-03-01-PT, “Scheduling Order for a Pre-Trial Conference Pursuant to Rule 73bis”, Trial Chamber, 2 February 2007.

INDEX OF AUTHORITIES

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2. *Prosecutor v Charles Taylor*, SCSL-03-01-PT, “Prosecution Response to ‘Defence Application for Service of a Disclosure Statement pursuant to Rule 68’”, 5 February 2007.
3. *Prosecutor v Charles Taylor*, SCSL-03-01-PT, “Scheduling Order for a Pre-Trial Conference pursuant to Rule 73bis”, 2 February 2007

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4. *Prosecutor v Krstic*, IT-98-33-A, ‘Appeal Judgment’, 19 April 2004.
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<http://www.un.org/icty/blagojevic/trialc/decision-e/021212.pdf>
6. *Prosecutor v. Zejnil Delalic (Celibici)*, IT-96-21-T-T, ‘Decision on the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information, 24 June 1997. <http://www.un.org/icty/celebici/trialc2/decision-e/70624DE2.htm>
7. *Prosecutor v. Zejnil Delalic (Celibici)*, IT-96-21-T-T, ‘Decision on the Motion by the Accused Zejnil Delalic for the disclosure of Evidence’, 26 September 1996.
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8. Special Court for Sierra Leone, Rules of Procedure and Evidence, Amended 24 November 2006.
9. John R.W.D. Jones and Steven Powles, *International Criminal Practice*, Oxford University Press, 2003.