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SCSL-03-01-T
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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 18 April 2011

Case No.: SCSL-03-01-T

THE PROSECUTOR

—v—

CHARLES GHANKAY TAYLOR

SPECIAL COURT FOR SIERRA LEONE	
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PUBLIC WITH CONFIDENTIAL ANNEXES A-C

**DEFENCE RESPONSE TO URGENT PROSECUTION MOTION FOR THE RE-FILING OF THE
“PUBLIC VERSION DEFENCE FINAL TRIAL BRIEF” AND “PUBLIC VERSION DEFENCE
RESPONSE TO PROSECUTION FINAL TRIAL BRIEF”**

Office of the Prosecutor:

Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Ula Nathai-Lutchman
Mr. Nathan Quick
Mr. James Pace

Counsel for Charles G. Taylor:

Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood
Ms. Logan Hambrick

I. INTRODUCTION

1. In *limine*, the Defence submits that the “*Urgent Prosecution Motion for the Re-Filing of the ‘Public Version Defence Final Trial Brief’ and ‘Public Version Defence Response to Prosecution Final Trial Brief’*” (the “Motion”)¹ was premature, as it cut short ongoing *inter partes* discussions that were specifically designed to address the Prosecution’s concerns; it illustrates the Prosecution’s litigious predilection, even when pacific dispute resolution mechanisms are available.
2. The Trial Chamber will note from the email exchanges attached as Confidential Annexes A-D to the Motion that, at the time the Prosecution filed the Motion, the parties were still in consultation and were, at the behest of the Defence, contemplating meeting to try and amicably resolve the Prosecution’s concerns, some of which are well-founded.
3. The Defence had also suggested that the parties exchange searchable PDF versions of their respective Public Briefs, for ease of reference in determining whether the parties’ respective public briefs were in compliance with protective measures orders. The Defence duly provided the Prosecution with a searchable version of its Brief;² a professional courtesy that was neither reciprocated nor acknowledged. Further, when the Prosecution raised security breaches in the Defence’s Public Brief, the Defence, *post haste*, acceded to the Prosecution’s representations to CMS, halting further public dissemination of the Brief pending resolution of the Prosecution’s concerns.³
4. Against this background, it was therefore somewhat surprising that the Prosecution should hasten to file the present Motion. As will more fully appear in this Response,⁴ some of the issues raised in the Motion could have been resolved through pacific

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-1241, Public with Confidential Annexes A to E Urgent Prosecution Motion for the Re-Filing of the ‘Public Version Defence Final Trial Brief’ and ‘Public Version Defence Response to Prosecution Final Trial Brief’, 12 April 2011 (“Motion”). See also *Prosecutor v. Taylor*, SCSL-03-01-T-1237, Public Version Defence Final Trial Brief, 7 April 2011 (“Public Brief”) and *Prosecutor v. Taylor*, SCSL-03-01-T-1238, Public Version Defence Response to Prosecution Final Trial Brief, 7 April 2011 (“Public Response”).

² Email from Logan Hambrick to Brenda Hollis, dated 11 April 2011 [Confidential Annex A].

³ See representations made by the Defence in emails attached as Confidential Annexes A and C to the Motion.

⁴ This Response is filed in accordance with the Trial Chamber’s “Order for Expedited Filing and Interim Measures”, *Prosecutor v. Taylor*, SCSL-03-01-T-1243, 13 April 2011.

means without recourse to the Trial Chamber, otherwise presently immersed in judgment drafting.⁵

II. SUBMISSIONS

5. On the merits, the Prosecution's complaints in relation to the Defence's Public Brief fall into two main categories. Firstly, complaints relating to the identification of protected witnesses; and secondly, complaints relating to alleged procedural irregularities. This latter category largely relates to alleged "improper redactions and revisions".⁶ Also falling in this category are redactions that allegedly "go beyond those required for compliance with court orders".⁷

Objections relating to protective measures

6. With respect to the protection of witnesses, the Defence concedes that there was a measure of oversight with respect to some protected witnesses, resulting in their identity or certain information going to their identity being inadvertently disclosed in the Defence Public Brief and Public Response. The Defence takes full responsibility for the oversight, which is sincerely regretted. The Defence, *ex mero motu*, has also undertaken another comprehensive revision of its Public Brief and has identified further mistakes that require rectification. These errors are catalogued in Annex B.
7. The Defence has taken appropriate corrective action (i.e. has made further redactions or revisions as necessary), and has attached the pages as corrected in Annex C hereto. The Defence requests that these pages be substituted for those pages in the Defence Public Brief and Response, which contain confidential information. The Defence requests that thereafter, the Trial Chamber orders CMS to reverse the temporary "confidential" re-classification of its Public Brief and Public Response and to circulate the Public Brief and Public Response with the substituted pages.

⁵ The Defence recalls that the Trial Chamber has recently chosen to defer reaching a decision on another Prosecution motion until the trial (i.e. judgement) is completed. *Prosecutor v. Taylor*, SCSL-03-01-T-1235, Decision on Confidential with Confidential Annexes A-E Prosecution Motion for the Trial Chamber to Summarily Deal with Contempt of the Special Court for Sierra Leone and for Urgent Interim Measures, 24 March 2011 ("Confidentiality Decision"), p. 9.

⁶ Motion, para. 2.

⁷ Motion, para. 1. However, the Defence notes that no such redactions are specified by the Prosecution.

8. Beyond the changes indicated in Annex B, the Defence does not agree that the concerns raised by the Prosecution with respect to protected witnesses are legitimate. Also in Annex B, the Defence identifies what, in its considered view, are ill-founded objections by the Prosecution and offers its reasons for so contending. In the main, the Defence contends that protected witnesses cannot plausibly be identified by the details of the testimony included in the Defence Public Brief and Public Response.⁸ Rather, the Prosecution's submissions place an overly cautious emphasis on the protection of witnesses at the expense of the Accused's right to an open and public trial.
9. It is a universally acknowledged principle that criminal trials are inherently public. Indeed under Rule 78,⁹ all proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided. The transparency of the proceedings is also served by the filing of public documents.¹⁰
10. This right to a public trial may however, in limited instances, have to give way to other derogating rights,¹¹ such as the protection of witnesses.¹² The protection of witnesses (specifically, non-disclosure of their identity), it must however be underlined, is not a competing right to the principle of a public trial. It is derogation thereof.¹³ Consequently, a party's public trial brief, while safeguarding the safety and security of protected witnesses should endeavor to keep the public informed as much as possible. Indeed, it is incumbent upon the parties to strike this delicate balance, subject to the court's intervention, where there is legitimate dispute. This is the practice this court has consistently adopted when referring to closed/private session evidence of protected witnesses, as well as confidential exhibits, in open court.¹⁴

⁸ Indeed, with respect to some of the Prosecution's objections, the Trial Chamber has already determined that the material does not disclose the identity of any protected witness, and thus the issue with respect to those examples should be dismissed as *res judicata*. Confidentiality Decision, para. 19.

⁹ Rule 78 of the SCSL Rules of Procedure and Evidence; See also Article 17(2) of the SCSL Statute.

¹⁰ *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, Decision on Motions to Admit Witness Statements of Witnesses Joshua Abdul Ruzibiza, RW2 and RW3, 22 November 2007, para. 2.

¹¹ Rule 78 of the SCSL Rules of Procedure and Evidence

¹² Rules 75 and 79 of the SCSL Rules of Procedure and Evidence.

¹³ *Musema v. Prosecutor*, ICTR-96-13-A, Judgement, 16 November 2001, para. 68 (the rights of the accused are the first consideration and the need to protect victims and witnesses is a secondary one).

¹⁴ See, ex, *Prosecutor v. Taylor*, SCSL-03-01-T-1148, Public Decision on Urgent Prosecution Motion to Classify as 'Confidential' the 'Public Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the

Justice Sebutinde, in her remarks in response to the Defence's inquiry on how closed/private session evidence should be treated in the parties' public trial briefs, opined that this same practice would be applicable.¹⁵

11. Furthermore, the Defence notes that the Prosecution appears to be finding it difficult to divest itself of the inside knowledge it possesses of the case, when claiming that the testimony cited in the Public Brief and Public Response would disclose the identity of protected witnesses. This inside perspective thus colors the Prosecution's perception of how someone looking at the case from the outside might read the evidence. In this regard, the Defence reiterates that the test whether any piece of evidence discloses details sufficient to compromise the identity of a protected witness is not that of one looking at that piece of evidence with the inside knowledge of a trial lawyer on the case, but rather that "capable of revealing the identity of the witness to an informed observer of the proceedings".¹⁶ Applying this test to the disputed excerpts of the evidence in Annexes D and E to the Motion, the Defence submits there is nothing in those pieces of evidence that compromises the anonymity of the witnesses concerned, to even an informed observer of the proceedings.
12. Not as a *tu quoque* argument, but merely to illustrate the Defence's contention that there is no merit in the Prosecution's complaints in contention, it is quite curious to note that, in some instances, the Prosecution is 'guilty' of the very same conduct it alleges compromises the anonymity of its protected witnesses. To cite just a few examples, compare with the approach taken by the Prosecution when referencing

Alleged Death of John Paul Koroma' due to Protective Measures Violations, 10 January 2011, and underlying filings. See further, *Prosecutor v. Gatete*, ICTR-2001-61-T, Decision on Defence Motion on Public Filing of Prosecution Closing Brief, 4 October 2010, para. 7 (a party need not redact all references to sealed exhibits, closed session transcripts or information derived from closed session testimony, provided such references contain no information that could lead to the identification of protected witnesses); *Niyitegeka v. Prosecutor*, ICTR-96-14-R, Decision on Fourth Request for Review, 12 March 2009, para. 17 (only information from closed session testimony which might reveal the identity of the witness should be considered for redaction).

¹⁵ *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript, 7 March 2011, p. 49339-40 ("we are depending on the good judgment on both sides to measure and know what is likely to reveal the identity of a witness, a protected witness, and what is not...").

¹⁶ *Prosecutor v. Taylor*, SCSL-03-01-T-476, Decision on Confidential Urgent Motion to Mark as "Confidential" Material Introduced through Any Witness Testifying in Closed Session, and in Particular Material Introduced through TF1-371 and Decision on Confidential Urgent Prosecution Motion to Mark as "Confidential" Material Introduced through TF1-371, 16 April 2008, p. 4.

testimony of protected Defence witnesses, at pages 510 to 513 of the Prosecution Public Brief.¹⁷

13. The obvious duplicity and double standards besides, the above examples illustrate the Defence's contention that the Prosecution's perception of what information may or may not compromise protected witnesses is colored by its comprehensive inside knowledge of the evidence. The type of information cited in the Defence Final Brief and Response, viewed from the outside, it is submitted, does not disclose the identity of the witnesses concerned, even to persons who were close to the witnesses or the evidence concerned.

Objections relating to procedural issues

14. The Prosecution's objections to what it alleges are excessive redactions in the Defence Public Brief is most puzzling given its contra objections relating to the protection of witnesses; the objections again underline the Prosecution's duplicity and double standards. If the complaint is not that the Defence has disclosed too much, it is that they have disclosed too little; there is no winning.
15. With respect to the Prosecution's objections in relation to what it alleges are unauthorised edits, the Defence submits that the objections are without basis, given the inherent editorial powers a party has in order to adapt its confidential trial brief into a public version, due regard being had to, *inter alia*, the safety and security of protected witnesses and other confidential evidence.
16. The Prosecution's objections in this regard are two fold: those relating to the correction of typographical errors, and those relating to phraseology. The Prosecution alleges that, to the extent that the Defence effected these changes (which the Defence concedes it did) without the Trial Chamber's prior authorisation, such corrections are unlawful and should not be allowed.
17. Respectfully, the Prosecution's objections are frivolous and vexatious. With respect to the re-phrasing of some of the sentences from the original Defence Confidential Brief of 9 March 2011, the Defence submits that it made those necessary changes, as

¹⁷ The Defence appreciates that the testimony of the Defence witnesses referenced in these paragraphs was given in open session; however, the point remains that this information is as "at risk" of identify a protected witness as that cited by the Defence and complained of by the Prosecution.

it was within its right to do so, in order to protect certain (protected) witnesses, while at the same time keeping the public informed as much as possible. These necessary edits, it is however submitted, did not change the substance of the original text in any way, as that would not have been permissible.

18. To argue, as the Prosecution does, that the Defence required the Trial Chamber's prior authorisation to effect those innocuous edits in order to protect certain witnesses, while at the same time making the trial brief accessible to the public, would be tantamount to the Chamber redrafting the briefs for the parties. It is not for the Trial Chamber to play the role of copy editors. On the contrary, as argued above, the practice before this court is that the party concerned has the primary duty to adopt confidential evidence for public consumption, due regard being had to all the necessary exigencies, including witness protection, with the Court only getting involved when that party oversteps the legitimate bounds.
19. The suggestion implicit in the Prosecution's objection, that the conversion of a party's confidential final trial brief into a public version should only entail redactions (and not any necessary redrafting), has no basis in law or in logic. Redactions, in many instances, emphasise witness protection at the expense of content, and consequently, the overriding right to a public trial. Thus, they should be adopted only when it is necessary, and only to the extent necessary. As argued above, this stems from the time-honoured principle that criminal trials are inherently public and that the protection of witnesses is not a competing right but a necessary and limited derogation thereof.
20. The Defence therefore submits that it was well within its right to rephrase some of the sentences in the Confidential Brief and Response, to the extent that it was necessary to do so for the safety and security of protected witnesses. The Defence, as officers of the Court, discharged its functions judiciously in this regard. At no point did it attempt to alter the original substance of the affected texts. As established in the practice of this court, the Defence did not require the prior authorisation of the Trial Chamber as the Prosecution contends.
21. With respect to the Prosecution's objections relating to unauthorised typographical edits, the Defence submits that as the Prosecution's objections raise the merest of

technical formalities, they should fail on that basis. Indeed, that the Trial Chamber should be involved in the crossing of the “t”s and the dotting of “i”s in a party’s public version of the trial brief is trivial. The objection must fail under the established legal principle of *de minimis non curat lex*. Indeed, under Rule 5, a Trial Chamber may only grant relief to a party alleging non-compliance with the Rules or Regulations (and by parity of reason, any court order or established practice) where such non-compliance occasions irreparable prejudice to the objecting party.¹⁸ In *casu*, the Prosecution suffers none and alleges none. It would be too late and impermissible for the Prosecution to try to make out a case for prejudice in its Reply.

22. A distinction must be drawn between a party seeking to edit a document already before the Court and the present situation where the edited document (the Defence Public Brief and Response) even if an adaptation of a document already before the Court (the Defence Confidential Brief and Response), is itself not yet before the Court. While with respect to the former category, a party would indeed require the authorization of the court, it is respectfully submitted that, that is not necessary with respect to the latter.
23. This is precisely because in adopting its confidential brief into a public brief, a party is inherently possessed of certain editorial powers, provided that any necessary edits do not alter the substance of the original brief. Corrections relating to grammar and typographical errors, it is submitted, are consequential to those editorial powers, to that extent that they aid rather than detract from right of the public to be informed of the proceedings. The Prosecution’s objections to the Defence’s typographical corrections must therefore fail.
24. Equally bereft of legal reason is the Prosecution’s objection at paragraph 9 of the Motion that the version of the Confidential Final Brief that the Defence should have adapted for public consumption was the one filed on 3 February 2011, and not the one filed on 9 March 2011. The Defence cannot understand the tenor or basis of the objection. As far as the Defence is concerned, the official version of its Brief before the Court is the one filed on 9 March 2011. Consequently, that was the version that

¹⁸ Rule 5 of the SCSL Rules of Procedure and Evidence.

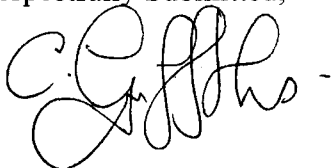
the Defence has adopted into the public version now in contention. How that is untoward is a mystery only fathomable to the Prosecution.

25. However, to the extent that the Trial Chamber might find that the Defence needed its prior authorization to make the editorial changes in contention, the Defence hereby seeks the Trial Chamber's *post facto* authorization for those changes. The Defence submits the said edits were necessary to protect witnesses or to correct obvious typographical errors and render the Public Brief and Response more comprehensible to the public. At all times, the Defence ensured that it did not alter the substance of the affected text. The edits do not prejudice the Prosecution or affect the cause of justice in any way. Should there be any dispute in this regard, the Defence has available for inspection, the original text with the long hand corrections that were incorporated into Public Brief and Response.

III. CONCLUSION AND RELIEF REQUESTED

26. For the foregoing reasons, the Defence requests the Trial Chamber's permission to effect the corrections highlighted in Annex B, in order to ensure the safety and security of protected witness and other confidential evidence. Subject to the foregoing request, the Defence requests the Trial Chamber's authorization to substitute the pages affected by the foregoing proposed changes with the corresponding pages effecting those changes in Annex C. The Defence otherwise requests the Trial Chamber to dismiss the remainder of the Prosecution's Motion, as it has no legal basis.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 18th Day of April 2011,
The Hague, The Netherlands

Table of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-1243, Order for Expedited Filing and Interim Measures, 13 April 2011

Prosecutor v. Taylor, SCSL-03-01-T-1241, Public with Confidential Annexes A to E Urgent Prosecution Motion for the Re-Filing of the ‘Public Version Defence Final Trial Brief’ and ‘Public Version Defence Response to Prosecution Final Trial Brief’, 12 April 2011

Prosecutor v. Taylor, SCSL-03-01-T-1237, Public Version Defence Final Trial Brief, 7 April 2011

Prosecutor v. Taylor, SCSL-03-01-T-1238, Public Version Defence Response to Prosecution Final Trial Brief, 7 April 2011

Prosecutor v. Taylor, SCSL-03-01-T-1235, Decision on Confidential with Confidential Annexes A-E Prosecution Motion for the Trial Chamber to Summarily Deal with Contempt of the Special Court for Sierra Leone and for Urgent Interim Measures, 24 March 2011

Prosecutor v. Taylor, SCSL-03-01-T-1148, Public Decision on Urgent Prosecution Motion to Classify as ‘Confidential’ the ‘Public Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma’ due to Protective Measures Violations, 10 January 2011

Prosecutor v. Taylor, SCSL-03-01-T-476, Decision on Confidential Urgent Motion to Mark as “Confidential” Material Introduced through Any Witness Testifying in Closed Session, and in Particular Material Introduced through TF1-371 and Decision on Confidential Urgent Prosecution Motion to Mark as “Confidential” Material Introduced through TF1-371, 16 April 2008

ICTR Cases

Prosecutor v. Gatete, ICTR-2001-61-T, Decision on Defence Motion on Public Filing of Prosecution Closing Brief, 4 October 2010
<http://www.ictrcaselaw.org/docs/20101004-dco-0061-01-en.PDF>

Musema v. Prosecutor, ICTR-96-13-A, Judgement, 16 November 2001
<http://www.ictrcaselaw.org/docs/doc34323.pdf>

Prosecutor v. Zigiranyirazo, ICTR-2001-73-T, Decision on Motions to Admit Witness Statements of Witnesses Joshua Abdul Ruzibiza, RW2 and RW3, 22 November 2007
<http://www.ictrcaselaw.org/docs/20071122-dco-0173-01-en.pdf>



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CONFIDENTIAL DOCUMENT CERTIFICATE

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

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Public with confidential Annexes A-C Defence response to urgent Prosecution motion for the re-filing of the public version Defence final trial brief and public version Defence response to Prosecution final trial brief

Name of Officer:

Alhassan Fornah

Signed: