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SCSL-03-01
(24011-24022)

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THE SPECIAL COURT FOR SIERRA LEONE

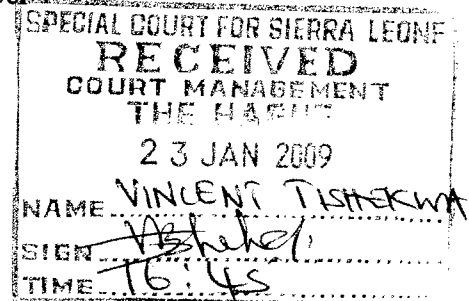
In Trial Chamber II

Before: Justice Richard Lussick, Presiding
Justice Teresa Doherty
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate

Registrar: Mr. Herman von Hebel

Date: 23 January 2009

Case No.: SCSL-2003-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE MOTION FOR THE DISCLOSURE OF THE IDENTITY OF A
CONFIDENTIAL 'SOURCE' RAISED DURING CROSS-EXAMINATION OF
TF1-355**

Office of the Prosecutor:
Ms. Brenda J. Hollis

Counsel for Charles G. Taylor:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. INTRODUCTION

1. This is a Defence Motion for the disclosure of the identity of the confidential 'source' raised during the cross-examination of TF1-355 (the "Motion").
2. The Defence files this Motion pursuant to Rule 54 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (the "Rules") and in accordance with Trial Chamber's II oral ruling on 14 January 2009.¹
3. In the Motion, the Defence seeks an order compelling Witness TF1-355 (the "Witness") to disclose the identities of the persons who facilitated his trip to Sierra Leone in 1997, as he alleged in his evidence, which information the Witness refused to disclose during cross-examination on 14 January 2009.

II. FACTUAL AND PROCEDURAL BACKGROUND

4. On 17 May 2006, the Prosecution disclosed to the Defence the transcript of the 28 October 2004, from the RUF Trial (the "RUF Transcript") before the Special Court of Sierra Leone, as part of the material that related to Witness TF1-355.
5. On 14 January 2009, during cross examination, Counsel for the Defence referred to a statement made by the Witness in the RUF Transcript. In that transcript as well as during court proceedings, the Witness made it clear that some members of ECOMOG had facilitated his trip to Sierra Leone in 1997.² Counsel for the Defence then asked the Witness for more specific details, in particular the identity of the person(s) who had facilitated his entry into Sierra Leone. The

¹ *Prosecutor v Taylor*, SCSL-03-01-T Trial Transcripts 14 January 2009 ("Transcript") pp. 22520-22522. The Trial Chamber's oral ruling: "...In the present case the Trial Chamber is therefore of the opinion that in order to express a view on all relevant factors it should first call for formal written submissions from the parties...We direct the Defence to file its motion by close of business on Friday..the 23rd (of January 2009)..."

² *Prosecutor v Sesay et al* , SCSL-0-2004-15-T, Trial Transcripts 28 October 2004 ,(“RUF Transcript”), p.67. lines : 24-25

Witness refused.³ Despite further probing,⁴ the Witness remained adamant and pleaded privilege.⁵

6. Defence counsel then appealed to the Trial Chamber for the Witness to be compelled to answer the question as his refusal impacted on the Accused's right to a full and proper cross-examination.⁶ Counsel further submitted that the Witness's answer was relevant to the question relating to his motivation in visiting Sierra Leone and to his activities.⁷
7. The Witness responded by explaining that some of the unnamed persons who facilitated his trip to Sierra Leone were currently serving as military officers in the Federal Army of Nigeria and he feared compromising their positions by disclosing their identities.⁸
8. The court then ordered Counsel to put his application in the form of a written motion for the court's further consideration.

III. APPLICABLE LEGAL PRINCIPLE

9. Article 17(4)(e) of the Special Court of Sierra Leone Statute (the "Statute") guarantees the right of the Accused to examine or have examined the witnesses against him. This is a fundamental right that goes to the heart of the Accused fair trial rights. As such this right may only be limited in exceptional circumstances when it is strictly necessary and no other less intrusive measures suffice.

³ Transcript, p.22505, line: 22, p.22506, lines: 9-10

⁴ Transcript, p.22505, lines: 23-29, p.22506, lines: 11-18

⁵ Transcript, p.22501, lines:6-8

⁶ Transcript, p.22501, lines: 9-14

⁷ Transcript, p.22506, line: 29 to p.22506, line: 22507, lines: 1-13

⁸ Transcript, p.22506, lines: 11-18

10. Under Rule 54, which is entirely discretionary in nature, a Judge or Trial Chamber, at the request of either party or of its own motion, may, *inter alia*, issue orders that are necessary for purposes of an investigation or for the preparation or conduct of the trial. In this Motion, the Defence requests the Trial Chamber to compel the Witness to give specific details in order for the Defence to conduct a full and proper cross-examination.

IV. SUBMISSIONS

a) No privilege exists in relation to the Witness's evidence

11. The Defence submits that in order for the Trial Chamber to properly determine whether journalistic privilege attaches to the information withheld by the Witness, it must first analyse the nature of the information. In this regard, the Defence submits that the information in question relates to a person or persons who facilitated the Witness's entry into Sierra Leone. A fundamental distinction must be drawn between *information* given to a journalist by a 'source' and an *act* by a person facilitating the movement of another in and out of a country,⁹ whether the latter is a journalist or not.
12. The Defence submits that the information relating to the identity of the persons who facilitated the Witness's entry into Sierra Leone is not information that was gained in the Witness's capacity as a journalist, but rather information that was obtained through the conduct of a person or persons whom the Witness interacted with. To hold otherwise would suggest that every piece of information that a person who is a journalist by profession comes into possession of or any conduct on his part attracts journalistic privilege. In this instance, facilitating the Witness's entry into Sierra Leone is a completely different matter from information from

⁹ Transcript, p.22512, lines: 18-29- p22516, lines:1-3

source(s) relating to the Witness's research and material as a journalist; as Justice Sebutinde pointed out during court proceedings on 14 January 2009.¹⁰

13. Therefore, if the Witness made a promise to those who facilitated his trip into Sierra Leone that if they helped him, he would not reveal their identities, then that was a personal issue for the witness in his private capacity and not in his capacity as a journalist.¹¹ The fact that the Witness is a journalist was just incidental.
14. Further/alternatively, other than a mere desire to keep a promise, the Witness failed to establish any compelling reason why privilege should be upheld at the expense of the Accused's right to a full and proper cross-examination. Weighed against the Accused fair trial rights, the Witness failed to show why the court should uphold privilege. After all, the act for which the Witness pleads privilege – assisting his passage into Sierra Leone back in 1997 – was a harmless act by the military personnel concerned and is highly unlikely to jeopardise their present positions.¹² Further/alternatively, if divulging their identities back in 1997 could have compromised their positions, the Witness did not indicate how that would affect them now.
15. The courts have generally upheld privilege in order to protect civilian informants from harm and to protect the public's right to freedom of information. There is not only a distinction here between someone who assists – such as one who facilitates entry into another country – and a source, but also between civilian and military personnel.¹³ The European Court of Human Rights has held that it is slow to attach privilege to the evidence of state security agents. In *Van Mechelen* where it was dealing with the evidence of the police, the court stated that maintaining the anonymity of this type of witness should be resorted to only in

¹⁰ Transcript, p.22523, lines: 1-3

¹¹ Transcript, p.22517, lines: 6-16

¹² Transcript, p.22513, line: 1-3

¹³ Transcript, p.22506, line: 21-27

exceptional circumstances.¹⁴ In particular, the court recognised that any measures restricting the rights of the defence should be strictly necessary and such extreme limitations should only occur if no less restrictive measure would suffice. The Defence submits that the evidence in relation to the ECOMOG personnel who assisted the Witness comes within this category of evidence and the Witness did not show that it was necessary to withhold their identities.

b) Journalistic privilege is not absolute

16. Further/alternative to the foregoing, while the Defence accepts that the Witness is a journalist, and noting that this court acknowledges the privilege of journalists or monitors to withhold the particulars of their sources;¹⁵ such privilege is however not absolute.¹⁶ It must yield in cases where the identification of the source is necessary either to prove guilt or to prove a reasonable doubt about guilt.¹⁷

17. In this case, the Defence submits that the identity of the people who assisted the Witness goes to proof of a reasonable doubt about guilt. Firstly, the information sought goes to the credibility of the Witness and is crucial to the ability of the Defence to properly and adequately test the veracity of the Witness's account. The information sought, for instance, would assist the Defence to establish the motivation of the Witness's trip into Sierra Leone – an issue that was in dispute during cross examination.¹⁸

¹⁴ *Van Mechelen and Others v The Netherlands*, (55/1996/674/861-864) 23 April 1997.

¹⁵ *Prosecutor v Brima et al*, SCSL-04-16-AR73, Decision on prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to testify without being compelled to Answer Questions on Grounds of Confidentiality: Separate and Concurring Opinion of Hon. Justice Geoffrey Robertson, QC, 26 May 2006, Concurring opinion para. 33 (“AFRC Appeals Chamber Decision”)

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ See Transcript, p.22519, line: 9-14 where Defence Counsel questions the Witness's relationship with ECOMOG and suggests that the Witness had illicit dealing with ECOMOG and spied for different organisations.

18. Secondly, establishing the identity of the persons who helped the Witness into Sierra Leone will help the Defence to pursue its line of defence that "...ECOMOG during this critical period were channelling arms to the CDF and the Kamajors in Sierra Leone from stocks held by them in Liberia"¹⁹ As the supply of arms and ammunition into Sierra Leone from Liberia, allegedly by the Accused, is the mainstay of the prosecution's case, it is important that the Defence be given ample opportunity to test any evidence that might impact on that issue. Any evidence that ECOMOG was trafficking arms into Sierra Leone thus ultimately impacts on the Prosecution's evidence that the Accused shipped arms into Sierra Leone during the conflict. The issue thus goes directly to proof of reasonable doubt of the Accused, at least on the allegation of supply of arms into Sierra Leone. Therefore, even if the Witness were to claim privilege, the information sought *in casu* falls under one of the recognised exceptions.

c) Balancing the Interest of Justice and Journalistic Privilege

19. Further/ and alternative to the foregoing, assuming *arguendo* that journalist privilege attaches to the information in question, the Trial Chamber has the inherent right to balance the interests of justice and journalist privilege. In this regard, the Trial Chamber may seek guidance from the jurisprudence of other international tribunals. In the ICTY *Brdjanin* case, on the question of privilege, the Appeals Chamber underlined the importance of upholding the accused's fair trial rights and held that it was in the interests of justice to have all relevant evidence put before the Trial Chambers for a proper assessment of the culpability of the individual on trial.²⁰ The Appeals Chamber underscored the need to balance: a) the public interest in accommodating the work of war correspondents, and b) in having all relevant evidence available to the court.²¹

¹⁹ Transcript , p.22507, line: 7-13

²⁰ *Prosecutor v Brdjanin*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 46

²¹ *Ibid*

20. The Appeals Chamber adopted a two-pronged test to determine journalistic privilege.²² Firstly, that the evidence sought must be of direct and important value in determining a core issue in the case, and secondly, that the evidence sought could not be reasonably obtained elsewhere.²³
21. If the Trial Chamber in this case were to adopt this test, it is submitted that it would be in the interest of justice to have all the relevant information relating to Witness TF1-355's evidence on the aspect in issue before the court, given the importance of the Witness to the Prosecution's case and the importance of the information sought to the defence case as elaborated in paragraphs 17 and 18 above.
22. The Defence submits that the information sought in the Motion has a direct bearing on the core issue in this case in that: Firstly, it will help the Defence to adequately test the evidence and credibility of the Witness, who is one of the Prosecution's core 'linkage' witnesses. As highlighted above, the identity of the person or persons who assisted the Witness would help the Defence in establishing its allegation that the Witness was a spy who had illicit dealings with ECOMOG. Secondly, the information would also help the Defence develop its line of defence that some of the arms that were shipped into Sierra Leone allegedly by the Accused were in fact being trafficked by ECOMOG.
23. Per the second leg of the *Brdjanin* test, the Defence further avers that it cannot obtain the information sought in this case from any other sources as the information relates to a personal trip that was made by the Witness.
24. Therefore, should the Trial Chamber adopt the *Brdjanin* case test, it would be in the interests of justice to have all relevant evidence before the court. The

²². *Prosecutor v Brdjanin*, Supra Note.20, para 50

²³ Ibid

Chamber should therefore order disclosure of the names of the people who facilitated the Witness's trip to Sierra Leone in 1997.

d) Other less restrictive measures

25. Further, in exercising its inherent discretion as to whether or not to uphold the journalistic privilege claimed by the Witness, the Defence submits that the Trial Chamber must be mindful that there are other less restrictive measures available to allay the Witness's concerns in this case.²⁴ During court proceeding, the Witness expressed concern that revealing the name of the people who facilitated his Sierra Leone trip could compromise them as some were still serving as military officers in the Federal Army of Nigeria.

26. The Defence maintains that this is not sufficient reason to claim privilege as the Witness did not establish any real danger the persons would be exposed to. The Defence however submits that should the Trial Chamber consider it necessary to protect the respective identities of those persons, then less restrictive measures such as a closed or private session could be employed to achieve that result. That should strike a proper balance between the accused's fair trial rights and journalist privilege in this case.

e) No application for non-disclosure has been made

27. The Defence notes that the Prosecution made no application in advance of TF1-355's oral testimony to the Trial Chamber for the non-disclosure of the information sought. Under Rule 66(A), the Prosecution has a continuous

²⁴ It was specifically stated in the *Van Mechelen* case that if a less restrictive measure can suffice to stop the non-disclosure of this type of evidence was available then it should be applied. See Supra note 14.

disclosure obligation relating to all evidence in its possession or within its knowledge.²⁵

28. In terms of Rule 66(B):

Where information or materials are in possession of the Prosecutor, the disclosure of which may prejudice further or on ongoing investigations, or any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to a Judge designated by the President sitting *ex parte* and *in camera*, but with notice to the Defence, to be relieved from the obligation to disclose pursuant to Sub-Rule (A). When making such an application the Prosecutor shall provide, only to such Judge, the information or materials that are sought to be kept confidential.

29. To the Defence's knowledge, the Prosecution has not made any Rule 66(B) application with respect to the identity of the people who facilitated the Witness's trip to Sierra Leone in 1997, despite its prior knowledge that the Witness would not be willing to divulge this information.²⁶ The Prosecution (through its Witness) must therefore be deemed to have waived its right to claim privilege as claiming privilege at this late stage unduly impedes the Defence's full and proper cross examination.

30. Rule 66(B) was, among other things, designed to put the Defence on notice as to any information that would not be disclosed so that it would not be taken by surprise. Where oral evidence is involved, the Rule was also meant to ensure that it was not left to a witness to unilaterally decide which questions to answer and

²⁵ Trial Chamber I of the Special Court has ruled that Rule 66 imposes an obligation of continuous disclosure for *all witness statements* in the possession of the Prosecution, *regardless of their form or source*, save for any material covered by Rule 70(A). See: *Prosecutor v. Norman et al.*, SCSL-2004-14-T, "Ruling on Disclosure of Witness Statements", 01 October 2004, para. 2; see also, *Prosecutor v Alex Tamba Brima, et al.*, SCSL-04-16-T-246, "Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68", 04 May 2005, para. 16.

²⁶ RUF Transcript 28 October 2004, *Supra* note 2, p.68; Witness said that he will not disclose source of certain information.

which not to, as the Witness allowed himself to do. In the circumstances, the Prosecution's brazen disregard of the Rules should not be allowed to work in its favour.

V. REMEDY

31. For any one or more of the foregoing reasons, the Defence requests the Trial Chamber to order Witness TF1-355 to give the names of the person(s) who facilitated his trip to Sierra Leone in 1997.
32. Subject to the Trial Chamber's order above, the Defence reserves to right to have the Witness recalled for further cross-examination.

Respectfully Submitted,

(Signature)
SILAS OBIKELI

JW

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 23rd Day of January 2009
The Hague, The Netherlands

LIST OF AUTHORITIES**SCSL**

Prosecutor v Taylor, SCSL-03-01, Trial Transcript 14 January 2009

Prosecutor v Sesay et al, SCSL-0-2004-15-T Trial Transcript 28 October 2004

Prosecutor v Brima et.al, SCSL-04-16-AR73, Decision on prosecution Appeal against Decision on Oral Application for Witness TF1-150 to testify without being compelled to Answer Questions on Grounds of Confidentiality: Separate and Concurring Opinion of Hon. Justice Geoffrey Robertson, QC, 26 May 2006, Concurring opinion para. 33 (“AFRC Appeals Chamber Decision”)

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ECHR

Van Mechelen and Others v The Netherlands, (55/1996/674/861-864) 23 April 1997

http://www.hrcr.org/safrica/arrested_rights/mechelen_netherlands.html