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THE SPECIAL COURT FOR SIERRA LEONE

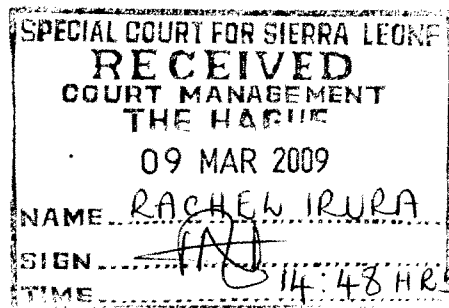
Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 9 March 2009

Case No.: SCSL-2003-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC WITH CONFIDENTIAL ANNEX A

**DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION
PURSUANT TO RULES 66 AND 68 FOR THE DISCLOSURE
OF EXCULPATORY MATERIAL IN REDACTED WITNESS STATEMENTS
OF WITNESSES THE PROSECUTION DOES NOT INTEND TO CALL**

Office of the Prosecutor:

Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Kathryn Howarth

Counsel for Charles G. Taylor:

Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. Procedural History

1. This is the Defence Reply to the *Prosecution Response to Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution Does Not Intend to Call*, filed on 5 March 2009 (“Response”).¹
2. The Prosecution argues that the Defence Motion² should be dismissed because:
 - a) The pleading contains multiple requests for relief;
 - b) The Prosecution have complied with its disclosure obligations; and
 - c) The Defence has not satisfied the test for a variation of protective measures.However, the Prosecution does not object to a variation of the protective measures orders to allow access to witnesses via WVS.
3. The Prosecution objections are disingenuous and not compelling and should be dismissed.

II. Submissions

There is No Procedural Defect in the Motion

4. The Prosecution objects that “the Defence has improperly combined three requests for relief in one pleading”.³ In support of this objection, the Prosecution cites a decision from the Trial Chamber in relation to a Defence request to file an oversized filing, which contained two separate requests for relief. In that instance, because the two requests for relief made the filing in excess of the regular 10 page limit, the Trial Chamber was not satisfied that it was necessary to combine several motions in one.
5. However, there is no prohibition against combining several requests for relief, especially when the requests are inter-related and can easily be addressed within a single document and still within the prescribed page limit. Indeed, it makes judicial economy to combine

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-756, Prosecution Response to Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution Does Not Intend to Call, 5 March 2009.

² *Prosecutor v. Taylor*, SCSL-03-01-T-746, Public with Confidential Annex A Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution Does Not Intend to Call, 25 February 2009 (“Motion”).

³ Response, para. 2.

inter-related requests in a single motion. It avoids a multiplicity of processes and tedious cross referencing.

6. The Defence submits that the three separate requests in the Motion are clearly identified and separately argued in such a way that the Trial Chamber is capable of pronouncing itself in respect of each. The Prosecution's objection is therefore without basis and must be dismissed.

The Defence Has Shown Good Cause for Disclosure Under Rule 66

7. The Prosecution does not address the fact that the Defence has shown good cause pursuant to Rule 66(A)(ii) for the Trial Chamber to order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence.⁴ The Prosecution apparently fails appreciate that the Defence is not alleging non-compliance with Rule 66, but rather that it is requesting the Trial Chamber to make an order for disclosure.
8. The Defence submits that the fact that all eighty-five witnesses contain exculpatory material, whether or not all of the exculpatory material is already unredacted as the Prosecution claims, is good cause for the Trial Chamber to order that complete and unredacted copies of the statements be made available to the Defence, now that the Prosecution no longer intends to call them as witnesses.

The Disclosure of Rule 68 Material is Not Complete

9. The Prosecution contends that it has met its disclosure obligations under Rule 68, claiming that all Rule 68 potentially exculpatory material contained in the witness statements has been disclosed.⁵ Specifically, the Prosecution claims that the only information that has been redacted is that which "directly identifies the individuals" or which "would lead to the identification of the individuals".⁶
10. The Defence however finds this a bit incredulous, given the severity of the redactions in many of the statements. For instance, in the Confidential Annex to this Reply, the

⁴ See the discussion of Rule 66 in Response, paras. 5-7.

⁵ Response, para. 8.

⁶ Response, para. 9.

Defence has attached six examples of heavily redacted statements⁷ in which entire paragraphs are routinely blacked out. The Defence submits that this is *prima facie* evidence that the redacted areas contain significantly more than identifying data.

11. With respect to the Prosecution's argument that the Defence has been given sufficient information from which it has been able to make summaries,⁸ it is submitted that the Defence's ability to summarize the unredacted portions of the witness statements is not proof that all Rule 68 information has been disclosed. It simply shows that *some* exculpatory information has been made available. This limited information in its current form however cannot serve its intended purpose. Without the context and identification of the witnesses, the exculpatory material is virtually useless.
12. In this regard, Trial Chamber I has stated, "...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, in principle, be conducive to a full understanding of the text nor permit one to measure its full scope".⁹
13. To the extent that there is disagreement about whether or not undisclosed exculpatory material remains in the possession of the Prosecution, the Defence would not object to the Trial Chamber reviewing the unredacted portions and determining which portions should be disclosed.¹⁰
14. The Prosecution's claim that the Defence has incorrectly identified the "targeted evidentiary material" is, with all due respect, laughable. The Defence is entitled to the complete and unredacted witness statements that contain exculpatory information. If the Defence knew exactly what was in the redacted portions of the statements and could specify it, then it would not need to ask for disclosure.
15. Thus, the complete and unredacted statements of all Non-Trial and Unused-Trial Witnesses should be disclosed to the Defence forthwith.

⁷ Statements of witnesses TF1-273, -417, -428, -433, -450, and -462.

⁸ Response, para. 10.

⁹ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-189, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, para. 34 (citing *Prosecutor v. Blaskic*, IT-95-14, Decision on the Defence Motion for Sanctions for the Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence, 29 April 1998).

¹⁰ The Prosecution once asked the Trial Chamber or another independent person to undertake a similar evaluation. See *Prosecutor v. Taylor*, SCSL-03-01-T-355, Decision on Ex Parte and Confidential Prosecution Motion for an Order to Provide to the Prosecution Non-Privileged Documents Recently Obtained from the Accused's Personal Archive, 5 November 2007.

The Defence Has Applied and Satisfied the Test for Modification of Protective Measures

16. The witnesses at issue are no longer being called to testify for the Prosecution. This fact in and of itself is a changed circumstance that warrants a variation in the protective measures regime applicable to these witnesses.¹¹ The Prosecution apparently fears that these witnesses may still be the targets of threats and intimidation by the Defence if it were to become known that they had intended to testify for the Prosecution at this point. However, even assuming that the Accused and/or a member of his Defence team would threaten or intimidate a former potential Prosecution witness, such actions could be dealt with through contempt proceedings, criminal prosecutions or other means, without prejudice to the presentation of the Prosecution case, which has officially closed.

Procedure for Contacting Witnesses Through WVS

17. The Defence is grateful that the Prosecution does not object to the Defence request to use WVS to initiate contact with any of these witnesses.
18. However, given that the language of the relevant provision in the Taylor Prosecution Protective Measures Decision¹² is not self-evident that WVS is the appropriate body through which the Defence can contact certain witnesses, it would appreciate clarification or modification by the Trial Chamber.

Rule 70 Does Not Make an Exception to the Disclosure of Exculpatory Information

19. The Prosecution suggests that because TF1-605, -606, and -607 were not originally listed as witnesses, then they qualify as sources under the protection of Rule 70. However, Rule 70 only allows for the Prosecution to withhold information given to it on a confidential basis in so far as Rules 66 and 67 are concerned. There is no exception for such sources under Rule 68 and since the targeted evidentiary material is exculpatory, it must be disclosed in full, especially since these three TF1s are not covered by any protective measures scheme.

¹¹ Response, para. 17.

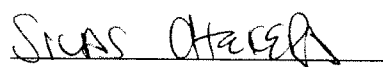
¹² Para. 1(m) of the 5 May 2006 Decision states: That the Defence Counsel shall not directly or indirectly contact any protected Prosecution witness except with the written consent of the Prosecution or leave of court.

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III. Conclusion

20. The Defence maintains its requests as set forth in its Motion for all eighty-five witnesses.

Respectfully Submitted,



Courtenay Griffiths, Q.C.

Lead Counsel for Charles G. Taylor

Dated this 9th Day of March 2009

The Hague, The Netherlands

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List of Authorities

Prosecutor v. Taylor, SCSL-03-01-T

Prosecutor v. Taylor, SCSL-03-01-PT-99, Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures and on Confidential Prosecution Motion for Leave to Substitute a Corrected and Supplemented List as Annex A of the Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures, 5 May 2006

Prosecutor v. Taylor, SCSL-03-01-T-355, Decision on Ex Parte and Confidential Prosecution Motion for an Order to Provide to the Prosecution Non-Privileged Documents Recently Obtained from the Accused's Personal Archive, 5 November 2007

Prosecutor v. Taylor, SCSL-03-01-T-746, Public with Confidential Annex A Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution Does Not Intend to Call, 25 February 2009

Prosecutor v. Taylor, SCSL-03-01-T-756, Prosecution Response to Defence Motion Pursuant to Rules 66 and 68 for the Disclosure of Exculpatory Material in Redacted Witness Statements of Witnesses the Prosecution Does Not Intend to Call, 5 March 2009

Other SCSL Jurisprudence

Prosecutor v. Sesay et al, SCSL-05-15-T-189, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004



SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +39 0831 257000 or +232 22 297000 or +39 083125 (+Ext)
UN Intermission 178 7000 or 178 (+Ext)
FAX: +232 22 297001 or UN Intermission: 178 7001

Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the *Confidential* Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**
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- Application
- Decision
- Indictment
- Application
- Reply
- Correspondence

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Name of Officer:

Rachel Irura

Signed: